D.H.WAGHELA, C.J. & BISWANATH RATH, J.

W.P.(C) NO. 17403 OF 2012

M/S.MIDEAST INTEGRATED STEEL LTD. & ANR. ……..Petitioners

.*Vrs.*

STATE OF ODISHA (DEPT. OF STEEL & MINES) & ORS. ……..Opp. Parties

MINES & MINERALS (DEVELOPMENT & REGULATIONS) ACT, 1957 – S.9 r/w Rule 64-B, 64-D of M.C.Rules, 1960

Levy of royalty for processed minerals, i.e. Calibrated Lump Ore (CLO) by the State Government challenged – Rule 64-B and Rule 64-D of the M.C.Rules 1960 have to be harmoniously read with section 9 of the Act, so as not to allow any particular form of iron ore to escape royalty at the prescribed rate by its conversion into another form i.e. from lumps to fines – Charging and computation of royalty on these lines will not be inconsistent with the basic premise that royalty is payable on mineral removed or consumed from the leased area, because ultimately the iron ore in the form of lumps and fines would be removed from the leased area after royalty being computed on the basis of the mineral produced in the leased area – Any change in the form of that mineral by any further process has to be ignored for computation of the amount of royalty – Held, the method of calculation of royalty and demand of additional amount of royalty by the State and the impugned circulars issued for that purpose is legal and justified.

(Paras 18, 19)

Case Laws Referred to :-

1. (2004) 6 SCC 281 : National Mineral Development Corporation Ltd. -V- State of M.P. & Anr.
2. (2015) 6 SCC 193 : Tata Steel Ltd. -V- Union of India & Ors.

For Petitioner : Mr. Salman Khurshid, Sr. Advocate
Mr. Avijit Pal & A. Das

For Opp. Parties : Mr. S.P.Mishra, Advocate General

Date of Hearing : 04.12.2015
Date of Judgment: 16.12. 2015

JUDGMENT

PER : D.H.WAGHELA, C.J.

1. This petition by Mideast Integrated Steel Limited ('MISL' for short) is directed against levy of royalty in alleged contravention of Central Government notifications dated 13.8.2009 by the State Government. MISL is engaged in manufacture of steel, pig iron and sponge iron by a plant set up in Odisha. It has obtained mineral concession at Roida-I, Iron Ore Mines spread over 104.68 hectares in village Tanto, Barbil Tahasil in the district of Keonjhar. Even after expiry of the mining lease period on 22.1.2003, the company has applied for second renewal of the mining lease and no final order is stated to have been passed. Hence, by virtue of Rule 24A(6) of the Mineral Concession Rules, 1960, mining lease is deemed to have been extended till final order. The petitioner has obtained approval of Indian Bureau of Mines ('IBM' for short) in respect of scheme of mining, including mines closure plan. The Government of India in the Department of Environment and Forest is stated to have granted final approval under Section 2 of the Forest Conservation Act for diversion of 51.99 hectares of forest land to the company. Thus, in short, MISL is stated to have carried its mining and extracting activity with necessary statutory clearances and it is stated to be extracting iron ore lumps and fines on payment of due royalty in accordance with Rule 64D of the Mineral Concession Rules, 1960 ('MC Rules' for short).

2. The opposite party no.1, State of Odisha, Department of Steel and Mines, issued circular dated 7.9.2010 addressed to opposite party no.2, Director of Mines and all Deputy Director of Mines in respect of charging of royalty under Rule 64B of M.C. Rules. That letter sought to clarify that in case processing of run-of-mine ('ROM' for short) is carried out within the leased area, then royalty shall be chargeable on the processed mineral removed from leased area; and tried give to a different meaning to Calibrated Lump Ore ('CLO' for short) On the basis of such letter, the Deputy Director of Mines started recovering the differential royalty in respect of CLO. The assessment of royalty for the financial years 2009-10, 2010-11 and 2011-12 were made in accordance with the circular dated 7.9.2010 and demands of differential royalty were made with coercive measures to follow.

3. It is the case of the petitioner that the State Government has no authority and jurisdiction to charge *ad valorem* royalty at different rate for CLO than lump ore as the IBM has not made any differentiation in respect of CLO and lump ore. However, the petitioner is made to make payments towards differential royalty under the threat of not granting permission for transportation of iron ore outside the leased area. Demand of more than

Rs.50 crores has been made from the petitioner by issuing five demand notices in respect of various periods from financial year 2009-10 to 2011-12. The petitioner is stated to have been forced to pay total amount of Rs.11,82,01,033/-. By letter dated 13.1.2012, additional demand for payment of interest on delayed payment of royalty is also made.

4. In the above context, by letter dated 23.7.2012, opposite party no.4, the Union of India, Department of Mines has addressed to the State Government a clarification stating that IBM has given its opinion that CLO is nothing but processed lump ore and it is requested to withdraw the Circular dated 7.9.2010 with immediate effect. The Central Government has also addressed letter dated 10.12.2009 to the IBM for clarification regarding computation of *ad valorem* royalty under Rule 64D of the MC Rules. It has also requested IBM to host on its Website benchmark sale price per ton of pit-mouth value of the mineral. Accordingly, the IBM has notified the benchmark sale price state wise on quarterly basis. The classification of iron ore as done by the IBM are high grade, BD and fines. The petitioner is stated to have paid royalty amount as assessed by the State Government for the financial year 2009-10, which is stated to be in excess of royalty required to be paid as per IBM report by Rs. 7,19,85,973/-. Similar excess payment is alleged to have been made in the following years. Thus, being aggrieved by the notice dated 6.7.2012 for payment of the amounts remaining due and the Circular dated 7.9.2010 and demand dated 13.1.2012, the present petition is filed. It is alleged in the petition that MISL has been forced to pay total amount of Rs. 35,87,24,422/- towards additional amount of royalty on the basis of the impugned Circular dated 7.9.2010 and amount of additional royalty already paid, amounting to Rs. 20,35,21,316/-, has not been passed on to the purchaser of iron ore. It is prayed that the impugned Circular dated 7.9.2010 may be declared to be illegal and without jurisdiction, that the assessment orders for financial years 2009-2010, 2010-11 and 2011-12 may be quashed to the extent they are based upon the impugned Circular and that refund of Rs. 35,87,24,422/- may be ordered.

5. By filing an affidavit of Under Secretary, Steel and Mines Department of the Government of Odisha, the contentions of the petitioners are controverted. It is averred therein that provisions of the Mines and Minerals (Development and Regulation) Act, 1957 ('MMDR Act' for short) have to be construed and applied harmoniously with the Rules made thereunder. In case of iron ore, ROM comprises of lumps, fines and waste material, the sale price of lumps being higher than the price of fines. When

ROM is fed into crusher for processing, the output is calibrated lump ore ('CLO' for short), fines and waste material. Generally CLOs are produced by crushing and would be less in volume/weight than the lumps comprised in ROM. The royalty payable on the basis of market price of CLO should be higher than the price of lumps, but IBM does not publish the sale price of CLO. In terms of the notifications of IBM, royalty on iron ore lumps is much higher than on iron ore fines. Due to crushing of iron ore lumps partly into fines by the petitioner, there was loss to the State exchequer. Therefore, the decision was taken by the State Government to calculate royalty on lump ore which the petitioner would have paid, had they not processed the lumps in the crushing plant inside the leased area. Charging royalty on CLO at the same rate as sale price of lump ore would be unreasonable and unjustified and resulting into loss of revenue, since the value of CLO is much more than that of the lump ore. It is submitted that mineral resources of the State are 'wasting assets' and non-renewable natural resources. Royalty is levied on the basis of quantity of minerals. Rule 64D of MC Rules obliges mine owner to compute the amount of royalty on minerals where such royalty is charged on the basis of state-wise rates of the mineral as published by IBM in accordance with the set formula. The State is obliged to oversee that the lessee pays a fair consideration for exploitation and enjoyment of privileges granted by the State. Therefore, the State opted to charge royalty on the basis of consumption of minerals. Section 9 of MMDR Act clearly offers the option to charge royalty of minerals which are removed or consumed from the lease hold area. It is averred that lumps and fines in the ROM used in the crusher is nothing but consumption of the mineral within the leasehold area by the lessee. On that basis, it is submitted that the question of charging royalty on processed minerals may arise only after IBM starts notifying the sale price of CLO.

6. It is submitted for the State that fines and lumps of iron ore are not suitably defined by the Government of India as far as levy of royalty is concerned. Iron ore lumps and CLO have never an equal market price and there is no justification for clubbing lumps with CLO while fixing weighted average price of lumps. There are some mines that sell lump ore to mining traders, who in turn process it outside the leased area into usable sizes. Due to under-reporting of pit's mouth value by the lessees, the State lost a sizeable amount of royalty in the initial phase of introduction of *ad valorem* regime of royalty on iron ore. Whenever lumps of iron ore or ROM is subjected to processing, fines are generated along with CLO. Due to non-publication of rate for CLO by IBM, royalty on CLO was collected at the

rate applicable to lumps and the State Government was losing huge sums of royalty. IBM was requested by letter dated 7.9.2010 to the Ministry of Mines, Government of India to publish average sale price of CLO and reminder was sent on 1.11.2010. Sub-Rule (1) of Rule 64B of the M.C. Rules inserted by GSR 743(E) dated 25.9.2000 on charging of royalty in case of minerals subjected to processing clarifies that in case processing of ROM mineral is carried out within the leased area, royalty shall be chargeable on the processed mineral removed from the leased area. In these facts, the State Government issued the impugned Circular dated 7.9.2010. The Department of Steel and Mines, Odisha issued fresh instructions to the Directorate of Mines by letter dated 9.4.2012 to modify the Directorate's instruction in conformity with the Circular dated 7.9.2010. Thereby, the Mining Officers were instructed to charge royalty on iron lumps as mined or in the processed form as CLO and fines whichever was higher.

Since IBM was yet to publish the rates for CLO, the Mining officers were directed to collect the differential amount that would arise upon the notification of rates of CLO by IBM. The IBM however expressed by letter dated 6.1.2011 its inability to publish such rates on the ground that there was no provision for reporting grade of CLO in Form F/1 and H/1 prescribed under Rule 45 of Mineral Conservation and Development Rules, 1988 ('MCDR' for short). Under such circumstances, after writing several letters to expeditiously take necessary steps for publication of average price of different grade of CLO, the State Government was compelled to charge royalty on the sale price of lumps and fines comprised in ROM, which generally contained higher percentage of lump ore as compared to CLO.

7. The Ministry of Mines, Government of India in their letter dated 23.7.2012 requested the State Government to withdraw the notification dated 7.9.2010, which letter was replied by letter dated 18.9.2012 by referring to two reports of the Comptroller and Auditor General of India on revenue receipts of the Government of Odisha. The report for the year ended on 31st March, 2008 read as under:

> "**7.2.15.2 : Short levy of royalty on iron ore**:
>
> According to the provisions of the MC Rules, in case of processing of run-of-mine (ROM) minerals within the leasehold area, royalty shall be charged on the output after processing the minerals. However, in case of processing of mineral other than ROM, royalty is chargeable on unprocessed mineral i.e. mineral extracted from the seam.

Scrutiny of the assessment records and monthly returns of seven iron ore mines under the DDM, Joda revealed that during the year 2006-2007, the lessees fed 53.82 lakh MT of unprocessed minerals in their processing plants and paid royalty of Rs. 10.61 crore classifying the minerals as ROM minerals. The assessing officer without carrying out any field inspection accepted the returns of the lessees and levied royalty accordingly. It was noticed that the output was equal to the input minerals i.e. 53.82 lakh MT which indicates that the minerals fed were not ROM minerals and thus royalty of Rs. 13.89 crore should have been levied on the unprocessed minerals. This resulted in short levy of royalty of Rs.3.28 crore.

x x x x x x x x x x x"

Para 7.3.2.1 of report of the CAG on revenue receipts of Government of Odisha for the year ended on 31st March, 2009 read as under:

"**7.3.2.1: Short levy of royalty on iron ore :**

Test check of the assessment of records of the Deputy Director of Mines, Koira, in January, 2009 revealed that during the years 2006-07 and 2007-08, a lessee declared to have fed 37.63 lakh of MT of unprocessed minerals as ROM minerals. The Assessing Officer accepted the returns of the lessee and levied royalty accordingly. Audit scrutiny revealed that the output was equal to the input minerals, i.e. 37.63 lakh MT which indicates that the minerals declared to have been fed by the lessee were not ROM minerals and thus royalty of Rs. 7.55 crore should have been levied on the unprocessed minerals. This resulted in short levy of royalty of Rs. 1.85 crore.

After the case was pointed out, the Deputy Director, Mines stated in January 2009 that the royalty was charged on the processed mineral as per the mining plan of the lessee approved by the Indian Bureau of Mines for production of ROM minerals. The fact, however, remains that the minerals fed were not ROM minerals since the output after processing was graded mineral, sized mineral and fines without any foreign material which was also equal to the input quantity."

8. Thus, the case of the opponent authorities is that the petitioner has not been required to pay royalty at any rate higher than that prescribed by the Central Government; but the so- called process within the leased area by the

petitioner was resulting into value addition to the mineral and as the iron ore was being consumed for the purpose of processing, the State was entitled to charge royalty on the iron ore before it was processed. The State had no option but to ensure collection of royalty at the fair value prescribed by the IBM. It is further submitted on oath on behalf of the Deputy Director of Mines that royalty was demanded in exercise of powers conferred by Section 24(2) of the MMDR Act and M.C. Rules as required under Section 9 of the MMDR Act. It is pointed out that as per the notification of IBM, royalty on iron ore lumps is much higher than iron ore fine. In view of obvious loss to the State Exchequer by crushing of lump ore into CLO and fine by the petitioner and in view of the remarks of the CAG, the impugned Circular had to be issued. As the price of CLO is yet to be published by IBM, the lessee has to pay at least royalty for the lump ore which he would have paid had he not processed the lumps in the crushing plant inside the leased area for value addition. The State Government has already clarified by letter dated 9.4.2012 that royalty shall be charged on iron ore lumps as mined or the processed form, i.e. CLO and fines whichever is higher. It is further submitted that the petitioner has voluntarily made advance payments of royalty through challans and online transfer of funds and the challenge thereto is an afterthought. When the petitioner failed to pay royalty within time, demand for payment of interest was also justified. The State Government has, vide letter dated 18.9.2012, pointed out to the Central Government the reports of the CAG. It is specifically averred that for the year 2010-11 and 2011-12, the petitioner was required to pay royalty at the rate applicable to lumps on the quantity of crushed fine generated by crushing of lumps without introducing any other or additional rate of royalty. It is stated that computation of royalty was in no way violative of the provisions of Rule 64D of the M.C.Rules.

9. In view of the facts and rival contentions, it may be pertinent to refer and reproduce the relevant statutory provisions as under:

> **"Mines & Minerals (Development & Regulation) Act, 1957**
>
> An Act to provide for the development and regulation of mines and minerals under the control of the Union.
>
> **Section 2-Declaration as to the expediency of Union control:**
>
> It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided.

Section 9-Royalties in respect of mining leases:

(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2A). The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.

(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years.

The Second Schedule (See Section 9)

Rates of Royalty in respect of minerals at item 1 to 9, 11 to 37, 39 to 45 and 47 to 51

xxxxxxxx

22. Iron Ore : Lumps Fines & Concentrates all grades	Ten percent of sale price on ad valorem basis.

The Mineral Concession Rules, 1960
Rule-2. Definitions

(i) '**Act**' means the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957).

(ii) '**Form'** means a Form set out in Schedule I to these Rules.;

Rule-22A. Mining operations to be in accordance with Mining Plans

(1) Mining operations shall be undertaken in accordance with the duly approved mining plan.

(2) Modification of the approved mining plan during the operation of a mining lease also requires prior approval.

Rule 64B. Charging of royalty in case of minerals subjected to processing

(1) In case processing of run-of-mine is carried out within the leased area,then, royalty shall be chargeable on the processed mineral removed from the leased area.

(2) In case run-of-mine mineral is removed from the leased area to a processing plant which is located outside the leased area, then, royalty shall be chargeable on the unprocessed run-of- mine mineral and not on the processed product.

Rule 64-C. Royalty on tailings or rejects

.....

Rule 64D. Manner of payment of royalty on minerals on *ad valorem* basis

(1) Every mine owner, his agent, manager, employee, contractor or sub-lessee shall compute the amount of royalty on minerals where such royalty is charged on *ad valorem* basis, as follows:-

(i) for all non-atomic and non fuel minerals sold in the domestic market or consumed in captive plants or exported by the mine owners (other than bauxite and laterite dispatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold, silver and minerals specified under Atomic Energy Act), the State-wise sale prices for different minerals as published by Indian Bureau of Mines shall be the sale price for computation of royalty in respect of any

mineral produced any time during a month in any mine in that State, and the royalty shall be computed as per the formula given below:

Royalty = Sale price of mineral (grade wise and State-wise) published by IBM x Rate of royalty (in percentage) x Total quantity of mineral grade produced/dispatched:

(ii) xxx

(iii) xxx

(iv) xxx

(2) ....."

xxx xxx xxx

The Mineral Conservation and Development Rules, 1988

In exercise of the powers conferred by section 18 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957), the Central Government hereby makes the following rules for conservation and Development of Minerals, namely:-

3. Definitions. - In these rules, unless the context otherwise requires-

(a) xxx

(b) xxx

(c) xxx

(d) '**beneficiation**' means processing of minerals or ores for the purpose of

(i) regulating the size of a desired produce;

(ii) removing unwanted constituents; and

(iii) improving quality, purity or assay grade of desired product;

Rule-13. Mining operations to be in accordance with mining plans.

(1) Every holder of a mining lease shall carry out mining operations in accordance with the approved mining plan with such conditions as may have been prescribed under sub-rule (2) of rule 9 or with such modifications, if any, as permitted under rule 10 or the mining plan or scheme approved under rule 11 or 12, as the case may be.

(2) If the mining operations are not carried out in accordance with the mining plan as referred to under sub-rule (1), the Regional Controller or the authorised officer may order suspension of all or any of the mining operations and permit continuance of only such operations as may be necessary to restore the conditions in the mine as envisaged under the said mining plan.

Rule 20. Beneficiation studies to be carried out.

(1) If the Controller General or the authorised officer, having due regard to the nature of mining operations and grade of ore/mineral is of the view that the sub-grade or / mineral contains certain recoverable product, he may direct the owner, agent, mining engineer or manager of the mine to get the beneficiation investigations carried out.

(2) The report of the beneficiation investigation so carried out shall be submitted to the Controller General or the authorised officer as the case may be immediately after the investigation is over.

(3) In a mine having a beneficiation plant, feed products and tailings shall be regularly sampled and analysed at suitable intervals and records of the same maintained in bound paged book:

Provided that the Controller General or the authorised officer may require the sampling and analysis to be done at any other interval than in practice.

Rule 58. Penalty

Whoever contravenes any of the provisions of these rules shall be punishable with imprisonment for a term which may extend up to two years, or with fine extending to fifty thousand rupees or with both, and in the case of continuing contravention with an additional fine which may extend up to five thousand rupees for every day during which such contravention continues, after conviction for the first such contravention:

Provided that for repeated contravention the punishment should be in the form of imprisonment only:

Provided further that any offence punishable under these rules may either before or after the institution of the prosecution, be compounded by the authorised officer to make a complaint to the

court with respect to that offence, on payment to that officer for credit to the Government, of such sum that officer may specify:

Provided also that in case of an offence punishable with fine only, such sum shall not exceed the maximum amount of fine which may be imposed for that offence:

Provided further that where an offence is compounded under these rules, no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, if in custody shall be released forthwith.

10. The important phrases in the present context, viz, 'mineral removed or consumed', 'processing' of 'run-of-mines (ROM)' and 'calibrated lump ore (CLO)' are not defined in the statutory scheme; and for the purpose of prescribing rate of royalty, iron ore is divided (in Entry No. 22 of the Second Schedule) into only three categories i.e. lumps, fines and concentrates. It may however be relevant to note here that 'beneficiation' means and includes processing of minerals or ores for the purpose of regulating size of a desired produce, and hence, changing size of lumps to convert them into CLO and fine would amount to 'beneficiation'.

11. It is particularly relevant in the context that the mining scheme of the petitioner for the year 2008-09 to 2013, submitted under Rule 12 of M.C.D.R., 1988 clearly stipulated in Chapter- X as under:

> "No mineral beneficiation is envisaged within the lease area. However, crushing and screening is proposed. Currently, Mesco operates a 100 tph and 200 tph crusher. The flow chart of 100 tph and 200 tph crusher is given annexure 6. As the increased production stabilizes and the central area (old quarry 4 & 5) gets merged, another 250 tph stationary/semi-mobile crusher are proposed to be installed with screening facilities to maintain higher production."

It may also be pertinent to note here that, as admitted in the written submissions of the petitioner, the input of ROM contains 30% of lump ore and 70% of fines. However, within the soft friable ore, which is 60%, 9% oversized lumps, 7.33% lumps of 10-13 mm size and fines of 43.67% is generated. Out of the rest 40% hard ore and 9% of oversized ore, when put to crusher, lump ore to the extent of 22.67% lumps and fines to the extent of 26.33% are generated. It is conceded in terms, by learned Senior Advocate

Sri Salman Khurshid appearing for the petitioner, that process of crushing definitely results into part of the iron ore lumps being reduced to fine on which lesser royalty is payable because of its lesser price and that would necessarily result into loss of revenue to the State exchequer.

12. In the facts of the present case, it is clear that the impugned letters dated 7.9.2010 and 9.4.2012 of the State Government were issued after recognizing the fact that, after extracting ROM iron ore, it was subjected to processing within the leasehold area and the State Government was losing some part of royalty and to meet that situation, instructions were issued to assess royalty on iron ore lumps mined or in the processed form i.e. fine and CLO, whichever was higher.

13. Relevant extracts of judgment of the Apex Court which are relied upon for the petitioner may be noted here.

(a) In ***National Mineral Development Corporation Ltd. vs. State of M.P. & another,*** (2004) 6 SCC 281, it is observed:

> "28. It is clear that in iron ore production the run-of-mine (ROM) is in a very crude form. A lot of waste material called "impurities" accompanies the iron ore. The ore has to be upgraded. Upgrading the ores is called "beneficiation". That saves the cost of transportation. Different processes have been developed by science and technology and accepted and adopted in different iron ore projects for the purpose of beneficiation. In the processes, a stage is reached which yields concentrates. They are treated in the concentrate plant by resort to physical, chemical and/or electrical methods....
>
> 29. Parliament knowing it full well that the iron ore shall have to undergo a process leading to emergence of lumps, fines, concentrates and slimes chose to make provision for quantification of royalty only by reference to the quantity of lumps, fines and concentrates. It left slimes out of consideration. Nothing prevented Parliament from either providing for the quantity of iron ore as such as the basis for quantification of royalty. <u>It chose to make provision for the quantification being awaited until the emergence of lumps, fines and concentrates</u>. Having done so Parliament has not said: "fines including slimes". Though "slimes" are not "fines" Parliament could have assigned an artificial or extended meaning to "fines" for the purpose of levy of royalty which it has chosen not to do. It is clearly

suggestive of its intention not to take into consideration "slimes" for quantifying the amount of royalty. This deliberate omission of Parliament cannot be made good by interpretative process so as to charge royalty on slimes by reading Section 9 of the Act divorced from the provisions of the Second Schedule. Even if slimes were to be held liable to charge of royalty, the question would still have remained, at what rate and on what quantity, which questions cannot be answered by Section 9."

(underlines added)

(b) In the recent judgment of Three Judge Bench of the Apex Court in ***Tata Steel Limited vs. Union of India & ors***, (2015) 6 SCC 193 it is observed:

"49. In sum and substance this is the issue before us, namely, whether for the purposes of payment of royalty, removal of a mineral as mentioned in Section 9 of the MMDR Act must be restrictively interpreted as removal or extraction of the mineral from the mine or the pit-head or a literal interpretation as removal of the mineral from the boundaries of the leased area?

"50. In *National Mineral Development Corpn. Ltd.* v. *State of M.P.*, (2004) 6 SCC 281, the question before this Court was whether "slimes" are exigible to royalty, as forming part and parcel of iron ore?

"58. On the other hand, in the case of dolomite or limestone (*State of Orissa vrs. SAIL (1998) 6 SCC476*) the process described in para 4 of the Report is undertaken not to upgrade or improve the quality of the mineral but to remove waste and foreign matter. It is not clear whether dolomite or limestone can be utilised as it is or in ROM state without removal of waste and foreign matter. That question was adverted to by the Orissa High Court but not considered by this Court, hence the critical reference. As mentioned above, the decision in *SAIL* was based not on removal but on consumption of the mineral. On the basis of the mineral extracted and the decision rendered by this Court, therefore, no similarity can be found between *SAIL* (case of consumption) and *National Coal Development Corpn. Ltd. ,1998) 6 SCC 476*.(case of removal) although royalty is charged on dolomite and limestone, as in coal, on a per tonne basis.

"59. Iron ore (with which *NMDC* is concerned) falls in the same generic category for levy of royalty as dolomite, limestone and coal,

namely, on a tonnage basis but there is a crucial difference between iron ore and coal (as also between dolomite, limestone and iron ore). In the case of iron ore, beneficiation is necessary before it can be utilised. It has been observed in *NMDC* that:

'*28*. … in iron ore production the run-of-mine (ROM) is in a very crude form. A lot of waste material called 'impurities' accompanies the iron ore. The ore has to be upgraded. Upgrading the ores is called 'beneficiation'. That saves the cost of transportation. Different processes have been developed by science and technology and accepted and adopted in different iron ore projects for the purpose of beneficiation.'

It is for this reason, inter alia, that the levy of royalty on iron ore is postponed, as held in *NMDC*, to a post-beneficiation stage."

60 to 67. xxx xxx

"68. A plain reading of Rule 64-B of the MCR, with which we are presently concerned, clearly suggests that the leased area mentioned therein has reference to the boundaries of the leased area given to a leaseholder. Sub-rule (1) provides that if ROM mineral is processed within the boundaries of that leased area, then royalty will be chargeable on the processed mineral removed from the boundaries of the leased area. However, if ROM mineral is removed without processing from the boundaries of the leased area then in terms of sub-rule (2) royalty will be chargeable on the unprocessed ROM mineral. Rule 64-B of the MCR is silent about removal of a mineral from the mine/pit-head but which is not removed from the boundaries of the leased area. This is a clear pointer that royalty is to be paid by the leaseholder only on removal of the mineral from the boundaries of the leased area. This simplification and clarification takes care of some of the different and difficult situations that we have referred to above, namely, the stage of charging royalty on coal at the pit-head or post-beneficiation, the stage of charging royalty on iron ore at the pit-head or post-beneficiation, the stage of charging royalty on dolomite and limestone at the pit-head or after the removal of waste and foreign matter and of course the stage of charging royalty on other minerals such as copper, gold, lead and zinc amongst others.

69. xxx xxx

70. xxx xxx

71. Therefore, on a plain reading of Rule 64-B and Rule 64-C of the MCR, we are of the opinion that with effect from 25-9-2000 when these Rules were inserted in the MCR, royalty is payable on all minerals including coal at the stage mentioned in these Rules, that is, on removal of the mineral from the boundaries of the leased area. For the period prior to that, the law laid down in *Central Coalfields Ltd. vs. State of Jharkhand, (2015) 6 SCC 220* will operate, as far as coal is concerned, from 10-8-1998 when *SAIL* was decided, though for different reasons.

xxx xxx xxx

77.3. In view of the insertion of Rule 64-B and Rule 64-C on 25-9-2000 in the Mineral concession Rules, the levy of royalty on coal has now been postponed from the pit-head to the stage of removal of the coal (whether unprocessed or ROM coal or whether beneficiated coal)." *(underlines added)*

14. In the case of ***Tata Steel Limited, etc.*** *(supra)*, the grievance of TISCO before the Apex Court was that, though the law laid down in SAIL *(supra)* was accepted by the High Court, *viz.* that royalty was chargeable in accordance with Section 9 of the MMDR Act on the quantity of coal extracted at the pit-head, yet refund of excess royalty paid by TISCO was denied. In TISCO (supra), it is stated that SAIL (supra) has been politely distinguished in NMDC (supra). The issue in TISCO, as culled out in para 49 of the judgment was : whether for the purpose of payment of royalty, removal of a mineral as mentioned in Section 9 of the MMDR Act must be restrictively interpreted as removal or extraction of the mineral from the mine or the pit-head or a literal interpretation as removal of the mineral from the boundaries of the leased area? In NMDC (supra) the question before the Court was whether "slimes" are exigible to royalty, as forming part and parcel of iron ore? Towards the concluding discussion on the legal issues arising in TISCO (supra), the Apex Court has observed (in para-61) that there are three categories of minerals dealt with by the Apex Court, viz. (i) that can be utilized in the raw or ROM stage straight from the pit-head, (ii) iron ore that cannot be utilized in the raw or ROM stage and needs beneficiation, and (iii) dolomite and limestone about which it is not clear whether it can be utilized in the raw or ROM stage. Though royalty may have a definite connotation, the rate of

royalty, its method of computation and the final levy are different from mineral to mineral. It is for this reason that the Court held in NMDC *(supra)* that 2nd Schedule to the MMDR Act has to be read as part and parcel of Section 9 of that Act *(para-63)*. In para-64 of the judgment, the Apex Court clarified that the issue of computation of royalty on minerals is rather complex and it is best left to the experts in the field and it cannot be painted with a broad brush, as has been done in SAIL. Insofar as coal is concerned, its "removal from the seam in the mine and extracting the same through the pit's mouth to the surface (satisfies) the requirement of Section 9 in order to give rise to liability for royalty" (Para-66).

The relevant further observations in paragraphs-68 and 70 require verbatim quotation as under:

> "68. A plain reading of Rule 64-B of the MCR, with which we are presently concerned, clearly suggests that the leased area mentioned therein has reference to the boundaries of the leased area given to a leaseholder. Sub-rule (1) provides that if ROM mineral is processed within the boundaries of that leased area, then royalty will be chargeable on the processed mineral removed from the boundaries of the leased area. However, if ROM mineral is removed without processing from the boundaries of the leased area then in terms of sub-rule (2) royalty will be chargeable on the unprocessed ROM mineral. Rule 64-B of the MCR is silent about removal of a mineral from the mine/pit-head but which is not removed from the boundaries of the leased area. This is a clear pointer that royalty is to be paid by the leaseholder only on removal of the mineral from the boundaries of the leased area .....
>
> xx xx xx xx
>
> 70. .....In any event, we are not bound to accept the interpretation given by the Union of India to Rule 64-B and Rule 64-C of the MCR as excluding only coal. On the contrary, in NMDC (supra) this Court has observed that these Rules are general in nature, applicable to all types of minerals, which includes coal. The expression of opinion by the Union of India is contrary to the observations of this Court."
>
> *(underlines added)*

15. The issues arising in the facts of the present case are slightly different from the issues settled in the cases referred hereinbefore. The relevant legal

provisions and the settled principles have to be applied herein in the context of two very important facts emerging from the record. Firstly, that the mining scheme submitted by the petitioner and approved or accepted by the respondent clearly stipulate that no mineral beneficiation was envisaged within the lease area and, as seen earlier, mining operations can be carried out only in accordance with the mining scheme. Therefore, even if the operation of crushing were projected in the mining plan, it was not permissible for the petitioner to carry out the process for regulating the size of iron ore lumps as that process amounted to beneficiation. Second important fact was that not only the processing amounted to beneficiation but it resulted into reduction in the amount of royalty on account of part of the lump ore being reduced to fines. These facts have to be scrutinized in light of two successive reports of the Comptroller and Auditor General of India, for the years ending on 31st March, 2008 and 2009, which clearly and exactly pointed out that the quantum of unprocessed mineral fed into the processing plant was exactly the same as the quantum of output from the plant, which would mean that the input was already iron ore lumps, part of which was converted into CLO and rest into fines. In such circumstances, inescapable conclusion is that iron ore lumps before beneficiation was already exigible to royalty at a higher rate, but before its removal from the lease-hold area, the composition of that mineral was partly changed so as to increase percentage of fines and increasing the value of lumps by converting them to calibrated size. Ultimately, what was removed from the leasehold area was, weight-wise and volume-wise, the same quantity of mineral.

16. In view of the above special facts, legal scheme on the subject of charging royalty may be examined.

Section-9 of the M.M.D.R. Act clearly mandate payment of royalty in respect of any mineral removed or consumed by the holder of a mining lease and such payment has to be at the rate specified in the Second Schedule. The Second Schedule, in its Entry 22, then specified iron ore as lumps, fines and concentrates of all grades and prescribed flat rate of royalty at ten percent of sale price on *ad valorem* basis. General provisions for charging of royalty, as contained in Rule 64B, 64C and 64D of MC Rules broadly provide for chargeability of royalty on the processed mineral removed from the lease area. Rule 64D casts an obligation on the mine owner to compute the amount of royalty on minerals where it is charged on *ad valorem* basis. In case of iron ore, the state-wise sale price for different minerals as published by IBM has to be taken as the sale price for computation of royalty in respect of any

mineral produced any time during a month. The prescribed formula for computation of royalty is multiplication of sale price of mineral (grade wise and state wise), as published by IBM, by (x) rate of royalty in percentage by (x) total quantity of mineral grade produced/dispatched. In such scheme of levy of royalty, the sale price of the mineral and the mineral produced or dispatched would be decisive. If the sale price published by IBM is different for different grade of the same mineral or if the quantity of different grade of mineral which is produced or dispatched is different, computation of amount of royalty would be necessarily impacted. In the case of iron ore, Entry 22 of Second Schedule to MMDR Act divided iron ore into three classes, i.e. lumps, fines and concentrates. There is no category of calibrated lump ore (CLO). Therefore, while computing the amount of royalty, the mine owner cannot resort to the device of a further process by which character of iron ore lumps were converted from lumps to calibrated lump ore and fines. Although royalty is chargeable on the processed mineral which is removed from the leased area, computation of amount of royalty could only be on the basis of three prescribed categories of the iron ore, which were produced and then dispatched. Deployment of the words "mineral produced" in Rule 64D of MC Rules have to be read with Entry 22 of the Second Schedule to MMDR Act. Since CLO did not find mention in Entry 22, all the mineral which would be classified as lumps have to be treated as lumps for the purpose of computing royalty.

17. As held in TISCO (supra), even as iron ore cannot be utilized in the ROM stage and needs beneficiation, the rate of royalty, its method of computation and the final levy may be different from mineral to mineral. It was held in the case of coal that its removal from the seam of the mine and extracting the same through the pit's mouth to the surface satisfies the requirement of Section 9 in order to give rise to liability of royalty. Therefore, in the case of iron ore, although royalty may be payable only at the stage when the mineral is removed from the boundaries of the lease area and the computation of royalty may have to await some processing; but computation of the amount of royalty would depend upon the form and grade of iron ore '*produced*', simply because the price published by the IBM could be relatable only to the form of iron ore prescribed in Entry 22. Admittedly, in the facts of the present case, IBM had not published any sale price, grade wise and state wise, for CLO. The sale price was published by IBM for iron ore lumps produced by the holder of mine. The holder of mine cannot be legally allowed to compute the amount of royalty after reducing the quantum

of lumps and converting part of lumps into fines for the purpose of value addition or otherwise. The process by which such transformation of lumps into fines was sought to be achieved definitely amounted to beneficiation within the meaning of Rule 3(d) of the Mineral Conservation and Development Rules, 1988 and it was stipulated to be not undertaken in the mining plan. Such beneficiation and undertaking of mining operations except in accordance with the mining plan also amounted to violation of Rule 22A of the MC Rules, 1960, which was in turn punishable under the provisions of Rule 58 of MCD Rules. In these peculiar facts and circumstances, the maxim *nullus commodum capere potest de injuria sua propria*, meaning 'no man can take advantage of his own wrong', squarely applies. In Broom's Legal Maxim (10th Edn.) at p.191, it is stated :

> "...it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

The petitioner cannot be allowed to secure the assistance of a court of law or equity for enjoying the fruits of their own wrong.

18. Thus, the initial case of the respondents that crushing of iron ore lumps into CLO and fines amounted to "consumption" was then shifted to the alternative argument of the process of crushing amounting to impermissible "beneficiation" or, at least, further processing of iron ore lumps by the petitioner. That argument was supported by the fact that, as observed in reports of the Comptroller & Auditor General, the quantity of input for the crushers remained exactly the same after crushing and only the form of iron ore lumps was partly reduced to fines.

18.1 Opposing such shift in the stand of the respondents, it was vehemently argued by learned Sr. Counsel Shri Salman Khurshid that the word "beneficiation" as defined in Rule 3(d) of the MCDR required three processes to occur, cumulatively and not alternatively.

18.2 That argument, however, has to be stated to be rejected in so far as the definition of beneficiation is exhaustive and clearly demarcates three different purposes of processing, each being separated by a semi-colon(;). If "beneficiation" is read and interpreted as processing of ore, which must simultaneously serve three purposes of regulating the size of the desired

produce, removing unwanted constituents and improving quality, purity or usability of the product, it would lead to absurd result; because practically no processing may then amount to "beneficiation". Therefore, it is held that if, by any processing, any one of the three purposes were served, the processing would amount to "beneficiation". In the peculiar facts of the present case, if the volume of input and output of iron ore were remaining same, while undergoing the process of crushing, it would necessarily mean that only the proportion of lumps and fines was changed by the process. It was argued on that basis by learned Advocate General Shri S.P. Misra that, what was crushed within the leased area was already processed and beneficiated mineral. Therefore, even if some processing and beneficiation were permissible and necessary before applying the market price as published by IBM, that process was already carried out by the petitioner before crushing took place. He submitted that even if the method and processes adopted by the petitioner in crushing iron ore lumps did not amount to beneficiation, it certainly was further processing and not the processing envisaged by Rule 64-B of the MC Rules.

18.3 That argument has to be accepted in view of the composite scheme of levying royalty on iron ore. While Section 9 of the MMDR Act obliges the holder of a mining lease to pay royalty in respect of any mineral removed or consumed, the rate at which royalty has to be paid is specified in the Second Schedule. The Second Schedule classifies iron ore into three forms, *viz.* lumps, fines and concentrates. Rule 64-B of the MC Rules provides for charging of royalty on the processed mineral removed from the leased area. The processing envisaged in Rule 64-B could be the processing of iron ore by which it is brought into any of the three forms for which royalty is payable under Section 9 of the MMDR Act; and the manner of computation and payment of royalty as provided in Rule 64-D requires as the basis the mineral produced. A conjoint reading of these relevant provisions for levy of royalty cannot accommodate further processing of the iron ore in any of three forms.

18.4 Rule 64-B and Rule 64-D of MC Rules have to be harmoniously read with Section 9 of the MMDR Act so as not to allow any particular form of iron ore to escape royalty at the prescribed rate by its conversion into another form i.e. from lumps to fines. Charging and computation of royalty on these lines will not be inconsistent with the basic premise that royalty is payable on mineral removed or consumed from the leased area, because ultimately the iron ore in the form of lumps and fines would be removed from the leased

area after royalty being computed on the basis of the mineral produced in the leased area. In other words, when the mineral is already produced in the form in which it is classified in Entry-22 and the royalty could be computed as prescribed, it's actual levy may have to await till the mineral leaves the boundary of the leased area. But, any change in the form of that mineral by any further process has to be ignored for computation of the amount of royalty.

19. In view of the above discussion and analysis of the peculiar issues arising in the facts of the present case, the prayers of the petitioner cannot be granted, since the method of calculation of royalty and demand of the additional amount of royalty by the State, and the impugned circulars issued for that purpose appear to be legal and justified. Consequently, the petition is required to be dismissed and it is accordingly dismissed without any order as to costs.

Writ petition dismissed.

2016 (I) ILR - CUT-229

D.H.WAGHELA, C.J. & BISWANATH RATH, J.

W.P.(C) NO. 13752 OF 2015

SUSANTA KUMAR TRIPATHY .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.311(2)

After retirement from Government Service petitioner was re-employed in terms of Special Contract – While working as such he was terminated from Service being booked in a vigilance case – Whether the petitioner is entitled to protection of Art. 311(2) of the Constitution of India before his termination from Service ? Held, since the petitioner was not holding a substantive post in the Government Service, he is not entitled to the protection under Art. 311(2) of the Constitution of India. (Para 16)

Case Laws Referred to :-

1. (2015) 6 SCC 193 : Tata Steel Limited vs. Union of India & ors
2. (2004) 6 SCC 281 : National Mineral Development Corporation Ltd. vs. State of M.P. & Anr.

For Petitioner : M/s. Jaydev Sengupta, D.K.Panda, G.Sinha & A.Mishra

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

Date of Hearing : 29.09.2015
Date of Judgment: 13.10.2015

JUDGMENT

BISWANATH RATH,J.

By filing this Writ petition, the petitioner has sought quashing of the order dated 08.07.2015 passed by the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O. A. No. 1289 of 2015 and thereby also quashing the order dated 23.04.2015 terminating his service with effect from 27.03.2015, the order impugned in the Original Application.

2. Short facts of the petition are that, due to inordinate delay in the recruitment, many posts in Government establishments remained vacant and unfilled, which resulted increase of workload in different establishments. Government of Orissa was sometimes forced to cope with the work by engagement of retired Government servants in particular regular vacancies but on temporary or contractual basis. In order to avoid the complications in such temporary and contractual engagement, Government in General Administration Department issued the resolution dated 27.08.2014 prescribing certain guidelines in the matter of engagement of retired Government servants. Under Clause 2 of the said resolution, prescription has been made to fix eligibility criteria for the officers who have retired from Government. service on attaining the age of superannuation but who are below the age of 65 years, having good service career and also physically fit to be considered for re-employment. Under Clause 4, it has been provided that re-employment shall be made initially for a period of two years and can be extended for subsequent period of two years with spells of one year each subject to satisfactory performance up to a total period of four years but not beyond the age of 65 years of age or till the posts are filled up by regular process, which ever is earlier.

3. Petitioner's case herein is that he retired from the Government service as an Assistant Engineer(Electrical) on attaining the age of superannuation on 31.12.2013 and was re-employed as an 'Officer on Special Duty' on contractual basis by the Government in Works Department vide letter dated 11.03.2015 and was posted against a vacant post under G.E.Sub-Division-1,Cuttack. Petitioner further averred that, while he was discharging his duties smoothly, a Vigilance Case was initiated against him on the allegations of demanding and accepting illegal gratification and it was registered as Cuttack Vigilance P.S. Case No.12 dated 26.03.2015, charging the petitioner Under Section 13(2) read with Sections 13(1)(d) and 7 of the Prevention of Corruption Act,1988. On registration of the above Vigilance Case, the petitioner was arrested on 27.03.2015. Petitioner remained in custody till 09.04.2015 and was finally released on bail pursuant to the order of this Court dated 22.04.2015. Consequent upon release of the petitioner on bail, on 23.04.2015 an Office Order was issued terminating his service with effect from 27.03.2015 on the premises of his arrest and initiation of a Vigilance Proceeding against him.

4. Being aggrieved by the order of termination dated 23.04.2015, the petitioner approached the Orissa Administrative Tribunal by filing O.A.No.1289 of 2015. Petitioner challenged the order of disengagement on the premises that, before taking the impugned action, the authority ought to have resorted to the provisions contained in Article 311 (2) of the Constitution of India. Upon notice in the Original Application, learned State Counsel appearing before the Tribunal submitted that the impugned order of termination was based on the involvement of the petitioner in Vigilance P.S. Case No.12 dated 26.03.2015, under Section 13(2) read with Sections 13(1)(d) and 7 of the Prevention of Corruption Act,1988 and on the allegation of demanding and accepting illegal gratification to the tune of Rs.50,000/-. Learned State Counsel had further submitted that since the petitioner was caught red handed and trapped while accepting the bribe of Rs.50, 000/-(Fifty Thousand), he did not deserve benefit of re-employment and as such there was no illegality in the impugned order. The Original Application was finally heard and disposed of by an order of dismissal of the Original Application, relying on Clause 2 of the terms and conditions of the appointment. Since the petitioner has been disengaged on the premises of misconduct, misappropriation and negligence in duties there was no need for notice before such disengagement. Being aggrieved by dismissal of the Original Application, the petitioner filed the present writ petition.

5. Learned Senior Counsel appearing for the petitioner contended that the petitioner being an employee in the Government establishment, holding a key post, in spite of being under a temporary and contractual engagement, the service conditions attached to employees under the Government establishment, particularly the provisions of Orissa Government Service Conduct Rule,1957 applied and the disengagement order not having followed the provisions thereof, it was bad in law. Learned Senior Counsel further contended that since the termination of service took place only on initiation of a Vigilance proceeding and particularly in absence of any finding of misconduct by the petitioner, the provisions contained in Article 311 (2) of the Constitution ought to have been complied before disengaging the petitioner. Therefore, learned senior counsel for the petitioner claimed that the order of termination as also the order of the Tribunal, were liable to be set aside.

6. On the other hand, Sri Sahoo, learned Addl. Government Advocate appearing for the State vehemently objected and contended that the petitioner was not only a temporary employee but also engaged on contractual basis under specific terms and conditions provided vide resolution dated 27.8.2014 of the General Administration Department specifically relating to engagement of retired Government servants and further in view of the specific condition in the offer of re-employment at Clause 2 of the Office Order dated 11.03.2015, the order of disengagement cannot be faulted. Sri Sahoo, further submitted that the petitioner being a temporary and contractual employee with specific terms and conditions and having agreed to join the post on specific conditions, has no right to oppose implementation of the conditions in the offer of appointment and as such he is estopped from raising such objections. Learned State Counsel further contended that there was no illegality in terminating the petitioner without notice upon being found to be involved in misappropriation. On that premises, learned State Counsel submitted that there was no illegality in the impugned order passed by the Orissa Administrative Tribunal.

7. Learned senior counsel for the petitioner, apart from making his submissions on the merit of the case, also relied upon the citations as under:

(1) AIR 1958 SC 36 (PURUSOTTAM LAL DHINGRA –vs- UNION OF INDIA)
(2) 1979 (2) SLR 651 (AP) (ILYAS AHMED –vrs – STATION DIRECTOR, AIR)
(3) AIR 1991 SC 537 (SRILEKHA VIDYARTHI-vrs- STATE OF U.P.)
(4) AIR 1991 SC 2010 (UNION OF INDIA-vrs- K.V. JANKIRAMAN)
(5) AIR 1992 SC 1685(STATE OF GUJURAT-vrs.- T.J. KAMPAVAT)

(6) AIR 2007 SC 1706 (COAL INDIA LTD.-VRS.-SAROJ MISHRA)
(7) AIR 2009 SC 2375 (UMA NATH PANDEY-vrs.-STATE OF U.P.)
(8) 2010 (15) SCC 305 (STATE OF U.P.-vrs.-RAM VINAI SINHA)
(9) AIR 2012 SC 729 (GRIDCO LTD.-vrs.-SADANANDA DOLOI)
(10) Vol.-118(2014) CLT 997 (DR. UTTAM KUMAR SAMANTA –vrs.- KIIT UNIVERSITY)

Similarly, Mr. Sahoo, learned Additional Government Advocate apart from making his submission on the merit of the case, relied upon decision of the Hon'ble Apex Court in 2011 (15) SCC 16.

8. Under the above facts and circumstances, the short question that falls for consideration of this Court is whether the provisions contained in Article 311(2) of the Constitution of India were applicable to the petitioner before passing the impugned order of disengagement ?

9. It is admitted at the Bar that the petitioner had superannuated on 31.12.2013. There is also no denial to the fact that the petitioner was re-employed as an Officer on Special Duty on contractual basis by the Government of Odisha in the Works Department vide communication dated 11.03.2015 and the offer of appointment vide Clause -2 read as under :

"(ii) The re-employment may be terminated at any time for dissatisfactory performance by Works Department on notice of one month. In case of any misconduct including misappropriation, negligence in duty or causing loss to Government, the services may be terminated without any prior notice."

10. The above clause contained in the offer of appointment has a clear indication that in case of any misconduct including misappropriation, negligence in duty or causing loss to Government, the services may be terminated without any prior notice. From the order of disengagement, it clearly appears that there has been some sort of preliminary inquiry held against the temporary servant and following such assessment, the service of the petitioner is dispensed with in accordance with the terms of Clause (ii) of the contract. Such disengagement could not mean that the termination of service amounted to infliction of punishment of dismissal or removal within the meaning of Article 311(2).

11. Hon'ble Apex Court has, in ***Champaklal Chimanlal Shah vs. The Union of India,*** **(1964) AIR 1854** held :

"The third proposition must be restricted only to those cases whether of temporary government servants or others, where government purports to

act under Art. 311(2)but ends up with a mere order of termination. In such a case the form of the order is immaterial and the termination of service may amount to dismissal or removal. The same view has been taken in Jagadish Mitter v. Union of India(1) We are therefore of opinion that on the facts of this case it cannot be said that the order by which the appellants, services were terminated under r. 5 was an order inflicting the punishment of dismissal or removal to which Art. 311(2) applied. It was in our opinion an order which was justified under r. 5 of the rules and the appellant was not entitled to the protection of Art. 311(2) in the circumstances."

12. Similarly, in ***Union Territory of Tripura Agartala vs.Gopal Chandar Dutta Choudhury,*** **(1963 AIR 601)** the Constitution Bench held:

"We are unable to agree with the judicial Commissioner that the termination of employment of the respondent by the Superintendent of Police by order dated December 6, 1957, was in violation of. Art. 311(2) of the Constitution. It is true that before the respondent was discharged from service no enquiry was made as to any alleged misconduct, nor was he given any opportunity of showing cause against the proposed termination of employment. But it is well settled that when employment of a temporary public servant, is terminated pursuant to the terms of a contract, he is not entitled to the protection of Art. 311(2)"

13. In another case of termination / disengagement of a temporary employee, in ***Satish Chandra Anand vs. The Union of India,*** **(1953 AIR 250)** the Constitution Bench of the Apex Court held as under :

" The discharge-

(c) of a person engaged under contract, in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule." These terms are used in the same sense in Article 3ll. It follows that the article has no application here and so no question of discrimination arises, for the "law" whose protection the petitioner seeks has no application to him. There was no compulsion on the petitioner to enter into the contract he did. He was as free under the law as any other person to accept or to reject the offer which was made to him. Having accepted, he still has open to him all the right-, and remedies available to other persons similarly situated -to enforce any rights under his contract which have been denied to him, assuming there are any, and to pursue in the ordinary courts of the land such remedies for a breach as are open to him to exactly the same extent as other

persons similarly situated. He has not been discriminated against and he has not been denied the protection of any laws which others similarly situated could claim. The remedy of a writ is misconceived. Article 16(1) is equally inapplicable. The whole matter rests in contract. When the petitioner's first contract (the five year one) came to an end, he was not a permanent Government servant and Government was not bound either to re-employ him or to continue him in service. On the other hand, it was open to Government to make him the offer it did of a continuation of his employment on a temporary and contractual basis. Though the employment was continued, it was in point of fact, and in the eyes of the law, under a new and fresh contract which was quite separate and distinct from the old even though many of its terms were the same. Article 16(1) deals with equality of opportunity in all matters relating to employment or appointment to any office under the State. The petitioner has not been denied any opportunity of employment or of appointment. He has been treated just like any other person to whom an offer of temporary employment under these conditions was made. His grievance, when analysed, is not one of personal differentiation but is against an offer of temporary employment on special terms as opposed to permanent employment. But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who choose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations government is, subject to the qualification mentioned above, as free to make special, contracts of, service with temporary employees, engaged in, works of a temporary nature, as any other employer. Various matters relating to the merits of the case were referred to but we express no opinion about whether the petitioner has other rights which he can enforce in other ways. We are dealing here with a writ under article 32 to enforce a fundamental right and the only point we decide is that no fundamental right has been infringed. When the matter was first argued we had decided not to make any order about costs but now that the petitioner has persisted in reopening the case and calling the learned Attorney-General here for a second time, we have no alternative but to dismiss the petition with costs."

14. Coming to another case in ***GRIDCO Ltd. and Anr. Vs. Sadananda Doloi and Ors,*** **(2011) Vol.15 SCC 16** the Hon'ble Apex Court held as follows:

"**42.** We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise."

15. Learned Senior Counsel for the petitioner has referred to the above mentioned cases but we find that none of the citation is applicable in the case of the petitioner. AIR 2012 S.C.729 (2011) vol.15 SCC 16 cited by the petitioner on the other hand goes against the petitioner.

16. In the factual background as narrated hereinabove as also the settled position of law as indicated hereinabove, we answer the issue in negative and concur with the view of the Tribunal that there was no scope of application of Article 311(2) of the Constitution of India in the case of the petitioner, even as he was not holding a substantive post in the Government service, but he was re-employed in terms of special contract of service.

17. We thus find no error in the impugned judgment of the State Administrative Tribunal in O.A. No. 1289 of 2015. Consequently, the petition is dismissed. However, there is no order as to cost.

Writ petition dismissed.

2016 (I) ILR - CUT-236

AMITAVA ROY, C.J. & DR.A.K.RATH, J.

W.A. NO. 99 OF 2014

PIYUSH HASMUKHLAL DESAI ……..Appellant

.Vrs.

INTERNATIONAL SOCIETY FOR KRISHNA CONSIOUSNESS (ISKCON) ……Respondent

CIVIL PROCEDURE CODE, 1908 – O-22, R-1

The words "Right to sue Survives" occurring in Rule-1 of Order-22 C.P.C. – Meaning of – It means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. (Para 9)

CIVIL PROCEDURE CODE, 1908 – O-1, R-10(2)

Transposition of defendant as plaintiff – When can be permitted ? – It can be permitted only when the defendant has some interest in common with that of the plaintiff – Even a proforma defendant can be transposed as plaintiff, when interest and identity are same between the plaintiff and one or more of the defendants – Held, a person, whose interest is adverse to the plaintiff, can not be permitted to be transposed as plaintiff. (Para 13)

Case Laws Referred to :-

1. A.I.R.1927 Oudh 156, : Mt. Lakhpati Kuer Vrs. Daulat Singh
2. A.I.R.1927 Nagpur 343 : Mt. Amritibai Vrs. Ratanlal and others
3. AIR 1961 Patna 178 : Jamuna Rai and others Vrs. Chandradip Rai and others.
4. AIR 1968 Gujarat 202 : Ibrahimbhai Karimbhai and others Vrs. State of Gujarat

For Appellant : Mr. D.C.Mohanty, Sr. Adv, R.N.Achrya

For Respondent : Mr. J.K.Tripathy, Sr. Adv, B.P.Tripathy

Date of Hearing : 16.12.2014
Date of Judgment: 08.01.2015

JUDGMENT

DR.A.K.RATH, J.

In this appeal under Clause 10 of the Letters Patent, the appellant has challenged, inter alia, the judgment and order dated 31.1.2014 passed by the learned Single Judge in W.P.(C) No.6499 of 2009, whereby and whereunder, the learned Single Judge allowed the writ petition and set aside the order dated 15.9.2008 passed by the learned District Judge, Puri in R.F.A.No.29 of 2005. By order dated 15.9.2008, the learned District Judge, Puri allowed the application filed by the respondent no.2 for substitution, condonation of delay and setting aside abetment and transposed the respondent no.2 to appellant.

2. Sans details, the short fact of the case is that the appellant and respondent as plaintiffs laid a suit for declaration of right, title and interest over the properties appertaining to khata no.88 covering various plots of mouza-Sipasarubali, Puri, area Ac.30.99 dec. in the Court of the learned Sub-

Judge, Puri against Hasmukhlal Ballav Das Desai, which was registered as T.S.No.118 of 1988. Be it noted that the appellant-Piyush Husmukhlal Desai is the son of Hasmukhlal Ballav Das Desai. The written statement was filed by Hasmukhlal Ballav Das Desai- defendant admitting the claim of the plaintiffs. The suit was decreed. Thereafter, Hasmukhlal Ballav Das Desai through his power of attorney holder instituted a title suit, for a declaration that the decree passed in T.S.No.118 of 1998 was a nullity, in the Court of the learned Civil Judge (Senior Division), Puri, which was registered as T.S.No.123 of 2000. The said suit was subsequently transferred to the learned Additional Civil Judge (Senior Division), Puri and renumbered as Title Suit No.119 of 2001. In the said suit, the respondent and appellant herein were arrayed as defendants 1 and 2. Pursuant to issuance of summons, the respondent only entered appearance and filed written statement denying the assertion made in the plaint. The said suit was dismissed. Challenging the judgment and decree dated 24.12.2004 and 7.1.2005 passed by the learned Civil Judge (Senior Division), Puri in T.S.No.119 of 2001, plaintiff-Hasmukhlal Ballav Das Desai filed R.F.A.No.29 of 2005 in the Court of the learned District Judge, Puri. In the said appeal, the respondent and appellant were arrayed as Respondents 1 and 2 respectively. Pursuant to issuance of notice, respondent no.1 entered appearance. The present appellant, who was respondent no.2, had chosen not to appear in spite of valid service of notice. During pendency of the appeal, the sole appellant died on 9.10.2006. While the matter stood thus, the respondent no.2 represented through his power of attorney holder filed an application under Order 22, Rule 3 C.P.C. praying to substitute the legal representatives of the appellant along with two other applications for condonation of delay and setting aside the abatement. The learned District Judge allowed the application for condonation of delay, setting aside the abetment and eventually allowed the application for substitution by order dated 15.9.2008. By the said order, the respondent no.2 was also transposed as appellant.

3. The present respondent challenged the order dated 15.9.2008 of the learned District Judge, Puri passed in R.F.A.No.29 of 2005 before this Court, being W.P.(C) No.6499 of 2009, which was allowed by the learned Single Judge.

4. We have heard Mr. D.C.Mohanty, learned Senior Advocate and Mr.R.N.Acharya, learned Advocate for the appellant and Mr.J.K. Tripathy, learned Senior Advocate and Mr.B.P.Tripathy, learned Advocate for the respondent.

5. Mr.Mohanty, learned Senior Advocate submitted that during pendency of the appeal, Hasmukhlal Ballav Das Desai, the father of the appellant-Piyush Hasmukhlal Desai died on 9.10.2006 leaving behind his legal heir and successor. Since the right to sue survives, learned District Judge has rightly allowed the application for substitution and transposed the respondent no.2 to appellant. He further submitted that by playing fraud with the Court, the plaintiffs in T.S.No.118 of 1988 had obtained the decree. The property in question, situates in Puri Town, is a very valuable property. Unless the respondent no.2 (appellant) is transposed in R.F.No.29 of 2005 as appellant, then the fraud perpetrated by the plaintiffs in earlier suit will remain undressed. He further submitted that the learned Single Judge brushed aside the aforesaid facts and as such the judgment is liable to be quashed.

6. Per contra, Mr.Tripathy, learned Senior Advocate submitted that the present appellant and respondent laid a Title Suit No. 118 of 1988 in the Court of the learned Sub-Judge, Puri for declaration of right, title and interest against Hasmukhlal Ballav Das Desai. The same was decreed. But after lapse of some years, Hasmukhlal Ballav Das Desai filed a Title Suit No.123 of 2000 in the Court of the learned Civil Judge (Senior Division), Puri to set aside the judgment and decree passed in T.S.No.118 of 1988. Thus, the defendant whose interest is adverse to the plaintiff cannot be transposed to plaintiff.

7. On the basis of the pleadings and rival submissions made at the Bar, the following points emerge for our consideration.

1. What is the meaning of the words "Right to sue Survives" occurring in Rule 1 of Order 22 CPC ?

2. Whether the respondent, who has conflicting interest with the appellant and when the interest and identity are not the same between the appellant and respondent, can be transposed to appellant ?

Point No.1.

8. The expression of "Right to sue" has not been defined in the Code of Civil Procedure. The same has been interpreted by different High Courts. The oldest decision on the issue is of the Calcutta High Court. In ***Sham Chand Giri Vrs. Bhayaram Panday,*** *21 I.A. 134,* it is held that the "right to sue" is based upon facts which go to make up what is called the "cause of action". The Bombay High Court, in ***Gopal Ganesh Abhyankar Vrs. Ramchandra Sadashiv,*** *ILR Bom.26,* held that "right to sue" means right to seek relief. It is

apt to state here that the Calcutta and Bombay High Courts had interpreted Section 368 of the Code of Civil Procedure, 1877. In ***Mt. Lakhpati Kuer Vrs. Daulat Singh,*** *A.I.R.1927 Oudh 156,* it is held that in Rule 6 of Order 22 C.P.C., the words used are "the cause of action" and not "the right to sue" and inference can be drawn that two expressions are intended to be synonymous. The Nagpur High Court, in ***Mt. Amritibai Vrs. Ratanlal and others,*** *A.I.R.1927 Nagpur 343,* relying on the decision of the Calcutta High Court in the case of ***Sarat Chandra Vrs. Mani Mohan (2)*** held that the expression "the right to sue" means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. The same view was taken by the Patna High Court in ***Jamuna Rai and others Vrs. Chandradip Rai and others,*** *AIR 1961 Patna 178* and Gujarat High Court *in* ***Ibrahimbhai Karimbhai and others Vrs. State of Gujarat,*** *AIR 1968 Gujarat 202.*

9. Thus, the legal position that emerges from the reading of the aforesaid decisions is that the words "right to sue" occurring in Order 22 C.P.C. mean the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death.

10. In the instant case, as has been stated earlier, the appellant was a co-plaintiff with the respondent in T.S.No.118 of 1988. The said suit was decreed. The said judgment and decree of the aforesaid suit was challenged by the defendant Hasmuklal Ballav Das Desai in T.S. No.123/119 of 2001-2000. In the later suit, the respondent and appellant were arrayed as defendants 1 and 2 respectively. The said suit was also dismissed, whereafter Hasmukhlal Ballav Das Desai filed R.F.A.No.29 of 2005 in the Court of the learned District Judge, Puri. The respondent no.2 in R.F.A.No.29 of 2005 (present appellant) has conflicting interest with that of the appellant. The cause of action does not survive after death of the appellant. The relief, which had been prayed for by the appellant in the suit, cannot be granted to the respondent no.2. Thus, the applications for substitution, setting aside abetment and condonation delay filed by the respondent no.2 are totally misconceived. We concur with the view of the learned Single Judge.

Point No.2.

11. Order 1, Rule 10(2) of C.P.C. is quoted hereunder:-

> "(2) **Court may strike out or add parties.-**The Court may at any stage of the proceedings, either upon or without the application of

> either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

12. The language of Rule 10 is wide enough. The Court may transpose a defendant as plaintiff in exercise of powers under Rule 10(2) of C.P.C. Under Order 1 Rule 10(2) and Section 107 C.P.C., the appellate court has also power to transpose the respondent as appellant or an appellant as respondent in the ends of justice. The Calcutta High Court in ***Smt.Ajita Debi Vrs. Musst. Hossenara Begum and others,*** *A.I.R. 1977 Calcutta 59,* held that where there is an affinity or identity of interests between the plaintiffs and one or more of the defendants, transposition can be made. The same view was taken by the Gujarat High Court in ***Jethiben Vrs. Maniben and another,*** *A.I.R. 1983 Gujarat 194.* Relying on the decision of the Gujarat High Court in the case of *Jethiben (supra)*, the Karnataka High Court in the case of ***Sulemanji Sanibhai and others Vrs. Abde Ali and others, 1995*** *(4) CCC 327* held that law does not countenance a defendant who is not proforma defendant or a defendant whose interest is not common to that of the plaintiff to be transposed as a plaintiff to continue the suit against erstwhile plaintiff.

13. Thus, transposition of defendant as plaintiff can be made only when the defendant has some interest in common with that of the plaintiff. A proforma defendant can be transposed as plaintiff only when interest and identity are same between the plaintiff and one or more of the defendants. A person, whose interest is adverse to the plaintiff, cannot be permitted to be transposed as plaintiff.

14. As has been stated in the preceding paragraphs, Piyush Hasmukhlal Desai-defendant in Title Suit No.123 of 2000 has adverse interest with Hasmukhlal Ballav Das Desai, his father. The interest and identity are not the same between the plaintiff and defendant. In view of the same, the learned District Judge, Puri fell into patent error of law in transposing the respondent to appellant. The view expressed by the learned Single Judge is in consonance with law.

15. On taking a holistic view of the matter, we are on ad idem that the learned District Judge, Puri fell into patent error of law in allowing the

applications for substitution, condonation of delay and setting aside abetment and transposition of respondent no.2 as appellant in R.F.A.No.29 of 2005. The learned Single Judge has rightly set aside the said order. The appeal, being devoid of merit, is dismissed. No Costs.

Appeal dismissed.

2016 (I) ILR - CUT-242

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

CRLA NOS. 526, 532 & 541 OF 2007 & 385 OF 2008

RAJAN MISHRA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A) CRIMINAL PROCEDURE CODE,1973 – Ss 154,162

Whether the F.I.R.(Ext.1) is hit by Section 162 Cr.P.C. as the same is not the first information with regard to the occurrence Dt 24.01.2004 ? In this case P.W. 33 on receipt of the VHF message made station diary entry and proceeded to the spot but he did not find any clue – Held, the VHF message being very cryptic the same can not be treated as an F.I.R. and it can not be said that the FI.R. Ext-1 is hit by Section 162 Cr.P.C. (Para 12)

(**B**) **CRIMINAL TRIAL** – **Chance witness – Value – Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses, rather their evidence is admissible if corroborated by other witnesses – In this case P.W.2 is the only independent eye-witness who proves abduction at the point of pistol by some of the accused persons and clearly identified them in the T.I. parade – His version has been corroborated by P.W.s 7 & 8 – He is also not inimically disposed of towards the accused persons – Held, evidence of P.W.2 can not be ignored by dubbing him as a chance witness.** (Para 11)

(**C**) **CRIMINAL PROCEDURE CODE,1973 – S. 154**

F.I.R. – Whether VHF message can be treated as an F.I.R. ? – Held, it can be treated as F.I.R. if such message is not cryptic one and on the basis of that information the Officer in charge is prima-facie satisfied about the commission of a cognizable offence and

proceeded for investigation – In the present case the VHF message being cryptic it can not be treated as an F.I.R. (Para12)

(**D**) **CRIMINAL PROCEDURE CODE,1973 –S. 154**

Delay in dispatch of F.I.R. to Court – F.I.R. registered on 24.01.2004 at 11 PM and sent to Court on 25.01.2004 which was received on 27.01.2004 – Such delay cannot be described as unusual as 26.01.2004 was a holiday – Moreover there is nothing to show that the accused has been prejudiced by such delay – Such delay may be a procedural irregularity but the same cannot demolish the core prosecution story. (Para11)

(E) PENAL CODE, 1860 – S.364-A

Kidnapping for ransom – Object – No strait jacket formula that the demand for payment has to be made to a person who ultimately pays – After making the demand to the abducted person and merely because the demand can not be conveyed to the person who is supposed to make payment, does not take away the offence out of the purview of section 364-A I.P.C. – In this case the appellants were party to the demand of ransom – Held, conviction of the appellant U/s. 364 A/34 I.P.C. is upheld. (Paras 1,15)

(**F**) **CRIMINAL TRIAL – Non-examination of some witnesses alleged – As a matter of fact prosecution has proved its case with regard to the charges beyond reasonable doubt – It is the quality of evidence that matters but not the quantity.** (Para 12)

Citations of Case Laws :-

1. 1970 Crl.J. 1149 : (Budhsen & another v. State of U.P.).
2. 1977 Crl.J.173 (S.C.) : (Rabindra Kumar Dey v. State of Orissa)
3. AIR 2007 S.C. 1729 : (Ravi alias Ravichandran v. State represented by Inspector of Police)
4. 2005 CrLJ 3151 : (Dwijadas Banerjee v. State of West Bengal)
5. 2004 SCC (Crl.) 126 : (State of Haryana v Jagbir Singh and another
6. AIR 1954 S.C. 41 : (Purnendu Nath Tagore v. Administrator, General of West Bengal)
7. (2007) 1 SCC (Crl) 744: (Ritesh Chakravarti v. State of Madhya Pradesh)
8. 2003 SCC (Crl.) 869 : (Ram Narayan Popli v. Central Bureau of Investigation)
9. 2002 AIR SCW 3655/AIR 2002 S.C. 3164. (Bodhraj @ Bodha & Ors. v. State of Jammu & Kashmir)
10. (2004) 8 SCC 95 : AIR 2004 SC 4865 (Malleshi v. State of Karnakata)

11. (2008) 15 SCC 418 : (Shyam Babu and others v. State of Haryana)
12. AIR 2015 S.C. 3577 : (Vikram Singh alias Vicky and another v. Union of India and others

For Appellant : Mr. Devashis Panda
M/s. Bharati Dash & Rajeet Roy
Mr. Y.Dash, Sr. Advocate, A.K.Rout & Rita Singh
M/s. K.Safirullah & D.K.Mohapatra & S.K.Singh

For Respondent : Mr. Jyoti Prakash Patnaik (Addl. Government Advocate)

Date of Judgment : 24.12.2015

JUDGMENT

BISWAJIT MOHANTY, J.

The above Criminal Appeals arise out of a common judgment dated 13.9.2007 passed by learned Sessions Judge, Sundergarh in S.T. Case No.169 of 2004 in which the learned Sessions Judge has held the appellants of the above mentioned Criminal Appeals along with one Atul Pandey guilty of offences under Sections 364A/34; 342/34 & 120B, IPC and accordingly, convicted them thereunder. Consequently, the learned Sessions Judge, Sundergarh sentenced all four appellants along with Atul Pandey to undergo imprisonment for life and to pay a fine of Rs.10,000/- each in default to undergo R.I. for two years each under Sections 364A/34, IPC, R.I. for ten years each and to pay a fine of Rs.5,000/- each in default to undergo R.I. for one year each under Section 120B, IPC and to undergo R.I. for six months each under Sections 342/34, IPC. He further directed that all the substantive sentences to run concurrently and the U.T.P period be set off under Section 428 of the Cr.P.C. However, the learned Sessions Judge, Sundergarh acquitted the above mentioned four appellants along with one Atul Pandey of the charges under Section 395, IPC and Sections 25/27 of the Arms Act. Further, the learned Sessions Judge acquitted the other accused persons, namely, Pradeep Srivastava, Rajendra Prasad and Santosh Jha of all the charges. Against such acquittal of Pradeep Srivastava, Rajendra Prasad and Santosh Jha, Criminal Revision No.1426 of 2007 has been filed by Rajesh Gadodia, who is the informant. While hearing Criminal Revision No.1426 of 2007, analogously it was brought to our notice that in the meantime Rajendra Prasad has died. Though Atul Pandey has filed CRLA No.523 of 2007, however, the same has been segregated as he is presently absconding.

2. The case of the prosecution is that on 24.1.2004 at about 3.30 P.M., Sawarmal Gadodia (P.W.8), an industrialist of Rajgangpur left his residence for Sundergarh in his Maruti Zen Car bearing registration No.OR-16-A-5921 driven by his driver Fransis Minz (P.W.7). P.W.8 also took one Amin, namely, Biranchi Bag of Rajgangpur Tahasil with him. P.W.8 first went to his factory at Budhakata. After that P.W.8 visited his factory at Bai-Bai. At Bai-Bai P.W.8 left Biranchi Bag for demarcation of a land. Thereafter, he proceeded to Sundagarh. As P.W.8 did not return home by 10 P.M., the informant (P.W.1), who is the son of P.W.8, sent his staff, namely, Deepak Sharma and Prabin Patra to Sundergarh. On the way near Karamdihi, Deepak Sharma and Prabin Patra found the Maruti Zen Car of P.W.8 by the

road side. They also informed P.W.1 (informant) that unknown culprits had followed the Maruti Zen Car in a Bolero vehicle and stopped the said Zen Car on the point of pistol and took P.Ws.7 and 8 in their Bolero vehicle. As P.W.8 is an Industrialist, his son (P.W.1) suspected that the unknown culprits have abducted P.W.8 with a motive to demand money. Accordingly, P.W.1 lodged F.I.R. (Ext.1) at 11 P.M. before the IIC, Sadar Police Station, Sundergarh on 24.1.2004. Basing on this, the case was registered and investigation commenced. During course of investigation, witnesses were examined, spot was visited, a number of persons including present appellants and three opposite parties of Criminal Revision No.1426 of 2007 were arrested, some weapon of offences were recovered and the victims - P.Ws.7 and 8 were rescued from the farm house of the appellant-Virendra Jaiswal situated at Hartoli in the State of Chhatishgarh. Three appellants, namely, Roshan Ali, Rajan Mishra and Shamim Sidique along with one Atul Pandey were put to Test Identification Parade. Voices of appellants-Rosan Ali and Rajan Mishra were recorded by the Magistrate for comparison. The Bolero vehicle in which the victims (P.Ws.7 & 8) were abducted and the Maruti Zen Car in which P.Ws.7 and 8 proceeded to Sundergarh were seized. Sanction order of the Additional District Magistrate for prosecution under the Arms Act was obtained and after completion of investigation, charge sheet was submitted against the accused persons which included four appellants and three private opposite parties arrayed as such in Criminal Revision No.1426 of 2007. Later the matter was duly committed to the Court of Sessions and the appellants and three private opposite parties arrayed in the Criminal Revision No.1426 of 2007 along with others stood their trial under Sections 364A/34, IPC, 342/34, IPC, 395, IPC, 120B, IPC and Sections 25/27 of the Arms Act.

3. The plea of the convicted appellants as well as the three persons arrayed as opposite parties to Criminal Revision No.1426 of 2007 was one of complete denial. In order to establish the charges against the convicted appellants and others which included three persons arrayed as opposite parties in the Criminal Revision, the prosecution examined as many as 33 witnesses. So far as the prosecution witnesses are concerned, P.W.1 is the informant, who happens to be the son of P.W.8 (victim), P.W.2 is an eye-witness to the abduction, P.W.3 is the S.I. of Police then attached to Sundergarh Town Police Station to whom P.W.2 is said to have informed about the incident over mobile phone. P.Ws.4 and 5 are the villagers of Karamdihi of whom P.W.4 is a witness to the seizure of Maruti Zen Car and its documents. P.W.6 is the Peon of the victim P.W.8, who is a witness to the seizure of fax message and cassettes vide seizure list Ext.5. P.Ws.7 and 8 are the victims, who were abducted. P.Ws.9 & 10 are two Gram Rakhis, who are witnesses to the seizure. P.W.11 is the Accountant of Hotel Bishnu Palace, Jharsuguda where some culprits stayed and is a witness to the seizure of the documents of the said Hotel. P.W.12 is a witness, who turned hostile. P.W.13 is the S.I. of Police attached to Sadar Police Station, Sundergarh who proceeded to Nagpur to bring the appellants-Roshan Ali, Rajan Mishra and Pradeep Srivastav (opposite party no.4 in Criminal Revision No.1426 of 2007) and certain documents. P.W.14 is the Police Constable of Sadar Police Station, Sundergarh, who is a witness to the seizure of mobile phone of the appellant-Shamim Sidique as well as a witness to the voice recording and seizure of Cassettes. P.W.15 is another Police Constable of Sadar Police Station, Sundagarh, who is a witness to the seizure of mobile phone of the appellant-Shamim Sidique along with other seizures. P.W.16 is Kedarnath Kedia, who was earlier abducted by some of the culprits. He has stated about receiving repeated phone calls over his mobile from the appellant-Rosan Ali. He is also a witness to the seizure of his mobile phone. P.W.17 is the

A.S.I. of Police of Shankargarh Police Station in the State of Chhatishgarh, who rescued P.Ws.7 & 8 from the farm house of the appellant-Virendra Jaiswal, also arrested the appellant-Virendra Jaiswal and lodged plain paper F.I.R. (Ext.36) and did some investigation. P.W.18 is a co-villager of the appellant-Virendra Jaiswal, who is a witness to the Panchnama for the raid and seizure of the fire arms and other materials. P.W.19 is the Attendant of the S.T.D. Booth of Munjer Chowk from where the appellants-Roshan Ali and Rajan Mishra were arrested. He is also a witness to the seizure of the telephone bills as well as telephone set of the S.T.D. Booth. P.W.20 is the Receptionist of Hotel Kamal at Sitawardi in the State of Maharashtra and is a witness to the seizure of the documents relating to the said Hotel. P.W.21 is the Police Constable of Sitawardi Police Station, who is a witness to the seizure of the S.T.D. Booth Telephone of Munjer Chowk and documents of Hotel Kamal. P.W.22 is the A.S.I. of Police of Sitawardi Police Station, who apprehended the appellants-Rajan Mishra & Roshan Ali from the S.T.D. Booth at Munjer Chowk. He is also a witness to the seizure of the telephone bills. P.W.23 is the Station Officer of Civil Line Police Station. P.W.24 is a water pipe fitter, who used to fit pipes in police station. While he was in police station, P.W.23 came there with Bolero vehicle. P.W.25 is a witness to the arrest of the appellants Rajan Mishra and Rosan Ali. P.W.26 is the S.I. of Police attached to the Sadar Police Station, Sundergarh, who proceeded to Ambikapur to submit the remand report in respect of the appellant-Virendra Jaiswal and absconding accused-Abdul Kayum. He also arrested Atul Pandey in course of investigation. P.W.27 is the S.I. of Sadar Police Station, Sundergarh, who had accompanied P.W.26. P.W.28 is the Medical Officer, who examined P.Ws.7 & 8 and the appellant-Virendra Jaiswal and submitted his reports. P.W.29 is the then S.D.J.M., Sundergarh, who conducted T.I. Parades inside the Sundergarh Jail on different dates in respect of the appellants-Rajan Mishra, Roshan Ali, Shamim Sidique and Atul Pandey and also recorded the voices of the appellants-Rajan Mishra and Rosan Ali. P.W.30 is the Divisional Engineer, BSNL, who submitted the phone/call chart. P.W.31 is the S.I. of Police of Crime Cell, Sitawardi Police Station, who is a witness to the arrest of the appellants – Rajan Mishra & Rosan Ali and Pradeep Srivastava (opposite party no.4 in Criminal Revision No.1426 of 2007). P.W.32 is the Station Officer of Sitawardi Police Station, who is a witness to the seizure of certain documents. P.W.33 is the main Investigating Officer, who submitted the charge sheet against the 9 culprits. One such culprit Abdul Qayum is absconding and has not stood the trial. The prosecution exhibited several documents covered by Exts.1 to 71. After closure of the prosecution of evidence, all the four appellants in the present appeal were examined under Section 313, Cr.P.C. These four appellants answered most of the questions in negatives and with regard to the Test Identification Parade, they took the plea that identifying witnesses had seen them earlier and also seen their photographs earlier. On behalf of defence, the appellant, Roshan Ali examined one defence witness, namely, Khalid Parbeen taking a plea of alibi. On behalf of other three appellants, no defence witnesses were examined.

4. Upon completion of trial and on examining materials available on record, the learned Sessions Judge, Sundergarh came to the conclusion that the prosecution had failed to prove its case against Santosh Jha, late-Rejendra Prasad and Pradeep Srivastava, who have been arrayed as opposite party nos.2 to 4 in Criminal Revision No.1426 of 2007 under any of the charges. Accordingly, they were fully acquitted of all the charges. So far as the appellants-Rajan Mishra, Roshan Ali, Shamim Sidique and Virendra Jaiswal along with one Atul Pandey are concerned, the learned Sessions Judge held that the prosecution has

successfully proved its case against these persons for having committed offences under Sections 364A/34, IPC, 342/34, IPC and 120B, IPC beyond reasonable doubt and accordingly convicted them thereunder. However, with regard to the charges under Section 395, IPC and Sections 25/27 of the Arms Act, the learned Sessions Judge came to a finding that the prosecution had failed to prove these charges against the appellants Rajan Mishra, Roshan Ali, Shamim Sidique, Virendra Jaiswal and Atul Pandey. Accordingly, he acquitted them of the said charges. As indicated earlier, the appellants Rajan Mishra, Rosan Ali, Shamim Sidique, Virendra Jaiswal and Atul Pandey were sentenced to undergo various punishments.

5. Mr. Devashis Panda, learned counsel for the appellant-Rajan Mishra, in assailing the judgment dated 13.09.2007 passed by the learned Sessions Judge, Sundergarh in S.T. No.169 of 2004, submitted that the circumstances of lodging of the F.I.R. (Ext.1) was doubtful and the time of lodging F.I.R. ought to have been disbelieved since the formal F.I.R. showed that it was registered at 11 P.M. of 24.01.2004. The distance between Rajgangpur to Sundergarh is about 62 Kms and P.W.1 could not have covered the distance from his house at Rajgangpur after receiving information about the Maruti Zen Car being found abandoned from his staff at 10.30 P.M. to Sadar Police Station, Sundergarh with a halt at the spot where the Maruti Zen Car had been abandoned and dictating the contents of Ext.1 to a scribe and handing it over to P.W.33 for registration at 11.00 P.M. as has been recorded. Besides, according to Mr Panda, scribe of the F.I.R. as well as the staff who had gone on inquiry to the spot had not been examined to corroborate P.W.1 and though the court of jurisdictional Magistrate was at a distance of only 6 kms from Sadar Police Station, Sundergarh, however, as stated by P.W.33 the F.I.R. was sent to the court by messenger on 25.01.2004 and it was received only on 27.01.2004 as endorsed by the learned S.D.J.M. and there existed no explanation for such delay in receipt of the F.I.R. at Court.

Secondly, Mr. Panda contended that the charge of criminal conspiracy has not been established from the evidence on record and accordingly, the trial court erred in recording a conviction thereunder mainly relying on the evidence of P.Ws.11 & 20. According to Mr. Panda, the evidence of P.Ws.11 & 20 were not sufficient to record a conviction under Section 120-B, IPC. No credible evidence has been led either direct or circumstantial to show that on or before 24.01.2004, the appellant-Rajan Mishra along with others convicted with him had been together where they had agreed to abduct P.W.8 for ransom and to confine him till ransom was paid. According to Mr. Panda, the evidence of P.W.11 was not based on personal knowledge but on certain entries in the hotel register showing that some persons having the same names as some of the appellants were hotel guests in between 18.01.2004 to 19.01.2004. Further P.W.11 had neither made the entries in the register nor had identified the names found in the register with any of the persons facing trial. So far as the evidence of P.W.20 is concerned, according to Mr. Panda, the said evidence related to a period after the conspiracy was over and was not admissible under Section 10 of the Indian Evidence Act, 1872.

Thirdly, with regard to offence under Section 342, I.P.C., he submitted that nothing was there to show complicity of the appellant-Rajan Mishra in committing the above offence. In fact neither P.W.7 nor P.W.8 in their evidence had indicated about presence of Rajan Mishra in the farm house of appellant-Virendra Jaiswal.

Fourthly, with regard to identification of the appellant-Rajan Mishra in the Test Identification Parade as well as in Court by P.Ws.2,7 & 8. Mr. Panda submitted that the evidence of P.Ws.2,7, & 8 should not be relied on as intrinsically they did not corroborate each other. The statement of P.W.2 that the appellant-Rajan Mishra along with two others forcibly pulled and dragged an elderly person from the Maruti Zen Car and took him to the Bolero vehicle at the point of pistol has not been corroborated by the versions of P.Ws.7 & 8 as none of these P.Ws. had stated that it was Rajan Mishra along with other appellants, namely, Shamim Sidique, Rosan Ali forcibly pulled up and dragged P.W.8 from the Maruti Zen Car. Further, P.W.2 has never stated about the identifying features of Rajan Mishra to police. P.W.8 has not stated about the specific roles played by the appellant-Rajan Mishra and other culprits at the time of incident. For all these reasons, according to Mr. Panda, the evidence relating to T.I. Parade as well as identification of the culprits in court should have been disbelieved. In this context, Mr. Panda also submitted that P.W.32, who happened to be the in-charge of Sitawardi Police Station at Nagpur, in his cross-examination, admitted that he had taken the photographs of the appellants – Rajan Mishra and Roshan Ali after their arrest. The learned Sessions Judge, Sundergarh while discussing the same in his judgment at Page-108 of Volume-I of the Paper Book, has erred in brushing aside such evidence by merely stating there was no evidence on record to show that the said photographs were handed over to the Orissa Police by P.W.32 and that P.Ws.2,7, & 8 had gone there or that the photographs were shown to them at any point of time. In this context, Mr. Panda relied on the deposition of P.W.16 to the effect that in his cross-examination, he had stated to have seen the photographs of all these four persons in the Newspaper. In such background, Mr. Panda contended that the evidence of P.W.32, P.W.2 and P.W.16 clearly established that the T.I. Parade conducted was not trustworthy and the very fact that the photographs of the accused persons were taken and published in the Newspaper defeated the very object of the T.I. Parade, which usually furnished an assurance that the investigation was proceeding on the right lines in addition to furnishing the corroboration of evidence to be given by the witnesses later in the Court during trial. Further, Mr. Panda submitted that P.W.29 did not corroborate the versions of P.Ws.7 & 8 that the accused put to T.I. Parade were asked and then they disclosed their names after the T.I. Parade. Mr. Panda also took exception to not putting Virendra Jaiswal, Pradeep Srivastava and late Rajendra Prasad to T.I. Parade. According to Mr. Panda, this was a glaring defect. In this context, Mr. Panda relied on a decision of the Hon'ble Supreme Court as reported in **AIR 2010 SC 3000** (**Siddanki Ram Reddy** v. **State of Andhra Pradesh**).

Fifthly, Mr. Panda submitted that the reasons for which the appellant, Rajan Mishra was acquitted of the charges under Section 395, IPC should have been made use of by the learned trial court to disbelieve the other charges brought against him.

Sixthly, Mr. Panda submitted that the evidence of P.Ws.7 & 8 should be discarded with regard to Rajan Mishra's complicity in the alleged abduction and demand of ransom as there existed inherent contradictions in the evidences of P.Ws.7 & 8 with regard to presence of P.W.7, at the time of demand of ransom. Mr. Panda also criticised the trial court in not ignoring Exts.2 & 4 as P.W.8 in his evidence has said that though he could understand in Hindi but he could not speak Hindi correctly and properly. According to Mr. Panda, such a person could not be expected to write letters in Hindi. On this account, the messages under Exts.2 & 4 should have been ignored by the trial court.

Seventhly, Mr. Panda contended that there existed no evidence to establish that the appellant-Rajan Mishra or for that matter any other accused had demanded ransom as entire prosecution case rested on a series of telephone calls being made to the landline numbers as well as the mobile numbers of P.W.1 and P.W.16 besides the two fax messages received under Exts.2 and 4 without any evidence that the accused persons were sending such messages and were making such calls. Further, the prosecution had miserably failed to ascertain as to from which place and from which number, the alleged calls were made and the fax messages were sent. Except, the solitary evidence in shape of the P.C.O bills dated 9.2.2004 (Ext.58) alleged to have been seized from the appellant-Roshan Ali at the time of his arrest near the S.T.D. booth, there was nothing to show that the accused persons were calling P.W.1 and P.W.16 in connection with the alleged crime. Mr. Panda has also taken exception to the conduct of the prosecution in not calling for call records from the very beginning and for giving requisition to the Telecom Officers to supply the call chart only of date 8/9.2.2004 vis-à-vis Telephone No.071-2563746 and Mobile No.9861027400. Thus, according to Mr. Panda, the prosecution has dealt the entire thing in a very casual manner. Thus, there existed glaring loopholes on the part of the prosecution which spoke volumes about the truthfulness of their case. Further, according to Mr. Panda, no prosecution witness has whispered anywhere that the appellant-Rajan Mishra had ever made any phone call to P.W.1 demanding ransom. Mr. Panda also submitted that the evidence of P.W.16 ought not to be believed as he was a highly interested witness having alleged similar offence of abduction of ransom against the appellant-Rajan Mishra and others.

Eighthly, Mr. Panda submitted that the trial court has gone wrong in not appreciating the fact that the appellant-Rajan Mishra in his statement recorded under Section 313, Cr.P.C, made it clear that he had been made a scapegoat in place of Ramesh Agarwal and Dinesh Garg by the police. Mr. Panda pointed out that failure by P.W.32 to seize the articles belonging to the appellant-Rajan Mishra like shirts, pants, suitcases found in the room alleged to have been occupied by Rajan Mishra and Roshan Ali also throws a doubt on prosecution case. The I.O. did not bother to ascertain the veracity of the signatures purported to have been made by the appellants-Rajan Mishra and Roshan Ali by sending it to a handwriting expert after having taken their specimen signature.

Ninthly, Mr. Panda submitted that P.W.2 was only a chance witness and the learned court below has gone wrong in not ignoring his evidence in toto.

Lastly, Mr. Panda submitted that the appellant-Rajan Mishra stood on the same footing like Pradeep Srivastava (since acquitted). Accordingly, benefit of doubt extended to Pradeep Srivastava should have been extended to the appellant-Rajan Mishra.

Mr. Y. Dash, learned Senior Advocate ably assisted by Ms. Bharati Das & Mr.Rajeet Roy, Advocate represented the case of appellants-Shamim Sidique and Virendra Jaiswal before us.

6. Mr. Y. Dash, learned Senior Advocate submitted that the information given by P.W.1 under Ext.1 is hit by Section 162, Cr.P.C. as the same was clearly not the first information with regard to the occurrence that took place on 24.1.2004. According to Mr. Dash, the first information has been suppressed which was given by P.W.2 to P.W.3 at about 4.00 P.M. and it was communicated by P.W.3 to Sadar Police Station, Sundergarh over V.H.F. According to Mr. Dash in his cross-examination, P.W.33 admitted that he made a Station Diary on 4.50 P.M. on getting V.H.F. message. However, he did not inform P.W.1

prior to the lodging of the F.I.R. that he had already received the information over V.H.F. and had made Station Diary entry. According to Mr. Dash, these series of facts destroy the very edifice of the prosecution case and, therefore, did not instill confidence to hold that prosecution has proved its case beyond reasonable doubt.

Secondly, according to Mr. Dash, there existed material contradictions with regard to the core prosecution story, if one perused the depositions of P.Ws.2,7 & 8 carefully. He further submitted that the principles of natural justice has been violated by not putting circumstances which appeared against the appellants-Shamim Siddique and Virendra Jaiswal from the depositions of P.Ws.7 and 8 while examining them under Section 313 Cr.P.C. In this context, Mr. Dash relied on a decision of the Hon'ble Supreme Court as reported in **(2013) 5 SCC 722** (**Raj Kumar Singh @ Raju @ Batya** v. **State of Rajasthan**). Since the appellants-Shamim Sidique and Virendra Jaiswal were never given a chance to put up their defence with regard to the statements of P.Ws.7 & 8, the prosecution case suffered from fatal infarmities.

Thirdly, Mr. Dash submitted that the learned Sessions Judge in its Judgment categorically held that the allegations of P.Ws.7 & 8 did not inspire confidence and accordingly, he acquitted the appellants-Shamim Siddique and Virendra Jaiswal of the offence under Section 395, IPC. According to Mr. Dash, when the statements made by P.Ws.7 & 8 were very inextricably mixed up and it was not possible to separate the grain from the chaff, on the self-same ground, the appellants-Shamim Siddique and Virendra Jaiswal ought to have been acquitted of all the charges. In this context, Mr. Dash relied on a decision of the Hon'ble Supreme Court reported in **(2007) 9 SCC 589 (Jakki @ Selvaraj and another** vs. **State Rep. By The Ip, Coimbatore)** wherein it has been made clear that where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made was to discard the evidence in toto. Like Mr. Panda, learned counsel for the appellant-Rajan Mishra, Mr. Dash submitted that the benefit of doubt extended to the accused Pradeep Srivastava, should have been extended to the appellants-Shamim Sidique and Virendra Jaiswal.

Fourthly, Mr. Dash raised his doubt relating to writing of letters under Exts.2 & 4 by P.W.8 as he admitted that he could not speak Hindi properly. Mr. Dash also submitted that as prosecution has miserably failed to trace the call records for ascertaining the source and place from where the calls were made or fax messages were sent, according to him, this was a great lacuna in prosecution story.

Fifthly, Mr. Dash took exception to non-examination of Rambhagat Agarwal from whose telephone call to P.W.1, the entire genesis of the prosecution case started. According to Mr. Dash such non-examination of Rambhagat Agarwal was fatal to the prosecution case. Similarly, non-examination of Deepak Sharma and Prabin Patra also according to Mr. Das threw a cloud on prosecution story.

Sixthly, Mr. Dash reiterated the argument advanced by Mr. Panda, learned counsel for the appellant-Rajan Mishra based on the judgment of the Hon'ble Supreme Court reported in **AIR 2010 SC 3000** (**Siddanki Ram Reddy** v. **State of Andhra Pradesh**) with regard to not putting all the accused to T.I. Parade. He also reiterated the argument

advanced by Mr. Panda that photograps of the appellants – Shamim Sidique and Virendra Jaiswal were published in the news paper as stated by P.Ws.2 & 16 and such publication clearly defeated the very object of the T.I. Parade. In such background, the T.I. Parade conducted could not be held to be trustworthy.

Lastly, Mr. Dash submitted like Mr. Panda, learned counsel for the appellant-Rajan Mishra that the charges of criminal conspiracy has not been established as there was no evidence on record about meeting of minds of convicts. Mere congregation of some of the convicts at more than one place without any substantive evidence being brought on record that such meeting of minds was to commit the crime, could not be construed to be a meeting of minds to commit crime.

Mr. Mohapatra, learned counsel representing appellant-Roshan Ali submitted that the learned Trial Court has committed illegality by considering the hearsay evidence of P.W.1 in Paragraphs 2,7 & 8 of the judgment and relying on the same has convicted Roshan Ali ought to have rejected such evidence in toto.

Secondly, none of the eye-witnesses like P.Ws.2,7 and 8 had ever named appellant-Roshan Ali during investigation. In this context, he also submitted that identification of Roshan Ali by P.W.8 in the T.I. Parade was a farce because as per evidence of P.W.8, he knew him before having lodged a case against him. In this context, he relied on a decision of the Hon'ble Supreme Court reported in **1998 SCC (Cri) 1527** (**Ravindra alias Ravi Bansi Gohar** v. **State of Maharashtra and others**). Further, P.W.32 admitted that he had taken photograph of Roshan Ali at Nagpur after his arrest. P.W.16 admitted that he had seen photo of Roshan Ali in newspaper. P.W.2 stated that he knew about apprehension of accused from newspaper. In such background, Mr. Mohapatra submitted that identification of Roshan Ali by P.W.2 was of no value. In this context, Mr. Mohapapatra relied on the decision of Hon'ble Supreme Court reported in **1970 Crl.J. 1149** (**Budhsen & another** v. **State of U.P.**). All these cast a doubt on effectiveness of T.I. Parade and demolish credibility of identifying witnesses. In this context, he relied on decisions of Hon'ble Supreme Court as reported in **1977 Crl.J.173 (S.C.)** (**Rabindra Kumar Dey** v. **State of Orissa**) and **AIR 2007 S.C. 1729** (**Ravi alias Ravichandran** v. **State represented by Inspector of Police**)

Thirdly, according to Mr. Mohapatra, the learned court below totally misread and misappreciated the evidence of P.W.16 as he was examined by I.O. only on 30.5.2004, i.e., much after the incident and rescue of P.Ws.7 and 8. Therefore, he had nothing to do with rescuing of these victims-P.Ws.7 & 8. The version of P.W.16 with regard to the appellant-Roshan Ali ought not to be believed as he admitted in his evidence that earlier he was kidnapped by Roshan Ali himself and it was highly unlikely for Roshan Ali to seek his help to know about financial status of P.W.8. Though, P.W.16 admitted that he knew P.W.8, it sounded strange that he never communicated about alleged phone calls coming from Roshan Ali to his son P.W.1.

Fourthly, Mr. Mohapatra contended that the version of P.W.2 should not have been believed as he had given a totally contradictory version of abduction. While P.W.2 stated that P.W.8 was dragged from Maruti Zen Car and was taken to Bolero Jeep at Pistol point, P.Ws.7 and 8 pointed out that while P.W.8 was urinating outside, he and P.W.7 were dragged into Bolero at revolver point.

Fifthly, though P.W.2 claimed himself to be an eye-witness, it was strange that P.Ws.7 and 8, (the victims) have never whispered about his presence in their evidence. Further, according to Mr, Mohapatra, the evidence of P.W.2 carried no value as he had not identified P.Ws.7 and 8.

Sixthly, with regard to conviction under Section 364A, IPC, Mr. Mohapatra submitted that there was no prosecution evidence to connect Roshan Ali with demand of ransom for release of abducted industrialist P.W.8 and P.W.7. P.W.1 had not identified the person/persons, who made the calls. Mr. Mohapatra submitted that P.W.33-I.O. had made no investigation at all as to from which telephone or fax machine those calls/messages had come. He also did not send the xerox of fax messages to any handwriting expert nor did he seize the original letters sent through fax. Thus, he contended that there were a lot of loose ends to the prosecution story. The fax messages also did not reveal any name. He further submitted that while apprehending Roshan Ali from Nagpur, none of the P.Ws. has stated that he had seized any paper from Roshan Ali which contained phone numbers from which it could be ascertained that the STD Booth number tallied with mobile phone number. Similarly, by forcing Roshan Ali to give specimen voice sample in tape recorder, his constitutional right was violated. In this context, he relied on **2005 CrLJ 3151** (**Dwijadas Banerjee** v. **State of West Bengal**) and **2004 SCC (Crl.) 126** (**State of Haryana** v **Jagbir Singh and another**). Thus, in nutshell, Mr. Mohapatra, learned counsel for Roshan Ali Submitted that there existed no evidence to link Roshan Ali with the crime of abduction of P.Ws.7 & 8 for ransom.

Seventhly, Mr. Mohapatra, submitted that though from Sri Ram Bhagat Agarwal of Ranchi, P.W.1 came to know about abduction of his father (P.W.8) for ransom and though he supplied his landline number and mobile number to said Ram Bhagat Agarwal in order to have direct contact with culprits; still Ram Bhagat Agarwal had not been examined by prosecution. Similarly, non-examination of Prabin Patra, Deepak Sharma and Sudhir Kumar Das was fatal to the prosecution case. For this adverse inference should have been drawn against the prosecution. In this context, Mr. Mohapatra relied on **AIR 1954 S.C. 41** (**Purnendu Nath Tagore** v. **Administrator, General of West Bengal**) and **(2007) 1 SCC (Crl) 744** (**Ritesh Chakravarti** v. **State of Madhya Pradesh**).

Eighthly, according to Mr. Mohapatra, Roshan Ali has been convicted under Section 120B, IPC without any iota of evidence against him. He never met and conspired with anybody. In this context, he relied on the decision of the Supreme Court as reported in **2003 SCC (Crl.) 869** (**Ram Narayan Popli** v. **Central Bureau of Investigation**).

Ninthly, Mr. Mohapatra contended that there existed no evidence to convict Roshan Ali under Sections 342/34 I.P.C.

Tenthly, Mr. Mohapatra, learned counsel appearing for Roshan Ali contended that the learned court below has gone wrong in relying on inadmissible evidence pertaining to the alleged confession by Roshan Ali before police officers like P.Ws.22, 31 and 32 to the effect that he along with other culprits abducted P.Ws.8 & 7 and kept them confined in the farm house of appellant Virendra Jaiswal. Further, he contended that placing of such reliance was wrong as I.O. (P.W.33) had deposed that P.Ws.22, 31 and 32 had never stated before him about confession of Roshan Ali about abduction of P.Ws.8 & 7 and keeping them confined at Sankargarh. In this context, he relied on **2002 AIR SCW 3655/AIR 2002 S.C. 3164**. **(Bodhraj @ Bodha and others v. State of Jammu & Kashmir)**.

Eleventhly, Mr. Mohapatra contended that his client Roshan Ali has been seriously prejudiced for bringing Exhibits 58/1, 58/2, 58/3 and 59 on record, which were never seized from his possession and no copy of the seizure list was ever prepared by any police officer in respect of those documents. P.Ws.22, 31 and 32 never ever deposed relating to above documents. Further, no questions were put about the said documents to Roshan Ali. However, illegally the learned court below relied heavily on these documents and convicted Roshan Ali.

Twelvethly, Mr. Mohapatra, learned counsel for Roshan Ali took serious exception to conviction of Roshan Ali while persons like Santosh Jha, late Rajendra Prasad and Pradeep Kumar Srivastava have been acquitted though P.W.8 had stated in his evidence that "All these 8 (eight) accused persons were very much present and they were talking with me during this period of two hours. The culprits threatened that if ransom is not paid my children and family members will be killed and finished". He also took exception to not carrying out T.I. Parade with regard to Santosh Jha, late Rajendra Prasad and Pradeep Kumar Srivastava.

Lastly, Mr. Mohapatra submitted that all the documents exhibited in this case were unauthenticated xerox copies and the learned court below has gone wrong in relying such xerox copies.

7. Mr. J.P. Pattnaik, learned Additional Government Advocate for the State mainly highlighted that this was not a case of circumstantial evidence but the prosecution case was based on evidence of credible eye-witnesses like P.Ws.2,7,8 &17. Besides this, he also relied on the evidence of P.W.16. According to Mr. Pattnaik, P.W.2 was an independent eye-witness and his version with regard to abduction of P.Ws.7 and 8 at the point of Pistol has been well corroborated by the evidence of P.Ws.3,7 & 8. Further, during T.I. Parade, he clearly identified Rajan Mishra, Roshan Ali & Shamim Sidique, who are the three appellants before us. Similarly, with regard to abduction, confinement and demand of ransom with common intention, Mr. Pattnaik contended that all these have been proved from the evidence rendered by P.Ws.7 and 8, who were the victims, who corroborated each other's version in material particulars, and from the evidence of P.Ws.1 and 16. Further, he submitted that the evidence of P.W.7 was corroborated by P.Ws.2,5,8 & 17. Similarly, the eye-witness account of P.W.8 has been corroborated by P.Ws.2,7 & 17. He further submitted that both P.W.7 and P.W.8 identified the appellants-Rajan Mishra, Roshan Ali and Shamim Sidique in the T.I. Parade as well as in the court. There was nothing to show that P.Ws.2,7 & 8 as well as P.Ws.3 & 5 have got any enmity with the appellants so as to criminally frame them. Mr. Pattnaik relied on a decision of the Hon'ble Supreme Court reported in **(2004) 8 SCC 95** : **AIR 2004 SC 4865** (**Malleshi** v. **State of Karnakata**) in which the Hon'ble Supreme Court held that communication of demand to the victim was sufficient to convict the accused under Section 364A, IPC. With regard to Section 364A, IPC, he also relied on **(2008) 15 SCC 418** (**Shyam Babu and others v. State of Haryana**) and **AIR 2015 S.C. 3577** (**Vikram Singh alias Vicky and another v. Union of India and others**). Mr. Pattnaik also relied on the evidence of P.W.17 which has been duly corroborated by P.Ws.7 & 8 with regard to role of the convict appellant Virendra Jaiswal being a party to the crime. He submitted that the appellant Virendra Jaiswal has not offered any explanation to rescuing of P.Ws.7 & 8 from his farm house. Therefore, on the basis of deposition of P.W.17 alone, the appellant Virendra Jaiswal can be convicted for illegal confinement of P.Ws.7 & 8. With regard to the evidence of P.W.16, Mr. Pattnaik submitted that the telephonic message received by him from the

appellant Roshan Ali from Nagpur made it easier for the police to arrest the appellants Roshan Ali and Rajan Mishra from the STD Booth at Nagpur which ultimately led to the unravelling of the case. With regard to serious objections raised by the appellants on the credibility of the evidence of P.W.16, Mr. Pattnaik submitted that even without presence of P.W.16 the trial court would have convicted the appellants on the basis of the eye-witnesses account of P.Ws.2,7 & 8. He also relied on the deposition of P.W.22, who ultimately apprehended the appellants, Rajan Mishra and Roshan Ali from the STD Booth at Nagpur. With regard to T.I. Parade, he repelled all the attacks made on the T.I. Parade raised by the appellants and submitted that there was no infirmity in the T.I. Parade whereby P.Ws.2,7 & 8 identified Roshan Ali, Rajan Mishra and Shamim Sidique. He mainly relied on **1976 (3) SCC 454** (**State of Andhra Pradesh v. K. Venkata Reddy and others**). He further submitted that concept of chance witness has no meaning in India and P.W.2 could not be described as chance witness and his evidence could not be ignored. With regard to status of chance witness, he relied on **(1983) 3 SCC 327** (**Rana Partap and others v. State of Haryana**). With regard to conspiracy part he relied on **(2010) 3 SCC 56** (**Vikram Singh and others v. State of Punjab**) and **(2012) 1 SCC 406** (**Akram Khan v. State of West Bengal**). While winding up his argument, Mr. Pattnaik again made it clear that the learned trial court has committed no error in passing the impugned judgment and he mainly relied on the eye-witnesses versions of P.Ws.2,7,8,17 & 18 along with other witnesses like P.Ws.1,16, 22, etc. to drive home his point. He also stoutly submitted that a clear case under Sections 364A/34, IPC, 342/34, IPC and Section 120B, IPC had been made out on the basis of the evidence of the above noted prosecution witnesses and other prosecution witnesses in the background of the fax messages under Exts.2 and 4.

8. We have gone through the evidence on record minutely. We have also perused LCR and written submissions filed on behalf of the appellants as well as State.

P.W.1 happens to be the informant in this case and the son of the victim (P.W.8). In his examination-in-chief, he stated that the occurrence took place on 24.1.2004 after noon. On the occurrence date at about 3.30 P.M., his father (P.W.8) left his house and proceeded in his Maruti Zen Car bearing Registration No.OR-16-A-5921. The said Car was then driven by Fransis Minz (P.W.7). When his father (P.W.8) did not return home by 9.30 P.M., P.W.1 sent two of his office staff, namely, Prabin Patra and Deepak Sharma. In the same night at about 10.30 P.M., P.W.1 got a telephone call from Deepak Sharma that they saw their Maruti Zen Car lying abandoned by the side of the road at Karamdihi on the State Highway and nobody was present in the Car including the driver and the doors of the Car were not locked. On receipt of this telephonic message, P.W.1 proceeded to Karamdihi along with one Sudhir Kumar Das. After reaching Karamdihi, P.W.1 saw the Maruti Zen Car lying there and his staff, Deepak Sharma and Prabin Patra informed him that after they reached the spot they were intimated by some of the villagers that one metallic colour Bolero followed their Car in which P.W.8 was travelling and by obstructing the car, they forcibly abducted P.W.8 on the point of Pistol and took him in their Bolero on a road leading from Karamdihi towards Chhatishgarh. After obtaining such information, P.W.1 proceeded to Sadar Police Station, Sundergarh and the information collected by him was reduced to writing through Sudhir Kumar Das. According to P.W.1, Sudhir Kumar Das scribed the report as per his instruction and dictation. After the report was scribed, the contents thereof were read over and explained to P.W.1. P.W.1 admitted the same and put his signature. That report has been treated as F.I.R. and marked as Ext.1. From the Police Station, he returned to his house. Till 28.1.2004,

he had no information regarding the abduction of his father (P.W.8) and the persons involved in it. On 28.1.2004, one Rambhagat Agarwal of Ranchi, who happened to be a friend of his father (P.W.8) telephoned P.W.1 that he got a telephonic message from somebody saying that P.W.8 was with him in safe condition and waiting to receive an amount of 3 million U.S. Dollars as ransom, which would be equivalent to Rs.15 Crores. Rambhagat Agarwal further told P.W.1 that the unknown person had asked about phone number of P.W.1 in order to make direct contact for payment of ransom. Accordingly, P.W.1 immediately gave his residential phone numbers to Rambhagat Agarwal. On the same day, P.W.1 got a communication in the handwriting of his father (P.W.8) sent through Fax. Through the Fax message, P.W.8 had written that those persons, who abducted him, were very dangerous and had confined him and asked him to make payment of the amount as demanded, failing which he would be killed. This fax message was marked as Ext.2 with objection. In his examination-in-chief, P.W.1 made it clear that he was acquainted with the handwriting of his father- P.W.8. During investigation, the Police seized the fax letter received as per seizure list Ext.3. On 29.1.2004, P.W.1 received message in his Mobile phone telling him that he might have received the letter of his father (P.W.8) sent through Fax. Accordingly, he should make all necessary arrangements for payment of the amount. It was also threatened over phone by this unknown person that if the matter was reported at the Police Station, the family members of P.W.1 would be finished. After receipt of the said message, P.W.1 frequently received phone calls from time to time and he advised the unknown person to give the calls in the landline phone as it would be audible. Accordingly, he gave is residential landline phone numbers. Thereafter, P.W.1 made all arrangements as per instruction of the Police to tape record the conversation. On the same date in the evening hours, the unknown person made further phone call and the entire conversion of the unknown person received through his landline phone was duly tape recorded by P.W.1. The tape recorder along with its cassettes were seized by the Police vide seizure list Ext.3. On 2.2.2004, the same person telephoned P.W.1 saying that being moved by the appeal of his father (P.W.8), he was inclined to reduce the ransom amount from Rs.15 Crores to Rs.10 Crores and directed to pay the said amount of Rs.10 Crores at Dubai. On 8.2.2004, the same person again telephoned P.W.1 that since no ransom was paid to them, they were going to kill his father (P.W.8) specifically saying that "JINDA GARDENGA". When P.W.1 wanted to convince the said person describing his incapacity to pay such a huge amount, the unknown culprit told P.W.1 that his father (P.W.8) had already agreed to make a part payment and to that effect, he had already given in writing. The unknown culprit directed P.W.1 to give his Fax number so that the letter of his father (P.W.8) could be sent through Fax. Accordingly, P.W.1 gave his Fax number to that person. Two hours after, he received a letter of his father (P.W.8) written in his own handwriting with his signature. The said Fax message was marked as Ext.4 with objection. Signature of the father (P.W.8) was marked as Ext.4/1. After receiving this letter of his father (P.W.8) through Fax, P.W.1 informed the Police and the police seized the Fax machine along with the Fax message of P.W.8. On 8.2.2004, the police instructed P.W.1 to convey the information to that unknown person to the effect that since his Fax machine was not working properly, the communication received was not properly visible. So, in the circumstances, to send the same again through Fax.

In the cross-examination conducted on behalf of the appellant Roshan Ali, P.W.1 stated that there was no endorsement in the F.I.R. (Ext.1) that the said F.I.R. was scribed by Sudhir Ranjan Das. But he stated that his staff Sudhir Ranjan Das was very much present

then and there. As per his (P.W.1) instruction, Sudhir Ranjan Das scribed the report. P.W.1 further stated that they were three brothers and all brothers and father (P.W.8) were income tax assessees. They had got three factories, and there existed five sites for these three factories. They all used to look after the affairs of their business jointly. P.W.1 also stated that in all the three factories, they deal in sponge iron ingot and rods, which were being supplied all over India. His father (P.W.8) was one of the Directors of the Company. P.W.1 further stated that his father (P.W.8) whenever went in connection with business affairs, definitely returned to his house before 8.00 P.M. P.W.1 further stated that Fransis Minz (P.W.7) was driving the car in which his father (P.W.8) was travelling. P.W.1 also stated that the police did not record his statement on the date of lodging of the F.I.R. Only on the date of seizure of the Fax machine, the police recorded his statement in connection with the case. P.W.1 also stated that he knew about Kedarnath Kedia (P.W.16) of Rourkela, who was an iron merchant. He was no way related to P.W.1 and P.W.1 had personal acquaintance with P.W.16. In the T.V. news on 10.2.2004, P.W.1 came to know that his father (P.W.8) had been rescued by Chhatisgarh Police. On the next day, i.e. 11.2.2004, the police brought his father (P.W.8) to his house. There was no injury mark on the body of P.W.8 and P.W.1 had not paid anything to the culprits. In the letter of his father (P.W.8) received through Fax vide Ext.2, which was a xerox copy, the signature of P.W.8 was not there. P.W.1 also stated that he had stated before the police that some unknown culprits followed his father (P.W.8) in a Bolero (Metallic Colour) stopped the car and took away his father (P.W.8) and driver (P.W.7) in the Bolero vehicle. P.W.1 suspected that the unknown culprits to have kidnapped P.W.8 with a motive to demand money. However, P.W.1 denied the suggestion that he had not stated before the I.O. that he proceeded to the spot and his staff told him that they got information from the villagers that one metallic colour Bolero vehicle followed his father's (P.W.8) car and they forcibly abducted P.W.8 on the point of Pistol and that they took his father in their vehicle on the road leading towards Chhatisgarh. Similarly, P.W.1 denied the suggestion that he has not stated before the I.O. (P.W.33) that Rambhagat Agarwal in course of telephonic conversation told to directly contact with them and make payment. P.W.1 also denied the suggestion that he has not stated before the I.O. (P.W.33) that in the letter (Ext.2) his father (P.W.8) had written that those persons were very dangerous and they asked for payment of the amount demanded failing which they would kill and finish his father (P.W.8). P.W.1 also denied the suggestion that he has not stated before the I.O. (P.W.33) that he was acquainted with the handwriting of his father (P.W.8) and that the culprit over phone asked P.W.1 to told them about the date, time and place of payment of the ransom amount. P.W.1 also denied the suggestion that he had not specifically stated before the I.O. (P.W.33) that in the telephonic talk that they told him that being moved by the appeal made by his father (P.W.8) to consider the amount of the ransom, they minimised the same to Rs.10 Crores. P.W.1 also denied the suggestion that he had not stated before the I.O. (P.W.33) that the unknown culprit told him to give the Fax number so that they would send the letter of his father (P.W.8). He also denied the suggestion that the two fax messages/letters under Exts.2 and 4 were fabricated and manipulated. He also denied the suggestion of ante dating of F.I.R.

In the cross-examination on behalf of the appellant-Shamim Siddique, P.W.1 stated that they had some liabilities towards Banks and Financiers. He also made it clear that he could not say that if there was any information available before the Police regarding this incident prior to lodging of the F.I.R.

In the cross-examination on behalf of the appellant-Rajan Mishra and Virendra Jaiswal, P.W.1 stated that it took about 30 minutes to reach Karamdihi on that date.

This witness proved F.I.R. and proved Fax messages under Exts.2 and 4. He clearly stated that those fax messages were written by his father-P.W.8. Further, there was also no suggestion to P.W.1 from the side of the defence that Exts.2 and 4 were not written by his father. As we will see later, these Exts.2 and 4 are also proved by P.W.8, who admitted to have written the same as per the dictation of culprits with originals remaining with them. Thus, version of P.W.1 has been corroborated by P.W.8. These Exts.2 and 4 reflect demand of ransom. P.W.1 got those xeroxed as, usually the fax messages disappear with time and get invisible. This was also corroborated by P.W.33. Though there exists some contradictions in the background of denial of suggestions by P.W.1 vis-à-vis the version of P.W.33, however, taking a broad view of the matter, these contradictions do not and cannot demolish the core prosecution story as has come out from the eye-witnesses like the evidence of P.Ws.2,7,8,17 &18 relating to abduction and illegal confinement with common intention, which we would discuss a little later. Moreover, the contradictions may not amount to much as denial of suggestion by P.W.1 is supported by FIR story and evidence of P.W.33 itself at Paragraphs 4 & 5 of his deposition.

P.W.2 in his examination-in-chief stated that he knew only three accused persons. Accordingly, he identified the appellants-Rajan Mishra, Shamim Sidique and Roshan Ali. According to P.W.2, occurrence took place on 24.1.2004 at about 4.00 P.M. on the road at a little distance from village Karamdihi towards Sundergarh. On that date, he had been to Subdega in his Scooter. On his way back, he saw the incident at Karamdihi, while he was proceeding towards Sundergarh, he saw one Maruti Zen Car was parking in a slanting manner by the side of the road and another Bolero (Metallic colour) was parking ahead of the Maruti Zen Car. The colour of the Maruti Zen was blue. Seeing those vehicles in such condition, he thought that it might be a case of accident. Seeing these vehicles, he slowed down his scooter and observed that four to five culprits were found standing and the appellants Rajan Mishra, Shamim Sidique and Rosan Ali forcibly pulled and dragged an elderly person from the Maruti Zen Car and took him on the point of Pistol to the Bolero vehicle. That gentleman, who was forcibly taken into the Bolero vehicle, was putting on one Dhoti and one Punjabi of white colour. In such situation being apprehensive, P.W.2 rang to the police of Town Police Station, Sundergarh (P.W.3) and informed P.W.3 that some unknown culprits forcibly pulled and dragged a gentleman from Maruti Zen Car on the point of Pistol and took him into a Bolero and in such situation, P.W.2 requested P.W.3 to look into the matter. Thereafter, both the vehicles backed and moved towards Rourkela, which P.W.2 saw at a little distance. Subsequently, the Mobile phone of P.W.2 from which he had telephoned to P.W.3 was seized by the Police on the next date, i.e., 25.1.2004 as per the seizure list under Ext.7. On 17.2.2004, P.W.2 identified the appellants Rajan Mishra and Rosan Ali in the T.I. Parade in the District Jail, Sundergarh conducted by the Magistrate. Again on 21.2.2004, P.W.2 identified another appellant Shamim Sidique in the T.I. Parade, which was held inside the Jail by the Magistrate. Both the T.I. Parades reports were prepared and signed by the Magistrate, which were duly exhibited.

In the cross-examination on behalf of Roshan Ali (appellant), P.W.2 admitted that he used to take Ganja and one case under N.D.P.S. Act was filed against him. He was confined in the Jail for a bout 5 0 days in connection with that case. The present Public

Prosecutor was his lawyer at that time. Besides that, he was not involved in any other case. P.W.2 further stated that Karamdihi Chhak always remained crowdy. About 20 to 30 persons were found assembled there. About 30 to 40 shops were there. The spot of occurrence was at a distance of 200 to 300 metres away from Karamdihi Chhak leading to Sundergarh. There was no house in the vicinity of the spot of occurrence. P.W.2 denied the suggestion that he had come to the Court on account of threat given by the Police and stated that nobody tutored him to depose in the Court. He witnessed the occurrence while moving in his Scooter. He saw the incident within two minutes. P.W.2 started observing the incident while moving in his Scooter from behind and saw the incident at a distance of 3 feet while crossing both the vehicles. P.W.2 further stated that the appellants Rajan Mishra, Roshan Ali and Shamim Sidique held revolvers in their hands and out of fear, he did not shout. He also did not try to call any other person to come there and interfere. The person, who was dragged out of the Maruti Zen by the appellants, did not raise any shout and kept quiet. According to P.W.2, all the culprits were of fair complexion and it was not possible on his part to tell their exact heights. He also made it clear that the three appellants, whom he had identified in the T.I. Parade, were not seen by him prior to the date of occurrence. P.W.2 did not know their names, addresses, etc. From the newspaper, P.W.2 came to know that the culprits have been apprehended and he did not know if such news came up in the T.V. or not. The T.I. Parades were conducted by the Magistrate inside the Jail. Almost 10 U.T.Ps. had been mixed with the suspects and all were made to stand together in a line. In the first T.I. Parade according to P.W.2 altogether 11 persons were standing on a row by the time P.W.2 was taken to that place for identification. On 17.2.2004, P.W.2 identified the appellants Roshan Ali and Rajan Mishra one after another in two separate T.I. Parades. On 21.2.2004, P.W.2 identified the appellant Shamim Sidique. The culprits revealed their names on being asked by the Magistrate after the identification, from which P.W.2 came to know about their names. As far as P.W.2 recollected those suspects identified by him had not raised any objection before the Magistrate. P.W.2 further made it clear that the police never showed the photographs of the three appellants prior to the T.I. Parade. In the cross-examination, P.W.2 denied the suggestion that he had not stated before the Police regarding the height, complexion, stature and mark of identification of each of the three appellants identified by him. Though P.W.33 contradicts this statement, but this may not be a serious lacunae considering the fact that the core prosecution story of abduction of P.W.8 at Pistol point by the three appellants remains undemolished in the cross-examination. P.W.2 reiterated that he stated before P.W.33 that the elderly person was wearing Dhoti and Punjabi. He also reiterated that he stated before the I.O. (P.W.33) that the act of abduction by these three appellants, namely, Rajan Mishra, Rosan Ali and Shamim Sidique was clearly seen by him. He denied the suggestion that there had been no such occurrence at such place and that he was deposing falsehood at the instance of the police. In the cross-examination on behalf of Shamim Sidique, at Paragraph-13, P.W.2 made it clear that much prior to the occurrence, he knew P.W.3. Along with P.W.33, he came to the spot of occurrence in Police Jeep. Sometime thereafter, the Superintendent of Police reached at the spot. P.W.2 identified the spot to the police. By then no vehicle was there at the spot but the Maruti Zen Car was there at a distance of 500 metres away from the spot. He did not disclose about the incident to any other person as per the instructions of the Police. In the cross-examination on behalf of Virendra Jaiswal and Rajan Mishra, P.W.2 made it clear that the appellants-Rajan Mishra, Roshan Ali and Shamim Sidique had actively participated in the commission of offence. He denied the suggestion that the police had shown the photographs of the appellants to him at

the police station prior to their identification by him in the T.I. Parade. He also denied the suggestion that the police had taken photographs of these appellants and that one Jasbir Singh, a photographer was engaged by the Police to take the photographs of these appellants.

P.W.2 is the only independent eye-witness, who proves abduction at the point of Pistol by Rajan Mishra, Rosan Ali and Shamim Sidique. There is not much contradiction with regard to core prosecution story as deposed by him. The very fact that these three appellants used Pistol to abduct P.W.8 would clearly show that their common intention was to abduct under threat of death. Though, P.W.2 occasionally takes Ganja, there exists no evidence that on the date of occurrence he had taken Ganja. Further, he clearly identified above three persons in the T.I. Parades held on 17.2.2004 & 21.2.2004. He also denied the suggestion relating to seeing the above three appellants or their photographs prior to holding of T.I. Parade. His evidence is also corroborated in material particulars by P.Ws.3,7 and 8, as we would see later. P.W.33 at Para-18 of his deposition stated that P.W.2 was examined by him and he had stated that three to four persons on the point of revolver forcibly took away an aged person wearing Dhoti and made him to sit in Bolero. This also corroborates the version of P.W.2. The minor contradictions in the version of P.W.2 and P.W.33 (I.O.) do not affect the core prosecution story. But a scanning of evidence of P.Ws.1,7 and 8 would make it clear that prosecution has clearly made out a case under Section 364A/34, IPC. There is also no evidence that P.W.2 was inimically disposed towards Roshan Ali, Rajan Mishra and Shamim Sidique so as to depose falsehood against them. Therefore, his versions are to be believed.

P.W.3 in his examination-in-chief stated that on the date of occurrence, i.e., 24.1.2004 he was working as S.I. of Police attached to the Town Police Station, Sundergarh. He knew P.W.2, who was running a betel shop. He admitted that he got a mobile message from P.W.2, who intimated him that while he was coming towards Sundergarh on his Scooter, three persons on the point of Revolver forcibly dragged an elderly person from Maruti Zen Car and took him inside a Bolero Jeep (Metallic Colour). P.W.2 told him that it was just near Karamdihi Chhaka. Therefore, on the point of jurisdiction, P.W.2 transmitted the same over V.H.F. to the Sadar Police Station. On the same night, P.W.3 got the information from the Sadar Police Station, Sundergarh that the father of P.W.1, i.e., P.W.8 has been abducted, for which information has been lodged at the Sadar Police Station, Sundergarh to that effect. During the course of investigation, the mobile phone of P.W.3 was seized by the police vide seizure list marked as Ext.12. In the cross-examination at the behest of Roshan Ali, P.W.3 stated that P.W.2 was well known to him much prior to the receipt of his mobile message. Whatever information he received from P.W.2, he conveyed the same to the Sadar Police Station over V.H.F. He further stated that the information constituted a cognizable offence and P.W.2 told him that only three persons had done this. There was no cross-examination from the side of Rajan Mishra, Shamim Sidique and Virendra Jaiswal. P.W.3 thus corroborates the version of P.W.2 with regard to abduction of P.W.8 at revolver point.

P.W.4 in his examination-in-chief stated that on 24.1.2004, he learnt from the co-villager that one Marwari along with his driver had been abducted by some persons. He also saw one Maruti Zen Car bearing registration No.OR-16-A-5961 was parked by the side of the road. On the same night at 10.30 P.M., the police of Sadar Police Station, Sundergarh

came to the spot. He described the colour of the Maruti Car as blue coloured one with no occupants. The police seized that Car as per seizure list prepared in presence of P.W.4. P.W.4 signed the said seizure list. In the cross-examination on behalf of Roshan Ali, P.W.4 stated that he was the sitting Samiti Member of Karamdihi Panchayat. He denied the suggestion that he had not stated before the I.O. that after returning to house, he came to know from some persons that P.W.7 & P.W.8 have been abducted. There was no cross-examination on behalf of Rajan Mishra, Shamim Sidique & Virendra Jaiswal.

P.W.5 - Like P.W.4, P.W.5 is also one of the villagers of Karamdihi, who in his examination-in-chief stated that he saw one blue coloured Maruti Car was going towards Rourkela and another Marshal like Van followed the Car. Both the vehicles stopped and parked on the road near the house of Patanga. One person came out of the Maruti Car and after sitting in the Marshall like van that van drove towards Karamdihi Chhaka. Nothing much has been elicited in the cross-examination at the behest of Roshan Ali. There was no cross-examination on behalf of Rajan Mishra, Shamim Sidique & Virendra Jaiswal.

P.W.6 in his examination-in-chief stated that he was working as a Peon under the victim (P.W.8). On 29.1.2004, he was working as Peon in the residential office of P.W.8. On 29.1.2004 at about 9.00 P.M., the police visited the house of P.W.8 and seized two numbers of telephone instruments of P.W.8 and one Fax message(Ext.2), some cassettes, one telephone set with recording system along with its cassettes as per seizure list under Ext.3. Again on 8.2.2004 according to P.W.6, the police seized one Fax machine, one Fax message (Ext.4) and one cassette and the relevant seizure list, is Ext.5. In the cross-examination, P.W.6 denied the suggestion that he was not present at the time and place of seizure and that the articles seized have been manufactured for the purpose of the case and that the Fax machine was not in order by the time it was seized.

P.W.7 is an eye-witness and one of the victims. In his examination-in-chief, he stated that on 24.1.2004, i.e., the date of occurrence, he was carrying his master-P.W.8 in the Maruti Zen Car towards Sundergarh. On the way, P.W.8 directed P.W.7 to stop the vehicle by the side of the road for urination. Accordingly, P.W.7 stopped the vehicle at a little ahead of Karamdihi Chhak. At that time, when P.W.8 was urinating at a little distance by the side of the road, a Bolero Jeep metallic colour came from his behind and parked infront of the Maruti Car. Immediately six number of occupants came out of that Bolero. Three of them proceeded towards P.W.8 and rest three came near him. All of them were armed with revolver. Three of these culprits on the point of revolver forcibly brought P.W.8 to the Bolero. Two of them sat on either side of P.W.8 in the Bolero. Out of the three culprits, who came near P.W.7 brought him from his seat on the Bolero to the backside. Altogether there were 8 occupants in the Bolero. Out of whom, six had came out of that Bolero and rest were in that vehicle. One of the occupants of the Bolero came and started driving the Maruti Zen Car, turned the car to the backside and the Bolero followed the Maruti Zen car. The Bolero on reaching the Karamdihi Chhaka slowed down the speed and the culprit, who was driving the Car, stopped the car, came out of the same and entered inside the Bolero. Thereafter, the culprits drove the Bolero in a high speed on the Subdega road by playing the tape recorder in a high volume. Thereafter, the Bolero after running for about four to five hours, stopped on the road. By then it would be about 9.30 P.M. The place where the Bolero was stopped was an isolated place. There was a tile roofed house, with an enclosure of mud wall. Thereafter, those miscreants took P.W.8 and P.W.7 from the Bolero to that house (tile roofed house). P.W.8 was made to sit on a cot in one of the rooms of the house and P.W.7 was made to sit

on the floor of that room. P.W.7 was frightened as the culprits had held revolvers in their hands and while P.W.7 was taken out of the Bolero to that house, they had also snatched away Kohinoor H.M.T. wrist watch which P.W.7 had worn and his purse containing a cash of Rs.650/-. Subsequently, P.W.7 came to know the name of that place to be Haratoli in the State of Chhatisgarh under Shankargarh Police Station. In the front row of the Bolero two occupants with P.W.8 at the centre were sitting and in the last row three other occupants were sitting besides P.W.7. All the culprits, who brought P.W.7 and P.W.8 to that place, came inside the room where P.W.8 was sitting on the cot and all of them talked to P.W.8 for some times. Almost two hours thereafter, they again took P.W.7 to other room of the said house and confined him in that room while locking the door from outside, and P.W.8 remained in that room in which he was talked by the culprits. P.W.7 and P.W.8 both remained there in that tile roofed house for 17 days. During these periods of 17 days, those culprits met P.W.7 several times, interrogated him by asking many questions regarding the number of factories P.W.8 was having, the number of sons & daughters and many others aspect. But P.W.7 told them that he being a man of Scheduled Tribe, he had no knowledge of all these things. They guarded P.Ws.7 & 8 and cautioned P.W.7 not to keep contact with any person. During this period, those miscreants were persuading P.W.8 to write letter to his son P.W.1 to arrange a cash of Rs. 5 crores, so that he could be relieved, failing which, they threatened to kill both P.W.7 & P.W.8. On 17th day of confinement of P.Ws.7 & 8, the police reached there in the morning hours and rescued them. On the date of rescue, one of these appellants, namely, Virendra Jaiswal along with one Abdul Kayum were guarding them. P.W.7 further stated that one of such accused persons namely, Virendra Jaiswal was present in the court and he identified him. He further stated that on that date at about 4 A.M., the police came and called the appellant-Virendra Jaiswal in loud voice to open the door. Although the police was telling in Hindi, but P.W.7 could understand the meaning. One of these culprits, came near P.W.7 with one revolver in his hand, threatened him not to shout as the police had already reached and to keep quiet, failing which P.W.7 would be killed. The police immediately snatched the revolvers from the hands of the miscreants along with cartridges. Further P.W.7 stated that he could identify those culprits who committed the crime. Of these eight culprits, P.W.7 identified five of them present in the court and standing in the dock, namely, Shamim Sidique, Atul Pandey, Rajan Mishra, Virendra Jaiswal and Roshan Ali by pointing towards them. Thereafter, the police took P.W.7 and P.W.8 to Shankargarh Police Station with two culprits, who were guarding P.W.7 and P.W.8 in the night. These two culprits revealed their names before the police being asked, from which P.W.7 could know their names. On 17.2.2004 at 10 A.M., P.W.7 came to the District Jail, Sundergarh as per direction of the police and entered inside the jail. P.W.29 asked P.W.7 to identify the suspects telling him if he had seen them participating in the occurrence. Altogether 11 persons were made to stand in a row inside the Jail. On a look at these persons, P.W.7 identified the appellant, Rajan Mishra, who was standing in the dock. After the T.I. Parade was over, P.W.29 prepared the T.I. Parade report which was duly signed by P.W.7. On the same date about one hour after the first T.I. Parade was over, P.W.7 was again called by P.W.29 to identify other suspects. In this T.I. Parade, the suspect was mixed with 10 persons and all were made to stand in a row. P.W.7 identified the suspect, Roshan Ali. After the said T.I. Parade was over, P.W.29 prepared the T.I. Parade report which was signed by P.W.7. Again on 21.2.2004, P.W.7 identified the appellant Shamim Sidique in the T.I. Parade which was held inside the District Jail, Sundergarh by P.W.29. Again in the 1st week of June, 2004, P.W.7 identified Atul Pandey in the T.I. Parade conducted by the Magistrate.

In the cross-examination on behalf of Atul Pandey, Rajan Mishra (appellant) and Shamim Sidique (appellant), P.W.7 stated that the incident occurred at a place on the road about 3 kms before Sundergarh Town. For two minutes P.W.7 stopped the Maruti Zen Car and the incident occurred. When P.W.8 got down from the car to urinate by the road, P.W.7 was sitting in the car. The Bolero came and the driver parked the Bolero in front of the car. P.W.7 further deposed that he did not raise any shout being afraid of the situation as each of the miscreants was holding revolver in his hand. In forcibly taking P.W.7 and P.W.8 into the Bolero, those miscreants had not tied their mouths, eyes. They had not assaulted P.W.7 or P.W.8 although they had given threats. P.W. 7 and P.W.8 were made to sit inside the Bolero. They restricted the talk of P.W.8 and asked him to keep quiet. None of the culprits had covered their face with cloth in order to conceal their identity. The Bolero had never stopped on the road at any place at any point of time for any break till it reached Hartoli. Initially P.Ws.7 and 8 were both kept in one room for few hours and thereafter P.W.7 was taken to another room and P.W.8 stayed in other room. Ten days after confinement of P.W.7 and P.W.8 in that house, P.W.7 had occasion to talk with P.W.8 for a very short time say about two minutes. One of the miscreants brought P.W.7 from his room to the room where P.W.8 was confined on the point of Pistol. P.W.8 did not tell anything more except that he was giving assurance for release after three days. By then P.W.7 was mentally shocked and started crying on seeing the condition of P.W.8.It was a fact that during confinement in that house in one occasion two of the miscreants asked P.W.8 to give a letter to his son asking him to pay Rs.5 Crores, so that he would be released. Since P.W.8 was confined in an adjoining room, P.W.7 could only hear the voice but he had not seen those culprits. P.W.7 denied the suggestion that he had not heard such things and that the culprits had not told anything to P.W.8 demanding any amount. The house in question was located at the centre of the compound wall. Beyond the compound wall, there was a village kacchha road. The Police personnel numbering 10 to 15 came and raided that house. In the cross-examination, P.W.7 further stated that he had never come to the police station at Sundergarh at any point of time prior for the identification of the suspects by him in the Jail. It took no time to identify the suspects standing on the row as P.W.7 had constantly seen those suspects in the scene of crime. P.W.7 denied the suggestion that the police had shown him the photographs of those suspects identified by him much prior to their identification in the T.I. Parade. He further denied the suggestion that the police got the photographs of those suspects taken through a photographer, namely, Jasbir Singh and that the photographs of those culprits came out in the newspaper. P.W.7 also denied the suggestion that P.W.8 has concocted this case with his assistance to falsely implicate the appellants. Since the appellants pointed Pistol on the heads of P.W.7 and P.W.8, it was not possible to raise any shout or alarm. In the cross-examination on behalf of Roshan Ali (appellant), Late Rajendra Prasad and Pradeep Srivastava, P.W.7 stated that he and P.W.8 had not made any effort to run away from the vehicle. Further in the cross-examination, P.W.7 stated that he had clearly seen those miscreants during his stay there for 17 days. He denied the suggestion that he had not stated before the Magistrate regarding specific role played by each of the suspects/appellants at the time of T.I. Parade. After P.W.7 identified the suspects, the Magistrate ascertained the name of suspect, from which he could know their names. In the second phase of T.I. Parade, the persons, who were mixed with the suspects were changed and new persons were mixed with the suspects. After identification of the first suspect was over, P.W.7 was kept in another place for about one hour till he was called to the second T.I. Parade. He, however, admitted that he had not stated before the I.O. specifically that three of those miscreants proceeded

towards P.W.8 and other three of them proceeded towards him and on the point of revolver took both of them to the Bolero forcibly and that two of those miscreants sat either side of P.W.8, but P.W.7 made it clear that he had stated before the I.O. that six miscreants from the Bolero came out with revolver and forcibly took them into the Bolero. In the further cross-examination, P.W.7 stated he had stated before the I.O. that the miscreants threatened P.W.8 at intervals to give Rs. 4 to 5 Crores and to write a letter to his son P.W.1, which he had heard. Further P.W.7 stated that on the date of rescue, the police seized the revolvers and cartridges from the culprits, Virendra Jaiswal and Tippu in their presence. P.W.7 denied the suggestion that he and P.W.8 were never abducted by the appellants and that he was falsely implicating the appellants at the behest of the police as they were shown to them by the police prior to the T.I. Parade and that the photographs of the accused persons were also shown to P.W.7 by the police prior to the T.I. Parade.

In the cross-examination on behalf of the appellant Virendra Jaiswal, P.W.7 stated that at the time of identification of the suspects, the suspects did not submit anything to the Magistrate except disclosing their names being asked by the Magistrate. There was a small window in the room where P.W.7 was confined and there was no window in the room where P.W.8 was confined. Two of the culprits after arrival of the police at the spot opened door of the room of P.W.7 from outside and released him and thereafter he was taken inside the room of P.W.8. P.W.7 denied the suggestion that he deposed falsehood at the instance of P.W.8.

In the cross-examination on behalf of Santosh Jha, P.W.7 denied the suggestion that he had never worked as a driver under P.W.8 and that on the date of occurrence, he never drove the car of P.W.8 carrying him and that neither P.W.8 nor P.W.7 were abducted by the culprits.

P.W.7 on further cross-examination on 10.1.2007 on behalf of Rajan Mishra, stated that he had not stated before P.W.17 that eight to nine persons being armed with revolver abducted P.W.8 and P.W.8 was made to sit in their vehicle with the eyes covered by a cloth, one of the culprits took away the key of the Maruti Car and remained at the spot and they were telling the names of Virendra Jaiswsal and Abdul Karim. He denied the suggestion that the accused persons did not abduct him and P.W.8 and that he was deposing falsehood.

An analysis of evidence of P.W.7 would show that he has clearly proved the factum of abduction, demand of ransom and confinement with common intention. The core prosecution story relating to abduction by the appellants and others at revolver point remains undemolished. This also reflect common intention of the above appellants. He has clearly deposed about demand of ransom at a number of places in his deposition. His deposition also clearly reflects how he and P.W.8 remained confined at Hartoli and how they were guarded by the culprits there. This also shows common intention of the appellants in confining them. His version relating to forcibly being taken inside the Bolero at revolver point by the appellants is well corroborated by the evidence of P.W.2 and P.W.8. His version relating to demand of ransom has been corroborated by P.W.8 and P.W.1. P.W.8 as we would see little later, corroborates the version of P.W.7 as to wrongful confinement. In the T.I. Parade, he clearly identified the appellants-Roshan Ali, Rajan Mishra and Shamim Sidique. The T.I. Parades were held on 17.2.2004 & 21.2.2004, while the occurrence took place on 24.1.2004. So, within a short time span T.I. Parade has been held. He clearly denied the suggestion that prior to holding of T.I. Parade, the culprits/their photographs were shown to him. In the court

below he identified the above noted three appellants along with Virendra Jaiswal. It is important to note here that P.W.7 had identified Rajan Mishra, Roshan Ali, Shamim Sidique, Virendra Jaiswal and Atul Pandey in court on 29.9.2005 out of 8 culprits. A perusal of order sheet dated 29.9.2005 of learned Sessions Judge shows, on that day the three acquitted persons were also present in the court. But they were not identified by P.W.7. Though there are some discripancies between the versions of P.W.7 and P.W.17, however, the same does not demolish the core prosecution story. With regard to covering of eyes of P.W.8 by cloth, it can be said that the same does not mean that prior to such covering he could not have seen the culprits. Further, there is nothing on evidence that such eye covering continued after P.Ws.7 & 8 reached Hartoli. Rather P.W.17 in his evidence has disclosed that P.W.8 stated before him that the culprits took P.W.8 to a house in Bolero and opened the cloth from his face and eyes. It may not be out of place to indicate here that there exists nothing in evidence to show that there existed enmity between appellants and P.W.7 so that P.W.7 would depose against appellants. In any case P.W.17 in his re-examination made it clear that P.W.7 was not present when he reduced his statement to writing after four to five hours of questioning him. In other words P.W.17 has recorded the so called statement of P.W.7 from his memory. So nothing much can be read into same. Similarly, the contradiction in evidence of P.W.7 vis-à-vis P.W.33 as pointed out by P.W.33 at Para-38 of his deposition does not appear to be major contradictions.

P.W.8, an eye-witness, in his examination-in-chief stated that he knew all the accused persons standing in the dock. He identified the accused persons by telling their names. He stated that P.W.1 was his son and the occurrence took place on 24.1.2004 at 4.30 P.M. At about 3.00 P.M. he started from his house in his Maruti Zen Car in connection with business work to Sundergarh. The registration number of his car was OR-16-A-5921. P.W.7 was his driver, who drove the car. While coming towards Sundagargh, P.W.8 asked his driver for a brief halt, 3kms before Sundargah to urinate. Accordingly, P.W.7 stopped the car and P.W.8 came out of the car by the side of the road to urinate. While urinating, a metallic colour Bolero came from behind and stopped in front of his car. Immediately some of the occupants of the Bolero numbering six being armed with revolvers in their hands came out of that Bolero. These culprits, who were armed with revolvers in their hands came out of that Bolero and pointing the revolvers on his head forcibly dragged him and P.W.7 and took them into their Bolero. P.W.8 discovered that two other occupants were inside the Bolero. Thereafter, the driver of the Bolero turned the Bolero backward and started moving towards Karamdihi. From Karamdihi the Bolero went towards Subdega. The culprits played the tape recorder of that vehicle in full volume. After the Bolero moved for five hours, it stopped on the road in an isolated place. In the Bolero P.W.8 was sitting in the middle seat in the middle with two culprits on either side of him pointing revolver on his head and in the last row three culprits were sitting and his driver was made to sit on the floor of the Bolero. By then, P.W.8 was wearing a Dhoti and Punjabi. There was a Titan wrist watch in his hand. He had cash of Rs.49,800/- in the side pocket of his Punjabi. The culprits forcibly snatched the entire cash from his pocket and his wrist watch. At last the Bolero stopped and the culprits took P.W.7 and P.W.8 from the Bolero to a tile roofed house with a mud compound wall. The house was a two roomed house having verandha on both sides. P.W.7 and P.W.8 were kept guarded by the culprits in one room for two hours. Thereafter, P.W.7 was separated and taken to another room. During this time of two hours those culprits at the point of revolver threatened P.W.8 saying that they wanted money for which they have been abducted to that place. They

demanded Rs.15 Crores. Both P.W.7 and P.W.8 were confined in two separate rooms of that house for a period of 17 days. Whenever, P.W.8 wanted to attend the call of nature, those culprits were guarding at the point of revolvers and they were taking him to the latrine. During the period of confinement of P.W.7 and P.W.8, these culprits were regularly coming to them and threatening him to give Rs.15 crores to them to release him from the confinement. In four to five occasions, the culprits had forced P.W.8 to write letters to his son by giving dictation as to what to write for extracting ransom. The culprits threatened to kill him if he failed to write according to their dictation. P.W.8 identified the letters under Exts.2 and 4 being written by him. His signature in Ext.1 was marked as Ext.4/1 but his signature in Ext.2 was not visible as these were the Xerox copies. The original letters were with the culprits. P.W.8 further stated that he remembered the essence of writings of all these letters was to extract ransom. Four to five culprits in turn were guarding P.W.8 for first few days. Thereafter, two culprits came for guarding him. To a question as to how he could identify the culprits with their names, P.W.8 replied that on the date they were rescued by the police and were taken to Shankargarh Police Station, on that date he came to know the names of two accused persons, namely, Virendra Jaiswal and Abdul Kaiyum @ Tippu and the other four accused persons were identified by him in the T.I. Parade in the Jail. He could come to know their names in the Jail and there was no difficulty in identifying them as they were frequently visiting him and talking with him during his confinement.

P.W. 8 further stated that on 10.02.2004 in the dawn hours at about 4 to 5 a.m. the police of Chhatishgarh raided the house and rescued him and P.W.7. Police seized three revolvers along with cartridges from the possession of the culprits-Virendra Jaiswal and Abdul Kaium @ Tippo. On 15.02.2004, police released his seized wrist watch in his zima. P.W.8 further clearly stated that the culprits abducted him for ransom. On 17.02.2004, P.W.8 identified appellant-Roshan Ali and Rajan Mishra and on 21.2.2004, he identified Shamim Sidique in the T.I. Parades and signed the T.I. Parade reports. Further P.W.8 clearly identified the appellants-Roshan Ali, Rajan Mishra and Shamim Sidique in the court. On 5.6.2004, he identified appellant-Atul Pandey in the T.I. Parade. He also identified appellant-Atul Pandey in court.

In the cross-examination at the behest of appellants-Atul Pandey, Rajan Mishra (appellant) and Md. Sidique (appellant), P.W.8 stated that he could understand Hindi but could not speak correctly or properly although to some extent he could say in Hindi. P.W.8 further stated that the Bolero started plying continuously for five hours without any stoppage. As he was guarded by four culprits inside the Bolero, he was not in a position to see any check gate or toll gate coming on the road. He denied a suggestion that he has not stated before I.O. that two culprits with revolvers sat on his either side. Further in the cross-examination, P.W.8 stated that they reached near the house where they were confined in the night at 9.30 P.M. at Haratoli. He came to know about that place from the police of Shankaragada police station. As he was in a panic sticken condition while travelling in the Bolero, there was no occasion to express his feelings as to whether he wanted to attend the call of nature or to drink. The culprits did not offer any tea, tiffin or anything to him while taking him in the Bolero. The culprits had only threatened him on the point of revolver to keep quiet. After he was taken inside the room of a tile-roofed house, the culprits searched his pockets and took away the cash and wrist watch. When he was caught by culprits, he had almost finished urinating there. Out of six occupants of that Bolero, three culprits with revolvers caught him and rest three forcibly pulled P.W.7 from the car. All the three culprits

had caught hold of him, two of them on either side and the third from back side. They had further pointed their revolvers on his head and back. He and his driver P.W.7 were forcibly taken inside the Bolero at the same time and the culprits threatened on the point of revolver not to shout. The abduction took place on the main road where there was no 'Basti' nearby. After he and his driver P.W.7 were taken into the house, they both stayed in one room for two hours and thereafter they were separated. During this period of two hours, the culprits persuaded P.W.8 and threatened him to give an amount of Rs.15 crores and further persuaded to write letters to P.W.1, his son. According to P.W.8, his driver P.W.7 was very much present in that room and this was within his knowledge what the culprits told him. He denied a suggestion that he did not state before the I.O. that during time of two hours, the culprits on the point of revolver threatened him saying that they wanted money to the tune of Rs.15 Crores. Further, in the cross-examination, P.W.8 admitted that he has read up to Class-IX and Ext.2 was in his own handwriting, written according to dictation of the culprits. He further stated that though he had signed in the original, but since Ext.2 happened to be a xerox copy, the in-print of his signature was not available in the xerox copy. He denied a suggestion that Ext.2 was manufactured for the purpose of this case. He also denied a suggestion that Ext.4 was also forged document and was manufactured for the purpose of this case. P.W.8 also stated that the culprits threatened him that if the ransom was not paid, his children and family members would be killed and finished. He also denied a suggestion that the culprits never abducted him for ransom. He also emphatically stated that two culprits were guarding him inside his room with revolver and such a practice was followed for a period of 15 days. Whenever he used to attend the call of nature, the culprits were guarding him since there was no attached latrine inside the room. He also emphatically denied a suggestion that the accused persons or culprits were shown to him at the Police Station by the Police before the T.I. parade.

In the cross-examination on behalf of Roshan Ali (appellant) and Pradeep Srivastava (since acquitted), P.W.8 stated that in one case while identifying the appellant-Roshan Ali in jail, Roshan Ali abused and threatened him. But he could not say about the fate of that case. He reiterated that he identified four culprits inside jail and out of the rest he knew appellant-Virendra Jaiswal, who was there with him when the police rescued him along with P.W.7 from the place of confinement. He further stated that out of 8 accused persons who abducted him, five were present in Court and Pradeep Srivastava, late-Rajendra Prasad and Santosh Jha were not involved in abducting him. Further, he stated that these three persons had no role to play in abducting him and his driver-P.W.7. He also made it clear that he did not see these three acquitted persons, namely, Pradeep Srivastava, late Rajendra Prasad and Santosh Jha in the place of their confinement or anywhere and for the first time he saw these three persons standing in the dock in the court. P.W.8 further made it clear that he had seen five accused persons or culprits present in Court at the time of their act of abduction. He further stated that he had specifically stated before the Sundergarh Police as well as Shankargarh police about the abduction by the culprits. He further stated that after reaching the room the culprits kept him and his driver in one room for two hours where the culprits talked with them. He further stated that he has stated before the I.O. that the culprits threatened him demanding Rs.3 Crores and for that to write letters to his son. He also denied a suggestion that he had not stated before the I.O. that the culprits wanted money to the tune of Rs.15 crores from him. P.W.8 also submitted that though he had not uttered the word ransom in his statement before I.O. he had stated before I.O. that culprits by confining him

demanded Rs.3 crores by sending letters to his son. He also denied a suggestion that he had not stated before I.O. that culprits had abducted him for ransom. He further stated that the culprits got these letters (Ext. 2 and 4) written from him and after writing of letters they took the letters from him in original and reiterated that Exts.2 and 4 were written by him and they were in his handwriting. He further stated that he could not say whether the photographs of the culprits came out in newspaper or not. He also could not say whether police had taken the photographs of above culprits. He also made it clear that the police had never shown the photographs of the culprits to him. He also made it clear that he did not know that the photographs of culprits were taken by one Jasbir Singh, photographer of Sundergarh. He denied the suggestion that the culprits had not abducted him for ransom and they had not confined him for 17 days in a house at Haratoli. He denied a suggestion that he was deposing falsehood.

In the cross-examination at the behest of appellant-Virendra Jaiswal, P.W.8 denied a suggestion that the culprits had not abducted him for ransom and that appellant-Virendra Jiswal was in no way involved in the commission of crime.

In the cross-examination on behalf of Santosh Jha (since acquitted), P.W.8 stated that P.W.7 was engaged to drive his car about one month prior to this incident and he denied a suggestion that he was not abducted by the culprits and was not confined by them. P.W.8 was subjected to further cross-examination on recall on 10.01.2007 by appellant-Rajan Mishra, i.e., around three years from the date of occurrence. There he reiterated that he could understand Hindi but could not properly speak Hindi. However, no question has been put to him on his capacity to write Hindi. He admitted that he was examined by P.W.17. He further stated that he did not say before P.W.17 that the culprits tied his face with cloth when he was pushed inside Bolero but P.W.17 stated in his cross-examination that P.W.8 stated before him that these culprits tied cloth in his face and eyes and pushed him inside vehicle. This contradiction also no way helps the defence as even prior to putting the cloth on his face, P.W.8 would have seen all the culprits. Further there is nothing to show that the cloth on the face continued even after arrival at the house, where P.W.8 was confined for 17 days. Rather as per evidence of P.W.17 after taking to the house, the culprits opened the cloth from his face and eyes. In any case on re-examination, P.W.17 stated that he reduced the statement of P.W.8 in his absence after four to five hours of questioning them. In other words P.W.17 had recorded the so called statement of P.W.8 from his memory. In such background nothing much can be read into same. He also did not state before the A.S.I. that the culprits dealt him slaps and fist blows and took away Rs.45,000/- from him and that they took away his Titan wrist watch. However, in further cross-examination, P.W.8 made it clear that the culprits did not assault him or pushed him showing revolver. P.W. 8 also stated that eight culprits abducted him but they were unknown to him. However, he denied a suggestion that the accused-culprits did not abduct him and that he was deposing falsehood. It is important to note here that in cross-examination no suggestion of enmity between the four appellants and P.W.8 has been given.

An analysis of evidence of P.W.8 would show that he has clearly proved that he was abducted along with P.W.7 by appellants and others at the revolver point. Then he along with P.W.7 were confined by the culprits in a tile-roofed house at Hartoli. There the culprits demanded the ransom and made P.W.8 to write letters under Exts.2 and 4 which were later sent by fax to P.W.1. All these reflect common intention of the appellants to abduct for

ransom and to subject the victims to illegal confinement. P.W.8 has clearly stated that reasons for writing these letters under threat was to extract ransom. It is important to note here that though P.W.8 stated that he had written letters under Exts. 2 and 4, the defence never put any question to him on his ability to write in Hindi. He and P.W.7 were confined in that house at Hartoli for 17 days after which Police rescued them. The story relating to he being abducted and pushed into Bolero has been corroborated by P.W.2 and P.W.7. The demand relating to ransom has been corroborated by P.Ws.1 and 7. The factum relating to confinement as stated by P.W.8 has been corroborated by P.W.7 and P.W.17. In the T.I. Parade, he clearly identified appellants-Rajan Mishra, Roshan Ali and Shamim Sidique. Here as indicated earlier the relevant T.I. Parades were held on 17.2.2004 and 21.2.2004, after Roshan Ali and Rajan Mishra were arrested on 10.2.2004 and Shamim Sidique arrested on 13.2.2004. P.W.8 has clearly denied the suggestion of either seeing the above appellants or their photographs prior to T.I. Parade. In the court also he identified the above three appellants along with Virendra Jaiswal and others. It is very important to note here that P.W.8 stated in clear terms that three acquitted persons were not involved in abducting him or P.W.7. He made it clear that he never saw the three acquitted persons either at the place of confinement or at anywhere. He stated that he saw the three acquitted persons for the first time in court. Though P.W.17 stated that before him P.W.8 had stated about a cloth being tied over his eyes at the time of abduction, however, there exists no evidence to show that situation was such that prior to putting the cloth before face, P.W.8 could not have seen the culprits abducting him. Same P.W.17 has also made it clear that P.W.8 also stated before him that the culprits took him to the house where he was confined and opened the cloth from his face and eyes. Thus, P.W.8 had seen all the culprits, who abducted him and P.W.7. Further P.W.17 stated that P.W.8 was not present, when he reduced his statement into writing. He made such recording after 4 to 5 hours after questioning P.W.8. This makes it clear that version narrated by P.W.17 vis-à-vis P.W.8 is more from memory and thus, there is bound to be discrepancy in such case. Thus, this contradiction nowhere helps the appellants. In the cross-examination, P.W.33 has stated that P.W.8 never told him about demand of Rs.15 crores while abducting him or at the time of his confinement. This appears to be contradictory to the evidence of P.W.8 to some extent. In fact in some place P.W.8 in his evidence has stated that the demand was for Rs.3 croes. Thus, though the evidence relating to quantum may differ, however, evidence relating to demand of ransom remains undemolished. The contradictions between the version of P.W.7 on one side and P.Ws.17 & 33 on the other side are not major affecting the core story of prosecution relating to abduction, demand of ransom and confinement, etc with common intention of appellants. Both P.W.7 and P.W.8 have also stated that police had seized revolvers and cartridges from the possession of Virendra Jaiswal and Abdul Kayum while resucing P.Ws.7 & 8. This shows all throughout P.Ws.7 & 8 remained under threat to their lives.

P.Ws.9 and 10 are two Gramarakhies and witnesses to the seizures. P.W.9 is a witness to the seizure in connection with Titan wrist watch from appellant-Roshan Ali, which was marked as M.O.-II & the relevant seizure list is Ext.19. In the cross-examination, he has also stated that he could identify the seized watch in the Court. P.W.10 is also a witness to the seizure of above watch from Roshan Ali. The mobile handset of P.W.3 was seized by P.W.33 in presence of P.W.10 and the relevant seizure list was marked as Ext.12. P.W.10 is also a witness to the seizure of diary and some papers before the I.I.C. as per the seizure list at Ext.20. He was also a witness to the seizure of two numbers of revolvers (M.O.IV &

M.O.V), 11 numbers of cartridges (M.O.VI), cash of Rs.3,000/-, six number plates of the vehicle with one mobile set phone produced by Shankargada Police before I.I.C. (PW.33) vide seizure list marked as Ext.21. P.W.10 also identified 11 numbers of cartridges and the hand set mobile phone in the court so also the revolvers.

In the cross-examination on behalf of appellants-Rajan Mishra, Roshan Ali and Shamim Sidique, P.W.10 stated that he was present at the Police Station when the seizure list was prepared by P.W.33. P.W. 33 seized Titan watch from appellant-Roshan Ali on his production before him. However, P.W.10 stated that such type of wrist watch was commonly available in the market. He denied a suggestion that he was deposing falsehood at the instance of P.W.33. In the cross-examination on behalf of Virendra Jaiswal, P.W.10 stated that all the articles seized by the police have been kept on the table and he signed those seizure lists one after the other after those were explained to him. In the cross-examination at the behest of Santosh Jha, P.W.10 stated that it was not possible on his part to say which witnesses were present on which date of seizures. He denied a suggestion that no such articles were seized in his presence and he was deposing falsehood.

P.W.11 happens to be a part-time Accountant at hotel Bishnu Palace, Jharsuguda. He deposed that in the month of February, 2004 the police had come to the above noted hotel. Being asked by the police, he produced the Entry Register, Guest Registration Card and Duplicate Bills and police seized the same as per the seizure list prepared in his presence which was marked as Ext.22. As per the Entry Register maintained in the hotel, on 17.1.2004 at 1.00 A.M., names of Shamim Sidique (appellant), Virendra Gupta and Atul Pandey have been reflected as per entries vide Sl. Nos. 92, 93 and 94 and they stayed in the hotel in room nos.106, 107 and 103 respectively. Thereafter, they left the hotel at 5.30 P.M on the same day. Again on 11 P.M., Virendra Gupta, S. Sidique and one Tipu Khan returned to the hotel and stayed there till 19.01.2004. After the seizure, the seized entry register was released in his zima as per zimanama marked as Ext.23. Virendra Gupta and Rajan Tripathy occupied room No.107 vide Guest Registration Card No.645 and Virendra Gupta had signed the registration card. Atul Pandey and Tippu Khan vide Sl. No.646 of Guest Registration Number occupied room No.103 and the card was singed by one Tippu Khan vide Ext.25.

In the cross-examination on behalf of Atul Pandey, Rajan Mishra (appellant), Md. Sidique (appellant) and Roshan Ali (appellant), P.W.11 stated that he did not have any personal acquaintance with the guest staying in the hotel and as per the records, he was deposing. He further stated that it was not possible on his part to identify those persons if he would see them.

P.W.12 is an independent witness, who turned hostile. In his examination-in-chief, he stated that as far as he recollected on 11.2.2004 he had signed a piece of paper at the instance of the Inspector of Police where his signature was marked as Ext.30. In the cross-examination by the prosecution, he denied a suggestion that he had stated before the I.O. that on 11.2.2004 at 10 P.M. the I.O. seized one Bajaj Boxer Motor Cycle bearing No.MB-20-AA-0098 where the engine number was found to have been tampered. He also denied a suggestion that he was deposing falsehood.

In the cross-examination conducted on behalf of Atul Pandey, Roshan Ali (appellant), late Rajendra Prasad and Pradeep Srivastava, he stated that he did not know these persons who were standing in the dock and he gave his signature being asked by the police in the bus stand of Sundergarh and nothing was written in the paper in which he had signed. In

the cross-examination conducted by rest of the culprits, P.W.12 stated that police had not examined him in connection with this case and he had not given his statement before the police.

P.W.13 was the then C.I. of Sadar, Sundergarh. In his examination-in-chief, P.W.13 stated that on 10.2.2004 as per the direction of S.P., Sundergrh, he proceeded to Nagpur with S.I. of Police, Sanjib Mohanty. On reaching Nagpur, he reported before the Inspector-in-charge of Sitawardi Police Station, P.W.32. Later, he left Nagpur with the culprits, namely Prdeep Srivastava, Roshan Ali and Rajan Mishra. On 12.2.2004 at 8.30 P.M. he reached Sadar P.S. and handed over the aforesaid persons along with the relevant connected papers, viz., seizure lists, statements of witnesses recorded under Section 161 Cr.P.C. and other documents (consisting 21 pages). Besides, the above, he had also handed over the xerox copy of the register of hotel "Kamal" at Nagpur and a paper containing the names of appellants-Roshan Ali, Virendra Jaiswal, Rajan Mishra and others, which was written in Hindi. He also handed over a piece of paper containing some telephone numbers, one telephone receipt dated 9.2.2004 granted by STD booth with phone No.2563746 of Nagpur. He also produced two papers containing telephone numbers and one bill of hotel Kamal at Nagpur, one pocket book (M.O.III) of Pradeep Srivastava containing some telephone numbers. These documents were made over to the IIC, Sadar, Sundergarh.

In the cross-examination at the behest of Rajan Mishra (appellant), Atul Pandey, Roshan Ali (appellant), late Rajendra Prasad and Pradeep Srivastava, P.W.13 stated that he had gone to Nagpur by train on 9.2.2004 and that he had not recorded the statements of any of the culprits. He further stated that the culprits were there at Nagpur Police Station by the time he reached there. He had not taken the personal search of those culprits, who were brought by him from Nagpur. Those culprits so far he remembered had not submitted anything to the Magistrate of Nagpur at the time of their production. He denied a suggestion that the documents which he referred to during his examination-in-chief, were manufactured documents and were prepared to suit this case and that he was deposing falsehood. Cross-examination by the rest of the accused was declined.

P.W.14 is a Police Constable of Sadar Police Station, Sundergarh. He was also a witness to the seizure of mobile phone bearing No.9415258853, which was seized from the custody of appellant-Shamim Sidique at the police station, as well as he was a witness in whose presence the seizure lists of cassettes were prepared by the I.I.C. which were marked as Exts. 31 and 32 respectively. In his examination-in-chief he stated that he knew three of the appellants standing in the dock and accordingly, identified Shamim Sidique, Rajan Mishra and Roshan Ali. He further stated that on 16.02.2004 while he was working as police constable at the Sadar Police Station, Sundergarh, the I.I.C. Sadar P.S. seized one Nokia hand set mobile phone from appellant-Shamim Sidique at the police station in his presence as per the seizure list prepared by the I.I.C. and that mobile set was marked as M.O-VIII. On 8.6.2004, in the court of S.D.J.M., Sundergarh the voice of the appellants-Roshan Ali and Rajan Mishra was recorded in two separate cassettes and two separate envelopes containing two cassettes were made over to the I.I.C., Sadar P.S. by the C.S.I. Balabhadra Pradhan. The I.I.C. on production of these cassettes seized the same as per the seizure list marked as Ext. 32.

In the cross-examination on behalf of the Rajan Mishra (appellant), Atul Pandey, Roshan Ali (appellant), late-Rajendra Prasad and Pradeep Srivastava, P.W.14 stated that he

was very much present in the court room at the time of recording of the voice of appellants-Roshan Ali and Rajan Mishra. But he could not say exactly what they stated during recording. He further stated that he was not present when the cassettes were sealed in an envelope. He denied a suggestion that he was deposing falsehood at the instance of I.I.C.

In the cross-examination at the behest of appellants-Shamim Sidique and Virendra Jaiswal, he stated that on 16.02.2004, he saw the appellant-Shamim Sidique at the police station and he came to know about the number of the seized mobile phone from the I.I.C. He denied a suggestion that as he was working under the I.I.C., he was deposing falsehood at his instance.

P.W.15 is another police constable of Sadar P.S., Sundergarh. He was also a witness to seizure of mobile phone along with other seizure. In his examination-in-chief, he stated that on 16.02.2004, he was working as police constable at Sadar Police Station, Sundergarh and on that date a mobile handset was seized by the I.I.C. from appellant-Shamim Sidique at the police station in his presence vide seizure list Ext.31. On 29.03.2004, the I.I.C. Sadar P.S. seized one note book and some papers on production by C.I. Sethi Babu vide seizure list marked as Ext.20. On 2.4.2004, one police constable of Shankaragarh police station in the State of Chhatisgarh produced before the I.I.C., Sadar P.S. two revolvers, 11 numbers of cartridges, cash of Rs.3,000/-, 15 nos. of "number plates" and some papers containing chasis number and engine number of vehicle and one Nokia Mobile hand set phone, vide seizure list Ext.21.

In the cross-examination on behalf of appellants-Shamim Sidique and Virendra Jaiswal, P.W.15 stated that appellant-Shamim Sidique was standing in the dock and accordingly, he identified appellant-Shamim Sidique. He further stated that he had no knowledge about any other culprits. He also stated that he had gone through all the seizure lists. He had seen the Nokia Mobile phone, which was in working condition but he had not tested to ascertain whether it was working or not. The police constable of Shankaragarh police station carried all the articles in an air bag. He denied a suggestion that nothing has been seized in his presence and that he was deposing falsehood.

P.W.16 is Kedarnath Kedia, who was abducted by some of the accused persons. It is P.W.16, who stated about receiving repeated phone calls in his mobile phone from appellant-Roshan Ali. In his examination-in-chief, P.W.16 stated that he knew four appellants standing in the dock. He identified the appellants, namely, Roshan Ali, Atul Pandey, Rajan Mishra and Jaiswal. He also stated that he knew P.W.8 and his son, Sanjaya Gododia. He stated that he came to know about these four appellants as they were involved in another case in which he was abducted. On 28.1.2004, he had received a telephonic message from appellant-Roshan Ali telling him to cooperate in the abduction case of P.W.8 and to let him know regarding the financial status of P.W.8. At the outset, appellant-Roshan Ali in order to identity himself recalled his memory explaining that he was that person who was involved in abducting him from Rourkela. Thereafter, he could identify the voice of the appellant-Roshan Ali. This message was received from appellant Roshan Ali in the land line phone of his office. Later, appellant-Roshan Ali rang up his mobile phone bearing No.9861027400. Again appellant-Roshan Ali enquired about financial condition and status of P.W.8. During course of investigation in which P.W.16 was abducted he was taken by the police to the house where P.W.8 was confined after his abduction. From there he could know that he was also confined in the same house for some days whereafter he was removed from

the house to the other place. After receiving the above mentioned message from appellant-Roshan Ali, he immediately informed S.P., Rourkela. The S.P. Rourkela advised him to keep patience and to attend such calls and to create confidence in the minds of miscreants. Three or four days thereafter appellant-Roshan Ali again kept contact with him over telephone and he telephoned him three to four times and the last phone call was received by P.W.16 on 9.2.2004. He further stated that he informed S.P., Rourkela about all the conversation he had with the appellant-Roshan Ali. On 9.2.2004, he received a telephonic call from appellant-Roshan Ali in his office at 2.00 P.M. in his cell phone. On receiving the call, he asked appellant-Roshan Ali to telephone him later. Thereafter, he intimated the said fact to S.P. Rourkela. From his cell phone he could know that this call was made from Nagpur as because the code number shown in the cell phone was 0712. In the evening of 9.2.2004, appellant-Roshan Ali again gave him a phone call in reply to which P.W.16 told him to wait and ring him after one hour as he was otherwise busy. Immediately thereafter, he intimated this fact to S.P. Rourkela. At About 7.30 P.M. on the same date appellant-Roshan Ali again gave him a call and without picking up that call P.W.16 rang up S.P.Rourkela through land line and intimated the fact that appellant-Roshan Ali had given a ring to his cell phone. S.P. Rourkela advised P.W.16 to continue the conversion with appellant-Roshan Ali whenever a call was received from him for a longer time. After a short while, the appellant-Roshan Ali gave a ring to his cell phone and he talked with appellant-Roshan Ali for 15 to 20 minutes and this was the last phone call made by appellant-Roshan Ali. About one and half hours thereafter S.P. Rourkela rang up to his cell phone and informed him that two to three culprits including appellant-Roshan Ali have already been apprehended from one of the P.C.O. of Nagpur. On 30.5.2004, the Sundergarh police came and seized his cell phone as per seizure list, Ext.33. P.W.33 in his cross-examination has made it clear that P.W.16 could not be examined earlier as he was not available.

In the cross-examination at the instance of Roshan Ali (appellant), late-Rajendra Prasad, Atul Pandey, Rajan Mishra (appellant), Md. Sidique (appellant) and Pradeep Srivastava, P.W.16 stated that he was abducted from his house at Rourkela on 28/29.10.2002 for which a case has been registered by the police of Raghunath Pali P.S. After he was abducted, he was confined for a period of 22 days. He was also examined by the police in that case. His wife-Kusum Kedia was the informant of that case. His statement was recorded by the police in his abduction case after he was released from the confinement during November, 2002. P.W.16 in the cross-examination further stated that he could not say what happened to that case and whether charge sheet had been filed or not. He further stated that he was examined by the police in connection with his abduction case after he got information from S.P. Rourkela that 3 to 4 culprits including appellant-Roshan Ali have already been apprehended from a S.T.D. call booth of Nagpur. P.W.16 also stated that after apprehension of appellant Roshan Ali at Nagpur as informed by S.P. Rourkela, he was examined by Sundergarh Police. He could not recollect the date of his examination by Sundergarh police and said that he might have been examined by Sundergarh police by 30.5.2004. Though he stated that he could not say the name of that village in which he was confined but he deposed that when he was taken near that house for the second time by the police he could mark some modification in the structure of that house and there was a disk antenna. However, he made it clear that neither P.W.7 nor P.W.8 had come with him to that place. He further stated that he was no way related to P.W.8 though he came to know about him eight years back. He never had any talk with P.W.8 but had talked with his son, Sanjay Gadodia. He stated that he had

seen the photos of these four culprits in the newspaper. He further stated that on 28.1.2004, he came to know that P.W.8 had been abducted. He also stated that he could know about the names of four culprits Roshan Ali, Atul Pandey, Rajan Mishra and Virendra Jaiswal whom he identified in court, at the place and time of T.I. parade in connection with his case. He further stated in the cross-examination that he could know the names of the culprits from the police as well as newspaper. It is extremely important to note here that there is no evidence on record to show that newspaper published the photographs prior to holding of T.I. Parades on 17.2.2004 and 21.2.2004. It could be that photographs of the culprits were published much after the three T.I. Parades were over and that names of culprits were made known to him by police after the T.I. Parades were over. Further he stated that he had no occasion to state before I.O of his case that appellant-Roshan Ali of this case had telephoned him on 28.1.2004. However, he denied a suggestion that he has not stated before I.O. (P.W.33) the names of four culprits. He stated that he had not specifically stated the names of appellant-Roshan Ali in his statement before P.W.33 but he told him that he was the boss. All these have not been contradicted by P.W.33. He also stated that it was a fact that he had stated before P.W.33 specifically that the S.P. Rourkela had instructed him that whenever a call came from the culprits, he was to continue to talk with him over phone for a longer time. However, P.W.16 denied a suggestion that he did not receive any telephonic call from appellant-Roshan Ali and that appellant-Roshan Ali never asked him over phone regarding financial condition and status of P.W.8.

In the cross-examination at the instance of appellant-Virendra Jaiswal, P.W. 16 stated that the house in question at Shankaragada was a farm house and the said house consisted of two rooms besides a kitchen and bath room. He denied a suggestion that the culprits were no way involved in the commission of the offence of abducting and that he was deposing falsehood.

A cautious analysis of evidence of P.W.16 shows that it was he who informed S.P. Rourkela about receipt of phone call from Roshan Ali on 28.1.2004 and 9.2.2004 from Nagpur. As per advice of S.P. Rourkela; on 9.2.2004 evening, he kept talking with Roshan Ali for 15 to 20 minutes, which led to his apprehension from Nagpur along with Rajan Mishra. It is important to note that on 9.2.2004, P.W.16 received the call in the evening at 7.30 P.M. Without picking up the said call, he informed S.P. Rourkela, who advised him to continue the conversation. After a short while Roshan Ali gave him a ring and then P.W.16 continued talking for 15 to 20 minutes. P.W.22 as we would see later, in the cross-examination, stated that he was directed to keep a watch on the booth between 7 P.M. to 8 P.M. and he apprehended Roshan Ali and Rajan Mishra at about 7.45 P.M. So this clearly corroborates the version of P.W.16. P.W.32 as we could see later also corroborates the version of P.W.16 as he stated that he received a phone call from DCP at about 7.40 P.M. on 9.2.2004 that culprits were contacting Rourkela for ransom from telephone booth in Munjer Chhak and accordingly, he sent subordinate officers P.Ws.22 & 31 to Munjer Chowk and by the time he himself reached the Chowk, one of the culprits had already been apprehended. In such background, evidence of P.W.16 cannot be ignored only because he was said to have been abducted earlier by some appellants. It is interesting to note that the defence never gave suggestion of enmity to P.W.16 as fairly admitted by Mr. Devasish Panda, learned counsel for one of the appellants. Police probably did not examine him on 28.1.2004 and 9.2.2004 as that would have given message to the culprits and they might have stopped ringing P.W.16. Even by 9.2.2004 other accused were at large. Atul Pandey was arrested only on 31.5.2004.

Though the conduct of Roshan Ali in contacting P.W.16 to know about financial status of P.W.8 is little strange but the same cannot be totally ignored in this age of rising of dare-devil crimes and abduction. With regard to publication of photographs in newspaper as indicated earlier much importance cannot be attached to it as date of publication of such newspaper has not come out in the evidence. For belated examination of P.W.16 his evidence cannot be ignored in view of the law laid down by the Hon'ble Supreme Court in **AIR 2002 SC 3164 (Bodhraj @ Bodha and others v. State of Jammu & Kashmir).** Further, P.W.33 as we would see later, in his evidence has made it clear that P.W.16 could not be examined earlier as he was not available. In any case, we should not forget that present one is not a case of circumstantial evidence. As indicated earlier, the core prosecution story, as described by the eye-witnesses, i.e., P.Ws.2,7 & 8, remain undemolished relating to abduction, illegal confinement with common intention.

P.W.17 is the A.S.I. of police of Shankargarh Police Station who rescued P.Ws.7 and 8 from the farm house of appellant-Virendra Jaiswal and it was he who arrested appellant-Virendra Jaiswal and also lodged plain paper F.I.R. vide Ext. 36. In his examination-in-chief, he stated that he knew appellant-Virendra Jaiswal and identified him in court. He also stated that he knew co-accused Abdul Karim, who was not present in Court. He stated that on 9.2.4004 he was working as A.S.I. of police having been attached to Sankaragada P.S. and in the absence of the O.I.C. he was in charge of the police station. On 9.2.4004 at about 9.00 P.M. in night while he along with other police staff were performing anti-naxal patrol duty, he got reliable information that appellant-Virendra Jaiswal had kept two persons confined in his farm house with an ulterior motive. On receipt of this information, he along with his staff came near the farm house of appellant-Virendra Jaiswal and guarded that farm house. He requested A.S.I. Sapan Choudhury to depute some police staff near to that farm house. After some time some police personnel of Balarampur P.S. came in a jeep near the farm house. Thereafter, he called some persons of that locality to come and remain physically present there. Five persons of that locality came there and accordingly he apprised them of the reason of search to be conducted in the farm house and accordingly he explained the matter to them. Thereafter, he prepared a Panchanama to that effect, which was marked as Ext.35. The door of the farm house was closed from inside. One constable Tikeswar knocked at the door and thereafter Virendra Jaiswal opened the door. Three other persons were also in that house besides Virendra Jiswal. They gave out their names as Abdul Karim @ Pandit, Swarmal Godadia (P.W.8) and Fransis Minz (P.W.7). Thus, P.W.7 and P.W.8 were rescued from the house. P.W.8 on being asked narrated that while he was coming in his Maruti Zen from Rajgangpur to Sundergarh on 24.1.2004 afternoon, on his way about 2 K.Ms before Sundergarh Town, he had a brief halt. As he came out from the Maruti Zen for urination and while he was urinating, by the side of the road, seven to eight miscreants came in a Bolero and forcibly abducted him and his driver (P.W.7) by taking them inside their Bolero and both of them were confined in that farm house. P.W.8 further gave out that he was abducted by the miscreants, who demanded ransom. On the basis of the information he received from P.W.8, he drew up plain paper F.I.R. then and there. After scribing the same, he sent it through a constable to the police station for its registration, which was marked as Ext.36. Head constable, Muralidhar Tiwari drew up formal F.I.R. which was marked as Ext.36/2. After rescue of P.W.7 and P.W.8, he started taking search of culprits, Virendra Jaiswal and Abdul Kayum @ Pandit. The search resulted in the recovery of one country made revolver (M.O.IV) with six cartridges from

Abdul Kayum @ Pandit so also 15 numbers of aluminium number plates containing the writings Mahendra and Mahendra and the letters from A to Z contained in one plastic container in seal like form and digit number "0" to "9" contained in another plastic container and a cash of Rs.1500/-. All those articles including cash were seized by him from culprit-Abdul Kaiyum @ Pandit as per seizure list vide Ext. 37. The aluminium number plates contained in plastic container was marked as M.O.-IX and the metallic letters from A to Z contained in a plastic container was marked as M.O.-X and the metallic digits from "0" to "9" container in a plastic container was marked as M.O.-XI. Besides one 303 Bore country made pistol loaded with one cartridge (M.O.V), one charger clip containing four live cartridges and one Nokia made hand set mobile phone (M.O.-VIII) and cash of Rs.1500/- were recovered from the possession of appellant-Virendrar Jaiswal and all these articles including the cash were seized as per seizure list marked as Ext. 38. Although these 11 cartridges were seized under two separate seizure lists, all these cartridges consisting 11 numbers were marked as M.O. VI. He also prepared spot map, which was marked as Ext. 39 and arrested both culprits Virendra Jaiswal and Abdul Kaiyum @ Pandit then and there at the spot and prepared the arrest memo, which were marked as Ext.40. Thereafter, both the culprits along with victims were brought to Shankaragada P.S. On 11.2.2004 both culprits Abdul Kaiyum @ Pandit and Virendra Jaiswal were forwarded before the J.M.F.C., Ambikapur in P.S. Case No.4 of 2004 under Sections 364A/34, I.P.C. On the point of jurisdiction, all connecting records of the case registered were transferred to the police of Sadar P.S. Sundergarh. The police of Sadar P.S. Sundergarh examined him in connection with this case twice, i.e. on 17.2.2004 and 25.2.2004.

In the cross-examination at the behest of Roshan Ali (appellant), Atul Pandey, Rajan Mishra (appellant), Md. Sidique (appellant), late Rajendra Prasad and Pradeep Srivastava, P.W.17 stated that he had not given any information to the police of Sundergarh P.S. after apprehending both the culprits (Virendra Jaiswal and Abdul Kaiyum) along with the victims. He further stated that he could not say how the police of Sundergarh Sadar P.S. became aware of such rescue of the victims from the farm house. Both these victims P.W.7 and P.W.8 were taken by the police of Sundergarh Sadar P.S. from Shankaragada P.S. The recovery of pistol from the possession of appellant-Virendra Jaiswal was not mentioned in the F.I.R. because the seizure of the same was made after scribing the F.I.R. He also stated that he had also recorded the statement of P.W.7 and P.W.8. He denied a suggestion that he had not produced the seized property before J.M.F.C., Ambikapur. The seized properties were kept in a malkhana in the police station for a period of one and half months after which all those properties were sent to the police of Sadar P.S. Sundergarh through constable No.65 Marianus Khalko. To a question put with regard to raiding the farm house, in the cross-examination P.W.17 stated that getting the information they came near the farm house and surrounded the farm house from all sides. Thereafter, he talked to the police of Balarampur P.S. over V.H. phone to depute some police staff. They waited for two to three hours after which the police personnel of Balarmpur reached there near the farm house. During this time no inmates from that farm house came out of that house. Since it was a naxal prone area and forest area, it was not possible to get search warrant within a very short span time. However, he stated that he had also asked the Shankaragada P.S. over V.H.F. to take steps for obtaining search warrant if at all it was possible. Although the police of Shankaragada P.S. made efforts to get search warrant but due to non-availability of the Magistrate, the same could not be obtained. There was no shout inside the farm house when they surrounded that

house. There was no overt-act, any firing or anything in resentment to their action. They searched both rooms of the farm house, which consisted of two living rooms, one toilet and one kitchen with adjoining verandha. P.W.17 further stated that he got credible information at village Haratoli pada at 10 P.M. in the night. No incriminating document relating to the demand of ransom was found in that house on search or from the possession of any of the culprits. Appellant-Virendra Jaiswal being a man of that locality was known to him two years prior to the date of raid of that farm house. He had seen the house of appellant-Virendra Jaiswal, but he had not entered inside his house much prior to the raid. From the villagers he could know about the house of appellant-Virendra Jaiswal. From villagers, he ascertained that farm house belonged to appellant-Virendra Jaiswal prior to raid. One Samaru Manasat had shown the farm house stating that it belonged to appellant-Virendra Jaiswal prior to raid. He also stated that he knew the family members of appellant-Virendra Jaiswal much prior to the date of raid. Appellant-Virenddra Jaiswal was having two brothers. He knew appellant-Virendra Jaiswal was married. He could not tell about his children. Appellant-Virendra Jaiswal, his two brothers and parents used to live in separate houses. The family members of appellant-Virndra Jaiswal did not stay and live in that farm house. He denied a suggestion that the farm house in question did not belong to appellant-Virendra Jaiswal. He further stated that before police of Sundergarh, he stated that 7 to 8 culprits had abducted P.W.7 and P.W.8; while in F.I.R. he has indicated that about 8 to 9 culprits abducted P.W.8. The discrepancy in his statement before Sundergarh Police and in his report was due to his lapse of memory. In the F.I.R. he had mentioned that P.W.8 was abducted for FHIROTI (ransom) but in the statement made before Sundergarh Police he stated that P.W.8 was abducted for huge amount. He also stated before I.O. that one revolver, one pistol etc. were seized from the culprits. He stated that he had not disclosed before I.O. that before search he had called persons of the locality to come to the place of search and to remain physically present there and that he apprised them about the reason of their search. He denied a suggestion that he did not state before I.O. that constable knocked at the door of the farm house and that appellant-Virendra Jaiswal opened the door and three other persons were there inside that house and that P.W.8 told him that while going towards Sundergarh he was abducted on the road about 2 K.Ms. distance before Sundergarh. P.W.17 denied a suggestion that the farm house did not belong to appellant Virendra Jaiswal and that appellant-Virendra Jaiswal was not in that house at the time of raid and that nothing had been seized from appellant- Virendrar Jaiswal and he was deposing falsehood.

In the cross-examination conducted on behalf of appellant-Virendra Jaiswal, P.W.17 stated that he had not properly sealed the seized properties. The J.M.F.C., Ambikapur had not put his initial on those papers, such as forwarding report, F.I.R., seizure list etc. He also stated that he had not given his personal search to the culprits and the witnesses. He denied a suggestion that all those papers were manufactured by him and that no forwarding report or other connecting papers were produced before the Magistrate, Ambikapur and nothing was seized from the possession of appellant-Virendra Jaiswal and that he was deposing falsehood.

In the cross-examination on recall on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajenda Prasad, P.W.17 stated that he recorded the statements of P.W.7 and P.W.8 on 10.2.2004. P.W.7 stated before him that eight to nine culprits being armed with revolver abducted P.W.8 and he was also abducted and sat in their vehicle. The eyes of P.W.8 were covered with cloth and one of the culprits took away the key of his vehicle,

remained at the spot and they were telling the names of Abdul Kayium and appellant-Virendra Jaiswal. P.W.7 did not state before him that he would not be able to identify the culprits if shown to him. In fact he did not put that question to him. P.W.7 did not state before him about their physical appearance. P.W.8 stated before him that nine persons were present, all of them were armed with revolver. They tied cloth on his face, eyes and in that condition they pushed him inside the vehicle. They dealt him slaps and fist blows and took away Rs.45,000/- from him. P.W.8 did not state before him that the culprits took away a Titan wrist watch. P.W.8 stated before him that one of the culprits told over mobile phone addressing his boss that they had already picked up his father and what would be about his son. P.W.8 also stated before him that the culprits left his Maruti car at the spot, they took him to a house in the Bolero, opened the cloth from his face and eyes, assaulted him. Two of the culprits, namely, Virendra Jaiswal and Tipu @ Abdul Kayum were watching him. P.W. 8 did not state before him that he would be able to identify the culprits and in fact P.W.17 never asked P.W.8 about that. In course of his re-examination on recall, P.W.17 stated that P.W.7 and P.W.8 were not present when he reduced their statements into writing. He recorded their statements after about four to five hours of questioning them. In the cross-examination P.W.17 stated that he recorded the statements of P.Ws.7 and 8 relying on the statements of the said witnesses, which he remembered. This makes it clear that the facts stated in Paras-20 and 21 of the cross-examination by P.W.17 are based on his memory and not on what P.W.7 and P.W.8 told P.W.17 exactly when they were being examined. This will explain away the contradictions between the evidence of P.W.7 and P.W.8 on one side and P.W.17 on the other side. In any case assuming that the culprits covered the face of P.W.8 there is nothing to show that situation was such that P.W.8 could not have seen the culprits prior to such putting of cloth over his eyes. Further again before P.W.17, P.W.8 made it clear that the culprits opened the cloth from his eyes after they took him to the house. Thus, he could have seen them all at that point. P.W.17 has also made a very important statement at para 3 of his examination-in chief, which remains un-demolished that P.W.8 stated before him that he was abducted by miscreants for extracting a huge amount.

10. An analysis of evidence of P.W.17 would show that on 9.2.2004 at around 9.00 P.M. he got reliable information that Virendra Jaiswal had kept two persons confined in his farm house with ulterior motive. He accordingly rescued P.W.7 and P.W.8 from that farm house and arrested Virendra Jiswal and Abdul Kayum @ Pandit @ Tipu. Thus, he corroborates the version of P.W.7 and PW.8 relating to their illegal confinement in the farm house of convict – appellant – Virendra Jaiswal. The evidence of P.Ws.2,7,8 and 17 prove common intention of appellants along with others in abducting P.W.7 and P.W.8 and subjecting them to illegal confinement for ransom. The minor contradictions in the version of P.W.17and P.W.33 with regard to knocking of door at farm house prior to rescue, no way affects the quality of evidence of P.W.17.

P.W.18 is a co-villager of appellant-Virendra Jaiswal, who is a witness to the Panchanama after the raid and seizure of fire arms and other materials. In his examination-in-chief P.W.18 stated that appellant Virendra Jaiswal was his co-villager. About 2 years back, in the month of Magha one day in the early morning at about 4 A.M. while he had gone for toilet, the police called him near the house of appellant-Virendra Jaiswal where they prepared a Panchanama in his presence and he signed the same. His signature was marked as Ext. 35/2. The police then entered inside that house and caught hold of appellant-Virendra along with his associate. Further on search, two persons one- Sethji and his driver were

found inside the house. He could know the name of that Sethji to be Sawarmal Godadia as told by police. One revolver and one pistol along with cartridges and cash of Rs.1500/- were seized from appellant- Virendra and his associates and those articles were seized under two separate seizure lists prepared by the police in his presence. One Daroga Police, namely, Chaturvedy of Shankaragada P.S. prepared the seizure lists.

In the cross-examination on behalf of Roshan Ali (appellant), Atul Pandey, Rajan Mishra (appellants), Md. Sidique (appellant), late-Rajendra Prasad and Pradeep Srivastava, P.W.18 stated that on that date he saw the revolver and pistol for the first time in his life. One "Banduka" was seized from the possession of appellant-Virenddra Jaiswal and the other "Banduka" was seized from the possession of his associate. Besides a cash of Rs.1500/- was also seized from each of them and no other things were seized. Cash only consisted of 100 denominations notes. Cash of Rs.1500/- was recovered from the pant pocket of appellant-Virendra Jaiswal. He did not recollect from which side pocket of the pant of appellant-Virendra Jaiswal, the said cash was recovered. He could not give the name of the associate of appellant-Virendra Jaiswal. Three other persons were there in that house besides appellant-Virendra Jaiswal. Appellant-Virendra Jaiswal and his associate were together in one room and the rest two persons were in the other room. The seizure lists were signed by him near the house of appellant-Virendra Jaiswal. The seized properties were not sealed by the police in his presence. The police had not obtained his signature on the seized articles. No other document was prepared by the police save and except these three papers in which he signed at the spot. He denied a suggestion that he was deposing falsehood being tortured by the police.

Thus P.W.18 had corroborated the version of P.W.17 relating to search, rescue of victim and seizure of revolver and pistol and other things.

P.W.19 was the attendant of S.T.D. booth from where the appellants, Rajan Mishra and Roshan Ali were arrested. In his examination-in-chief P.W.19 stated that the booth belonged to one Dharemendra Joshi at Munjer Chowk. The number of telephone installed in that booth was 0712-2563746. While P.W.19 was performing his duty in the S.T.D. booth, on 9.2.2004 at about 7 P.M. two persons came to his booth to telephone. Out of these two persons while one was standing out side the other one telephoning from inside the booth and after finishing his talk over phone while he was leaving the booth, some police staff about five in number came to the booth and caught hold of these two persons. P.W.19 came to know from these two persons that they had come to the Booth to telephone in connection with the abduction of a person. He came to know this when the police interrogated them in his presence. The police collected the telephone bill from the booth. These two persons revealed themselves to be Rajan Mishra and Roshan Ali to the police in his presence. The police verified the telephone number of the STD booth and checked the same with the bill. About two to three months thereafter the Orissa Police (now Odisha Police) visited the telephone booth and seized the concerned telephone bearing number 0712-2563746 from the booth and prepared the seizure list vide Ext.43. On the same day after seizure, the seized telephone was released by the Orissa Police in the zimma as per zimanama marked as Ext.44. He was also examined by the Orissa Police in connection with this case and his statement was recorded.

In the cross-examination on behalf of Rajan Mishra (appellant), Atul Pandey and Shamim Sidique (appellant), P.W.19 stated that he used to perform his duty in that booth right from 8.30 am in the morning till 8.40 p.m. The aforesaid two persons had come to booth twice to telephone and they were caught by the police while they came for the third time. The police took away the telephone bill from the possession of that person who had come to telephone. P.W.19 denied the suggestion that the aforesaid two persons had never come to the booth and they had not telephoned from his booth and that he was deposing falsehood at the instance of the police.

In the cross-examination on behalf of Roshal Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.19 stated that he could not give the name of the police station of his native place and tell specifically the total number of customers who had come to the booth to telephone on the said date. A great number of persons had gathered near the booth at the time of apprehension of these two persons by the police. P.W.19 could not say if that incident came up in the newspaper or not. He did not recollect whether the local police examined him or not in connection with the case. He had been examined by the Orissa Police about two to three months after apprehension of these two persons. The police did not prepare any seizure list. Though these two person had visited the booth twice prior to their apprehension, but P.W.19 did not know their names and addresses. He was not asked by the police to identify these two persons in any T.I. Parade. He denied the suggestion that no person by name Rajan Mishra was apprehended by the police from the telephone booth on that date. He said name of the other person was Roshan. But he could not tell his surname. He further denied the suggestion that he did not state before the I.O. that two persons had come to his S.T.D. Booth to telephone. He denied the suggestion that he was deposing falsehood at the instance of the police and that no such persons were apprehended by the police from the booth. Thus P.W.19 corroborates the version relating to arrest of Roshan Ali and Rajan Mishra and proved seizures.

P.W.20 was the Receptionist of Hotel Kamal at Sitawardi. In his examination-in-chief, P.W.20 stated that on 9.2.2004 while he was working as Receptionist in the Hotel Kamal at Sitawardi, at about 7 to 8 P.M., the police of Sitawardi police station came with two guests. These two guests were lodged in his hotel on 8.2.2004 in the morning. These two guests were Ramesh Agarwal and Dinesh Garg. P.W.20 identified these two persons in court as appellants Rajan Mishra and Roshan Ali. However, in the Hotel register they had signed as Ramesh Agarwal and Dinesh Garg. P.W.20 was told by the police that these two persons had abducted a person for ransom and have been apprehended from a S.T.D. booth at Munjer Chowk. The police verified the entry register maintained in the hotel and made his initial on the relevant entries and thereafter left the hotel along with these two persons. Two to four months thereafter some police personnel of Orissa came to the Hotel Kamal and seized the guest entry register in original as per seizure list under Ext.45. After seizure, the seized register was released in the zima of P.W.20 as per zimanama marked as Ext.46.

In the cross-examination on behalf of Rajan Mishra (appellant), Atul Pandey and Shamim Sidique (appellants), P.W.20 stated that those two persons who came with the police to the Hotel were not covered with any cloth on their faces. Those two persons in the relevant guest entry register had signed with fake names. The police of Sitawari Police Station had only put their initials on the relevant entry of guest registers. The signatures put by these persons in the register were not clearly visible in the Xerox copy. The police of Sitawari

Police Station have only verbally told about the implication of these two persons in the abduction case. P.W.20 had seen those two persons in the Hotel. P.W.20 denied the suggestion that these two persons whom he identified in the court were never lodged in Hotel Kamal and some other persons might have been lodged.

In the cross-examination on behalf of Roshal Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.20 stated that he was getting his salary from the Hotel Kamal for rendering his service as Receptionist. He did not have any document with him that he was working as a Receptionist in the said Hotel. However, he denied the suggestion that he had never worked as a Receptionist at any point of time. The guest entry of the Hotel was not seized by the Sitawardi Police and it was seized by the Orissa Police. P.W.20 denied the suggestion that he had made no endorsement on the relevant entries of the register after the same was signed by these two persons, namely, Roshan Ali and Rajan Mishra. Those two persons were not known to P.W.20. He denied the suggestion that he deposed falsehood at the instance of the police and that the seizure list and guest entry register were all prepared and planted for the purpose of this case. He further denied the suggestion that these two persons were never lodged in the Hotel Kamal on 8.2.2004. Thus P.W.20 spoke about how Roshan Ali and Rajan Mishra stayed at the Hotel in Nagpur under assumed names and is a witness to seizure of documents of Hotel.

P.W.21 was the Police Constable attached to Sitawardi Police Station. In his examination-in-chief, P.W.21 stated that on 3.6.2004, he was working as a Police Constable having attached to Sitawardi Police Station. On that day he had accompanied the Orissa Police to Munjer Chowk near a Kirana shop, having a S.T.D. P.C.O. booth where the police had seized one telephone set bearing No.2563746 from the telephone booth.There the police prepared the seizure list vide Ext.43. On the said date, P.W.21 had accompanied the Orissa Police near to Kamal Hotel. The Orissa Police seized the guest entry register of that Hotel in his presence as per Ext.45. Rajan Mishra (appellant), Atul Pandey, Shamim Sidique (appellant), Pradeep Srivastava and late-Rajendra Prasad had declined to cross-examine P.W.21.

In the cross-examination on behalf of Santosh Jha, P.W.21 stated that he was verbally directed by the Inspector of Police of Sitawardi Police Station to accompany with the Orissa Police and to assist them in the investigation. He stated about the telephone number seized by the Orissa Police, but he could not give the maker's name and number of the telephone set. He only signed the seizure list with regard to seizure of the telephone set in the telephone booth. He could not tell about the number of the registers seized by the police from Hotel Kamal. The appellant Virendra Jaiswal refused to cross-examine P.W.21. P.W.21 was cross-examined on recall by Rajan Mishra (appellant), Atul Pandey, Shamim Sidique (appellant) wherein P.W.21 stated that he could not tell about the special mark of identification on the seized telephone. There was no endorsement left on the register by the Sitawardi Police. It took about two hours to complete the seizure of the telephone set as well as Guest entry register from Kamal Hote. P.W.21 denied the suggestion that there was no such seizure, either of the telephone set from the S.T.D. booth or the guest entry register from Kamal Hotel. In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.21 stated that after seizure the seized telephone set was released in favour of the S.T.D. booth owner as per zimanama but he had not signed in that zimanama. Thus P.W.21 corroborated the version of P.W.20 and is a witness to seizure of S.T.D. Booth telephone and documents of Kamal Hotel.

P.W.22 is the A.S.I. of Police of Sitawardi Police Station. In his examination-in-chief, P.W.22 stated that on 9.2.2004 as per direction of the Inspector of Police of Sitawardi Police Station (P.W.32) he proceeded to Munje Chouk near to a S.T.D. Telephone booth with Telephone number 2563746. This booth was installed in a part of Kirana Shop under the name and style "NEW MDHUR KIRANA STORE". P.W.22 along with his staff proceeded to that place and kept a watchful eye on the booth by standing outside at a little distance. He was specifically directed by the Police Inspector to catch hold of that person, who was making telephone call in the said booth. Immediately he caught hold of the person who was just leaving the booth after talking over telephone in the said booth. Another person was standing outside waiting for the person to whom P.W.22 caught hold. On being asked, the former told him that he was waiting for the other person. The person who was caught by him while coming out of the telephone booth, on being asked revealed his name as Roshan Ali and the person standing outside and waiting for the said person on being asked revealed his name as Rajan Mishra. These two appellants were identified by P.W.22 in the court. P.W.22 collected the telephone bill from the appellant-Roshan Ali. On being asked, the appellant Roshan Ali told P.W.22 that he had telephoned to Rourkela that he had abducted a SETH and in that connection he was talking over telephone for ransom. He further gave out that he had kept that SETH confined in a house at Haratoli of Sitawardi. After getting such information, brought both to Sitawardi Police Station and handed over to the Police Inspector. On the basis of information received from the appellants Roshan Ali and Rajan Mishra, P.W.22 along with the Police Inspector and other staff apprehended accused Pradeep Srivastava as he was implicated by these two appellants. On 15.2.2006, cross-examination of P.W.22 was declined by Rajan Mishra(appellant), Atul Pandey, Shamim Sidique(appellant), Roshan Ali (appellant), late Rajendra Prasad and Santosh Jha. However, P.W.22 was cross-examined on recall by Rajan Mishra (appellant), Shamim Sidique (appellant) and Atul Pandey on 7.8.2006. In the said cross-examination, P.W.22 stated that as per the instruction of the Police Inspector of Sitawardi Police Station (P.W.32) he kept watch over the S.T.D. booth from where the appellants Rajan Mishra and Roshan Ali were apprehended. Such direction was given in between 7 P.M. to 8 P.M. The distance between the S.T.D. booth and the police station would be less than half kilometre. The appellants Roshan Ali and Rajan Mishra were caught outside the booth, while they were just coming out of the booth after making payment of the telephone bill. The OIC did not give any hints about the feature and appearance of those persons. They did not call any outsider to remain present with them. The appellants Roshan Ali and Rajan Mishra were apprehended on that date at about 7.45 P.M. A telephone bill and some telephone numbers were obtained from them. The appellants were taken near to a Hotel where they were staying. P.W.22 denied the suggestion that the appellants were not apprehended by him from near the S.T.D. booth and that the appellant-Rajan Mishra was apprehended by him in Gandhibag from the house of Dillip Godwale. He denied the suggestion that the appellants have been falsely implicated in this case.

In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.22 stated that he did not have any document with him to produce in the court to show that he was deputed by the OIC to guard the S.T.D. booth on the relevant date. Both the appellants were not known to him prior to their apprehension. He was examined by the Sundergarh Police about four months after the date of apprehension of the appellants. He came to know about the names of these two appellants at the police station. P.W.22 further stated that he had not heard the telephonic conversation made by the accused

person in the telephone booth. But during interrogation at the police station, the appellants gave out that they had abducted two persons. P.W.22 heard this while the appellants disclosed before the IIC at the police station. However, P.W.33 in the cross-examination stated that though he had examined P.W.22, however P.W.22 did not disclose before him that the culprits abducted P.W.7 and P.W.8 for ransom.

An analysis of evidence of P.W.22 shows that it was he who apprehended Roshan Ali and Rajan Mishra at 7.45 P.M. from near telephone booth. This to a great extent corroborates the version of P.W.16, who stated that he was receiving call of Roshan Ali from Nagpur around 7.00 P.M. onwards on the same date. Keeping in mind the broad features of the case particularly the version of eye-witnesses P.Ws.2,7 and 8, the contradiction between version of P.Ws.22 and 33 appears to be minor in nature.

P.W.23 was working as Station Officer, Civil Line Police Station. The S.P. Bilaspur on receipt of a telephonic message from the S.P., Sundergarh, directed him to conduct raid of the house of the accused Santosh Jha, who was residing near the Wire House road in the rented house of Jatin Mishra. On 10.2.2004 during evening hours, he proceeded to that place being accompanied by some police staff. On reaching there, P.W.23 saw one Bolero and Mahendra jeep found parked inside the campus boundary of that house. The registration number of that Bolero was MP-21-D-2516 (metallic colour). Santosh Jha was then very much present. P.W.23 verified the documents of that Bolero and Mahendra Jeep. Thereafter the Bolero and Jeep were brought to the police station.

In the cross-examination at the instance of Santosh Jha, P.W.23 stated that Orissa Police had not seized document from him in support of the proof of the fact that he was on duty at the police station on the relevant date. The Orissa Police although asked him some questions but did not record his statement. P.W.23 further stated that he seized the Mahendra jeep suspecting it to be a stolen vehicle as it had no valid document. Though P.W.23 had not effected any entry in the station diary book of Civil Line Police Station but there was entry in the book regarding the arrival of the Orissa Police and taking the Bolero Jeep from the Civil Line police station. P.W.23 further stated that he had entered this fact in the Roja Nancha (General Diary). He could not say whether the Orissa Police had seized the relevant documents relating to the recovery of the Bolero, etc. P.W.23 denied the suggestion that no such Bolero was recovered and brought to the police station from wire house line and that no such vehicle was seized by the police from the Civil Line Police Station.

In the cross-examination on behalf of Roshan Ali, Pradeep Srivastava and late-Rajendra Prasad, P.W.23 stated that the Orissa Police was not with him when he conducted raid and made recovery of the Bolero. Accused Santosh Jha was staying in the rented house of Jatin Mishra. P.W.23 had not seized any document in support of the tenancy of the accused Santosh Jha.

In the cross-examination on behalf of the accused Rajan Mishra(appellant), Atul Pandey and Shamim Sidique(appellants), P.W.23 stated that he had not mentioned in the General Diary that the S.P., Bilaspur got telephonic message from the S.P., Sundergarh in connection with the case in which he was directed to conduct raid. He had not obtained any search warrant before he proceeded there. Two outside witnesses were present with him along with other police staff. He denied the suggestion that he deposed falsehood.

P.W.24 was working as a water pipe fitter. In his examination-in-chief, P.W.24 stated that he knew P.W.23, who was working as Station Officer of Civil Line Police Station.

About two years back, he had gone to the Civil Line Police Station for getting his payment for fitting pipes in the Police Station. During his stay there, P.W.23 came to the Police Station with one Bolero vehicle.

In the cross-examination on behalf of Santosh Jha (since acquitted), P.W.24 stated that Thakur Babu (P.W.23) told him that he had seized that Bolero from a place under Civil Line Police Station but he had not told him in connection with which case and from where he brought that vehicle to the police station. P.W.24 was not cross-examined by the rest of the culprits.

P.W.25 is a witness to the arrest of Rajan Mishra and Roshan Ali. In his examination-in-chief, P.W.25 stated that about two years back, the police of Sitawardi Police Station apprehended two persons from near a S.T.D. Booth of Munje Chowk of MADHUR KIRANA SHOP. At the time of apprehension near the booth, they had given out their name as Ramesh Agarawal and Dinesh Garg. They had come to the booth to telephone and while leaving the booth, they were apprehended. The police seized the telephone bill along with some papers from that booth. The above noted two persons later disclosed their names as Rajan Mishra and Roshan Ali. The police had seized some documents and register of Kamal Hotel. In the register of Hotel Kamal, the appellants were named as Ramesh Agarwal and Dinesh Garg. They also gave out the names of some persons. Pradeep Srivastava was one of them as P.W.25 recollected. P.W.25 further stated that he was examined by the police and his statement was recorded. He came to know that one SETH of Sundergarh was abducted by the two miscreants.

In the cross-examination on behalf of Roshan Ali (appellant), Pradip Srivastava and Rjendra Prasad, P.W.25 stated that when both the appellants Rajan Mishra and Roshan Ali gave informations to the police, he heard them. P.W.25 further stated that he knew P.W.22. He further stated that he had signed three documents, one at Munje Chowk, second one was at Kamal Hotel and the third one at the Police Station. The Orissa Police after four months interrogated him but they had not recorded his statement. He narrated about the incident which he had seen in the court for the first time. P.W.25 denied the suggestion that he had no knowledge regarding the apprehension of these persons by the Sitawardi Police Station.

In the further cross-examination on behalf of Rajan Mishra (appellant) and Shamim Sidique(appellant), P.W.25 stated that it was 8 P.M. when the police apprehended these two persons. He was standing just in fornt of the S.T.D. booth by the side of the road. P.W.22 was in civil dress. P.W.25 denied the suggestion that he was not present there and he had not seen such apprehension of the accused persons by the police and that he deposed falsehood at the instance of P.W.22. Further he denied the suggestion that accused Rajan Mishra was apprehended from Gandhi Bag from the residence of Dillp Godbole.

A perusal of the evidence of P.W.25 shows that he is the witness to the arrest of Rajan Mishra and Roshan Ali and he corroborates the version of P.W.22 to a large extent.

P.W.26 was the S.I. of Police attached to Sadar Police Station, Sundergarh. In his examination-in-chief, he stated that on 15.2.2004 he received a requisition from the IIC, Sadar Police Station, Sundergarh to proceed to Ambikapur to submit remand report in respect of the accused persons, namely, Virendra Jaiswal and Abdul Kayum, who were remanded to judicial custody by the J.M.F.C., Ambikapur in Shankargarh Police Station Case No.4/2004. He further visited the spot at Hartoli where the victim (P.Ws.7 and 8) were confined. On 17.2.2004, he proceeded to Shankargarh Police Station and examined P.W.17

and recorded his statement. Later he proceeded to the spot along with P.W.17 and prepared spot map, which was marked as Ext.48. The spot is the farm house of the appellant Virendra Jaiswal. P.W.26 took photographs of the farm house and spot. There were altogether nine numbers of photographs which were marked as Exts.49 to 49/8 series. Thereafter, he returned to the headquarters. On 28.5.2004, on the basis of request made by the IIC, Sadar Police Station, again P.W.26 proceeded to Bara Police Station in Allahabad with A.P.R. force to arrest the accused Atul Pandey. On 30.5.2004, he made a requisition to the Station Officer of Bara Police Station for apprehension of Atul Pandey, who was involved in Bara P.S. Case No.172 of 1997 under Section 307, IPC. Ultimately, P.W.26 arrested Atul Pandey on 31.5.2004. Thereafter, Atul Pandey was brought to Sundergarh along with the escort party and he produced Atul Pandey along with all documents before the IIC, Sadar Police Station, Sundergarh. On 8.6.2004, the IIC seized one sealed envelop containing two audio cassettes on production by the A.S.I. Balabhadra Pradhan and prepared seizure list vide Ext.32.

In the cross-examination by Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.26 stated that the articles seized under Ext.32 were in sealed condition and he was very much present when the envelopes containing the audio cassettes were sealed. After recording of the voice in presence of the learned S.D.J.M., the A.S.I. collected it. P.W.26 further stated that at the time of voice recording of the appellant Roshan Ali and Rajan Mishra in presence of the learned S.D.J.M., Sundergarh, he was not present there. He came to know from P.W.33 and Sri Pradhan that the voice of these two appellants were recorded in presence of the learned S.D.J.M. He did not have any direct personal knowledge regarding such recording. He further stated that he received written requests from the IIC, Sadar Police Station in both the occasions to go to Shankargarh, Ambikapur for investigation. But these written requests were not readily available in the record. The said facts were entered in the Station Diary. He made a written prayer before the learned J.M.F.C., Ambikapur to take both the appellants on remand, but the office copy of the report since submitted to the IIC was not with him at present in order to produce the same in Court. P.W.26 further stated that he had not recorded the statement of any of the villagers at the time of his spot visit since no such villagers were available. He was accompanied to the spot by some of the police staff of Shankargarh Police Station, namely, P.W.17 and some others. Further P.W.26 stated that P.W.17 identified the spot to him stating that the same belonged to appellant Virendra Jaiswal. He denied the suggestion that he had never visited Ambikapur or Shankargarh and that no such photographs were taken by him in respect of the farm house and that being a subordinate officer working under P.W.33, he deposed falsehood at the instance of P.W.33.

In the cross-examination on behalf of Virendra Jaiswal (appellant), P.W.26 stated that he examined P.W.17 and it is a fact that P.W.17 had not specifically stated before him that one constable knocked the door of the farm house and that accused Virendra Jaiswal opened the door and three other persons were there inside that farm house. But he had stated before him that two persons were inside the farm house and were guarded by two miscreants.

In the cross-examination on behalf of Atul Pandey, Rajan Mishra (appellant) and Shamim Sidique (appellant), P.W.26 stated that to some extent he could understand Hindi. He could not answer to a question asked him in Hindi language but he could answer in English. He further stated that he had not enquired about the lodging of any F.I.R. by the police officer of Shankargarh Police Station relating to this case. He was not the full-fledged

I.O. of this case. Besides P.W.17, he had not examined any other witness in connection with the case. Scope of his investigation was limited as it was as per direction of the I.O. in his requisition. He reiterated that he was not present when the voice of Rajan Mishra and Roshan Ali was recorded. He arrested Atul Pandey at 1.30 P.M. in the night on 31.5.2004. He denied the suggestion that local police had arrested Atul Pandey on 28.5.2004 and that he did not arrest Atul Pandey in that night and he has been falsely implicated in this case by his enemy Rajesh Garg.

P.W.27 was working as A.S.I. of Police attached to Sadar Police Station, Sundergarh. In his examination-in-chief he stated that he knew P.W.26 and on the basis of requisition issued by the IIC, Sadar Police Station, he along with P.W.26 and APR force proceeded to arrest Atul Pandey. P.W.26 issued request to the Station Officer to assist them for arresting Atul Pandey. On that date, P.W.27 along with others in the company of the police staff of Bara Police Station proceeded to Bhundi and conducted raid on the house of the accused Atul Pandey and apprehended Atul Pandey from his house. P.W.26 prepared the arrest memo in presence of the village headman-Dharampal Singh. The mother of Atul Pandey was very much present in the house at the time of apprehension and his mother was informed about the arrest of her son.

In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.27 stated that he did not know the accused Atul Pandey prior to his arrest. Some villagers identified the house of Atul Pandey. Atul Pandey was not produced before any Magistrate of that area. The signature of mother of Atul Pandey was also obtained in the arrest memo. He denied the suggestion that he had not given any statement before the I.O. and he deposed falsehood. Thus P.W.27 corroborated version of P.W.26.

P.W.28 was the Medical Officer, who examined P.Ws.7 & 8, appellant-Virendra Jaiswal and submitted his report. In his examination-in-chief, P.W.28 stated that while he was working as Medical Officer, on 10.2.2004, he examined P.W.7 on the requisition of Shankargarh Police. The injured complained of pain of his survical region, back portion and lower part of the back. He prepared the examination report which was marked as Ext.50.On the same date on police requisition, P.W.28 examined P.W.8 being identified by T. Yadav, Constable of Shankargarh Police Station, who complained of pain and tenderness on the left side of back lower part. He also complained pain over left side of the head and back portion of the head. P.W.28 prepared the examination report of P.W.8 which was marked as Ext.51. P.W.28 further stated that on 11.2.2004 on the police requisition, he examined Virendra Jaiswal, who was duly identified by T.S. Yadav and found simple injuries which could be caused by hard and blunt weapon. On the same date, P.W.28 examined Abdul Kayum (since absconding) and according to Mr. Patnaik, learned Additional Government Advocate Abdul Qayum has not faced trial.

In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.28 stated that he was a Government Servant and due to non-availablity of the forms the reports were prepared in plain papers, but on the basis of the requisition sent by the Police, he examined and issued injury report on the reverse side of the requisition. He had not found any external injury on the bodies of P.Ws.7 & 8. Further P.W. 28 stated that P.Ws.7 & 8 did not explain the circumstances in which they suffered pain and tenderness in their persons. P.W.28 denied the suggestion that he had never examined those

persons on police requisitions and that they were not produced before him and that the medical examination reports for those persons exhibited in this case by him were fake documents.

Above cross-examination was accepted by Atul Pandey, Rajan Mishra and Shamim Sidique.

In the cross-examination conducted on behalf of Virendra Jaiswal (appellant), P.W.28 stated that he had not mentioned the O.P.D. Register number in the medical examination reports since they were produced in his residential office and not in the Hospital. P.W.28 also made it clear that the injuries found on the person of the appellant-Virendra Jaiswal under Ext.41 could also be possible by various reasons like fall, etc. and by hard and blunt object like lathi.

Santosh Jha (since acquitted) declined to cross-examine P.W.28.

P.W.29 was the S.D.J.M., Sundergarh, who conducted the T.I. Parades inside the Sundergarh Jail in respect of Rajan Mishra (appellant), Roshan Ali (appellant), Shamim Sidique(appellant) and Atul Pandey. She recorded the voice of the appellants Roshan Ali and Rajan Mishra. In her examination-in-chief, she stated that while she was working as S.D.J.M., Sundergarh, she conducted the T.I. Parades in respect of the appellants Roshan Ali and Rajan Mishra inside the District Jail, Sundergarh on 17.2.2004, i.e., within 7 days of their arrest. In the first T.I. Parade (held at 10.45 A.M.) where identification of the appellant Rajan Mishra was taken up, Rajan Mishra alone was mixed with ten U.T.Ps and all were made to stand in a row. All those U.T.Ps. were of similar height, similar appearance, similar complexion and similar health with similar dress. The witnesses were called to that place one after another. All these witnesses were kept outside and the identification by each witness was done in absence of other identifying witness. The place of identification was not visible to the identifying witnesses. At first P.W.2 was called to identify the suspect. P.W.2 correctly identified the suspect Rajan Mishra. Thereafter the witness P.W.8 was called, who correctly identified the suspect Rajan Mishra and thereafter the witness P.W.7 on being called identified the said suspect. This T.I. Parade was conducted in presence of the Jailor and Bhadramani Naik, Superintendent of the District Jail. While identifying, P.W.2 explained before P.W.29 that he has seen the suspect at a close proximity at the spot while the suspects and others holding revolvers were dragging the victims into the Bolero jeep. The other two identifying witnesses, P.Ws.7 and 8 stated that they identified the suspect as they were abducted by him and others and were confined at Haratoli. The T.I. Parade was conducted observing all legal and procedural formalities. The T.I. Parade report was prepared after the T.I. Parade was over. This T.I. parade report was marked as Ext. 11/3 and the signature of P.W.29 was marked as Ext.11/4. The identifying witnesses P.Ws.2,7 and 8 also signed in the report in presence of the Jail staff as stated earlier and the suspect and their signatures were marked as Exhibits 11,11/1 & 11/2 respectively. The appellant Rajan Mishra also signed in the T.I. Parade report, which was marked as Ext.11/5. The signatures of Prasana Kumar Naik, Jailor and Bhadramani Sai, Superintendent of Jail were marked as Exts.11/6 and 11/7 respectively. On the same day, P.W.29 conducted the T.I. Parade in respect of the appellant Roshan Ali inside the District Jail premises after the T.I. parade of Rajan Mishra was over. The suspect Roshan Ali was mixed with ten numbers of the U.T.Ps. of the Jail having almost similar height, health, appearance, complexion and made to stand in a row before the identifying witnesses, namely P.Ws.2,7 and 8, who were called to identify

the said suspect. The appellant Roshan Ali was first identified by P.W.2, thereafter by P.W.8 and lastly by P.W.7 correctly. P.Ws.2,7 and 8 while identifying the appellant Roshan Ali explained and gave similar statements which they had made while identifying the appellant Rajan Mishra. The Jail staff as named above, were present at the place and time of this T.I. Parade.

This second separate T.I. parade report was prepared then and there, which was marked as Ext.9/3 and the signature of P.W.29 was marked as Ext.9/4. P.Ws.2,7 and 8 also signed this report one after another in the presence of P.W.29 and in the presence of the Jail staff and the suspect which were marked as Exts.9,9/1, and 9/2 respectively. The appellant Roshan Ali had also signed the T.I. Parade report which was marked as Ext.9/5 and the signatures of Prasana Kumar Naik, Jailor and Bhadramani Sai, Superintendent of Jail were marked as Exts.9/6 and 9/7 respectively.

On 21.2.2004, P.W.29 conducted the T.I. Parade of the appellant Shamim Sidique, who was arrested on 13.2.2004, in which P.Ws.2,7 & 8 were to identify the appellant Shamim Sidique. The said T.I. Parade was conducted inside the District Jail in presence of Jail staff with the observance of all legal and procedural formalities. The appellant Shamim Sidique was mixed up with 10 number of U.T.Ps. having almost similar height, appearance, complexion, dress and were all made to stand in a row. The identification by each witness was done in absence of the other witness. P.Ws.2,7 & 8 while identifying the appellant Shamim Sidique one after the other offered the explanation, which they had offered at the time of identifying the appellants, Roshan Ali and Rajan Mishra.After the T.I. Parade in respect of the appellant Shamim Sidique was over, T.I. Parade report was prepared by P.W.29 in presence of the Jail staff, the appellant Shamim Sidique and the identifying witnesses, which was marked as Ext.10/3 and the signature of P.W.29 was marked as Ext.10/4, the signatures of P.Ws.2,7 & 8 in the report were marked as Exts.10,10/1 and 10/2 respectively and the signature of the appellant Shamim Sidique was marked as Ext.10/5. The signatures of Prasanna Kumar Naik, Jailor and Bhadramani Sai in the said T.I. Parade report were marked as Exts.10/6 and 10/7 respectively. While the first T.I. Parade was conducted at 10.45 A.M., the second T.I. Parade was conducted in between 11.30 A.M. and 12.30 P.M.

On 5.6.2004, P.W.29 conducted the T.I. Parade in respect of the convict Atul Pandey (since absconding), who was identified by P.W.8. After the T.I. Parade was over, the T.I. Parade report was prepared by P.W.29 which was marked as Ext.18/1 and on the said report the convict Atul Pandey, the identifying witness P.W. 8 and Jail staff duly signed. In a similar process on 9.6.2004, Atul Pandey was identified by P.W.7. After the T.I. Parade was over, P.W.29 prepared the T.I. Parade report which was marked as Ext.16/1 and her signature was marked as Ext.16/2 and the convict Atul Pandey, P.W.8 and above mentioned jail staff duly signed on it.

P.W.29 in his examination-in-chief further stated that when the appellant Roshan Ali was produced before her along with others, they had covered their faces with black clothes. Similarly, the appellants Shamim Sidique and Atul Pandey were produced before her in the court and their faces were also covered with clothes. On 8.6.2004 on the prayer of P.W.33, the voice test of the appellants Roshan Ali and Rajan Mishra was conducted by recording in audio cassettes in the Chambers of P.W.29, separately and these separate cassettes after recording were handed over to P.W.33.

In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.29 stated that the voice of the aforesaid appellants Roshan Ali and Rajan Mishra were recorded on the prayer of the I.O. (P.W.33) during course of investigation. The empty blank audio cassettes were supplied by the I.O. for recording. P.W.29 stated that she had no technical knowledge regarding tape recording of any voice. The I.O. appeared before P.W.29 with a tape recorder and he switched on the tape recorder and left her Chamber. Thereafter, these two appellants noted down a paragraph in their language which they recited before the tape recorder. P.W.29 had not prepared any report separately regarding that, but only she mentioned in the order sheet that the voice of these appellants were recorded in two audio cassettes separately. She also stated that she had not obtained the consent of these two appellants in writing. These appellants though did not object to recording of their voice, but they filed a petition stating that in the absence of their Advocate, such recording should be deferred to another date. But that petition was rejected. These two audio cassettes after recording were duly sealed. P.W.29 did not recollect whether she had signed on the paper seal. But both the cassettes bore the court seal. She had not obtained any memo in writing from these six accused persons that they had voluntarily agreed to record their voice, but they had signed in the order sheet in support of the recording. She denied the suggestion that she had not strictly followed the rules while recording the voice of the appellants. Vide order dated 12.2.2004 passed by P.W.29, she indicated that Roshan Ali (appellant), Rajan Mishra(appellant), Pradeep Srivastava and late-Rajendra Prasad were produced before her and their faces were covered with clothes. That portion of the order had not been written by her but it was written as per her dictation although the concluding para of the said order was written in her own hand. She also stated that the said order dated 12.2.2004 would indicate that the I.O. (P.W.33) had prayed for recording the confessional statements of the appellants but the appellants declined to confess. The notices to the identifying witnesses were issued by the Court. P.W.29 further stated that it was a fact that none of the identifying witnesses had stated before her that the abduction was for ransom. It was a fact that the suspect Roshan Ali had complained before her that prior to his identification in the T.I. Parade his photographs were taken by the Journalist and were shown to the identifying witnesses. It was a fact that none of the identifying witnesses had stated about the physical descriptions of the suspects nor they had stated about the identity, complexion, appearance, etc.

In the cross-examination at the instance of Rajan Mishra (appellant), Shamim Sidique (appellant) and Atul Pandey, P.W.29 stated that she selected those U.T.Ps. to be mixed with the suspect Rajan Mishra before the identifying witnesses were called one after another. She had verified the name and address of Rajan Mishra from the case record, but she had not mentioned the address of Rajan Mishra in the T.I. Parade report. She had also not mentioned the names and addresses of those U.T.Ps., who were mixed with suspect Rajan Mishra. She had not specifically stated in her report regarding dress put on by the suspect and U.T.Ps. so also about their complexion, height, etc. She further stated that it was a fact that Rajan Mishra has complained before her that his photographs were taken by some Journalist and the same were shown to the identifying witnesses before the T.I. Parade. P.W.29 further stated that no paper chits were affixed on the faces of the U.T.Ps. or the suspects mixed with the U.T.Ps. The appellant-Shamim Siddique had also complained before her that his photographs were taken at the Police Station and the police called the identifying

witnesses and shown him to them and P.W.8 offered him money to admit his guilt to which he refused.

P.W.29 denied the suggestion that no proper procedure had been followed at the time of conducting T.I. Parade. On 7.6.2004, the I.O. (P.W.33) made a request to record the voice of the appellants Roshan Ali and Rajan Mishra. The I.O. had prayed that these two appellants had contacted the son (P.W.1) of the victim (P.W.8) over phone and the particulars of the conversation since had been recorded. So it was necessary to record their voice for comparison. One or two cassettes contained the recording voice of these two appellants were produced before P.W.29. She could not recollect as to whether these cassettes produced before her were sealed or not and if the voice of the appellants were forcibly recorded by the police, which were produced before her. Two blank cassettes in sealed condition were produced before her by the I.O. and the seals thereof were broken, it was set on the tape recorder and played. P.W.29 found that it was fully blank. She did not caution the appellants that voice recording might go against them.

Cross examination on behalf of Virendra Jaiswal and Santosh Jha was declined.

An analysis of the evidence of P.W.29 makes one thing clear that proper procedure was followed during the T.I. Parades and Roshan Ali, Rajan Mishra and Shamim Siddique were duly identified by the identifying witnesses, namely, P.Ws.2,7 & 8 within very short span after their apprehension by the police. With regard to the statement of the above appellants that their photographs were earlier taken or they were shown to the identifying witnesses, details of the same have not been given by them. Therefore, the core prosecution story with regard to T.I. Parade remains unshaken. It is important to note here that neither Roshan Ali nor Rajan Mishra nor Shamim Sidique has led defence evidence to prove their case that prior to T.I. Parade, their photographs were taken and shown to the identifying witnesses or that their photographs were published in the newspaper prior to holding of dates of T.I. Parade. Further, it is the positive evidence of P.Ws.2,7 and 8 that prior to holding of T.I.Parades, photographs of none of the appellants were shown to them. In such background it can be safely said that the T.I. Parades were held in accordance with law and accordingly, Rajan Mishra, Roshan Ali and Shamim Sidique have been properly identified.

P.W.30 was the Divisional Engineer, BSNL, who submitted the phone chart. In his examination-in-chief, P.W.30 stated that on 10.11.2004 one Kulamani Padihari was the Divisional Engineer to whom he succeeded. The report was submitted by Kulamani Padihari. It was written by Kulamani Padihari with whose handwriting and signature, P.W.30 was acquainted. This letter was marked as Ext.52. This letter/report contained a vivid chart of telephone calls consisting of 20 pages accompanying with the said letter. At page-19 of the chart 'incoming call' has been made from phone No.0712-2563746 (phone number of booth at Nagpur) to 9861027400 (phone number of P.W.16) on 9.2.2004 at 7.52 P.M. The duration of talk under the aforesaid call was 8 minutes thirty seven seconds. At the same page from the said telephone incoming call was made and the talk time under the aforesaid call was at 8.01 P.M. This successive call was made on the same date within a gap of one second. The duration of talk made in the subsequent call was 4 minutes and 31 seconds. Both the aforesaid calls related to one code number.

These calls were made from Nagpur. These relevant entries are marked as Exts.52/2 and 52/3 respectively.

In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.30 stated that the said Kulamani Padihari was alive and was serving in his department. Kulamani Padihari has not been examined. P.W.30 did not have any personal knowledge regarding correspondence if any made between the S.P. Sundergarh and Kulamani Padihari regarding the investigation of the case. Ext.52 was the xerox copy of the original letter. The telephone call chart annexed to the letter has not been certified by any authority. P.W.30 was never examined by the I.O. in this case. He had not carried this letter along with the telephone call chart to the court but the same was available on record. He denied the suggestion that the letter and telephone calls chart were fake documents.

In the cross-examination on behalf of Rajan Mishra (appellant), Shamim Sidique (appellant) and Atul Pandey, P.W.30 stated that the documents about which he stated in his evidence were the computerised documents prepared through electronic process. He had not obtained any certificate from his authority in support of the fact that the documents about which he stated were genuine and correct. He denied the suggestion that the documents relied and put in this case were false and fake.

Rest of the accused person declined to cross-examine P.W.30.

P.W.31 was S.I. of Police of Crime Cell under Sitawardi Police Station. In his examination-in-chief, P.W.31 stated that on 9.2.2004 in the evening hour, the Police Inspector of Sitawardi Police Station told him to remain alert to watch the telephone call in connection with abduction for ransom case that occurred in Orissa (now Odisha). Accordingly, he alerted police staff. At 7.40 P.M., the Police Inspector directed him to proceed to the telephone booth with telephone no. 2563746 and stated him to watch the telephone calls, which were being passed from the S.T.D. Booth to the Mobile No.9861027400. Accordingly, P.W.31 along with P.W.22 and two constables proceeded to New Madhu Kirana Store where the S.T.D. Booth was functioning at a portion of the grocery shop, which was situated at Munje Chowk. They all reached near the S.T.D. Booth at about 7.50 P.M. and kept watch on the booth. One person just after making payment of the telephone call was coming out of the booth where as the other miscreant was standing outside. P.W.31 immediately caught hold of that miscreant who came out of the booth and took him to his custody and the other staff caught hold of the another accused standing infront of that booth. P.W.31 collected the telephone bill from the appellant Roshan Ali and on verification of the bill, the phone number of the S.T.D. booth along with mobile number provided to him were seen from that bill. Besides some papers were also found on search of the person of the appellant Roshan Ali containing some telephone numbers in those papers. That telephone bill along with three pieces of papers containing some telephone numbers and names were available in the case record, which were pasted in a paper. P.W.31 duly identified these papers. On being asked, both the appellants Roshan Ali and Rajan Mishra told that they along with accused Pandit, Virendra Jaiswal (appellant), Shamim (appellant), Pradeep Srivastava and others abducted a SETH from Orissa along with his driver and they kept them confined in the house of Virendra Jaiswal in Shankargarh, which was a farm house. On receipt of such information, P.W.31 immediately informed the Inspector and D.C.P. over telephone. From near that S.T.D. Booth P.W.31 brought these two appellants near to the Kamal Hotel, where they were staying as per their saying for verification. P.W.31 verified the relevant register of the Hotel Kamal and some documents. Thereafter, he produced both the appellants before the Police Inspector (P.W.32) along with

the telephone bill and the chits recovered from the appellants from near the S.T.D. booth. Thereafter, P.W.31 along with others proceeded near to the house of accused Pradip Srivastava situated at Rajnagar and apprehended the said accused from his hosue. Subsequently, these three accused persons were handed over to the Sundergarh Police. The Police Inspector Mr. Punikar (P.W.32) had effected necessary diary entry in the station diary book of Sitawardi Police Station in support of his deputing P.W.31 and others to near the S.T.D. booth and other assignment entrusted to them. The extract was marked as Ext.56.

In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late Rajendra Prasad, P.W.31 stated that he identified the three accused persons in court to whom he had seen for the first time on the date of their apprehension. He had no occasion to see them in between this period. He further stated that whatever information he had received it was from the appellant Roshan Ali and Rajan Mishra and not from the accused Pradeep Srivastava. On the basis of the information received from the appellants, Roshan Ali and Rajan Mishra, he apprehended Pradeep Srivastava. P.W.31 further stated that he had not made any inquiry to cross-check the statement made by Roshan Ali and Rajan Mishra. He made it clear that he had not recorded the statement of the appellants Roshan Ali and Rajan Mishra but only produced them before the Police Inspector (P.W.32). P.W.31 further stated that from the telephone bill recovered from the possession of the appellant Roshan Ali, he became sure that Roshan Ali was making telephone call to Rourkela. He had taken personal search of the appellants Roshan Ali and Rajan Mishra. P.W.22 was very much present with him at that place. P.W.31 denied the suggestion that he had not stated before the I.O. i.e. P.W.33 that Roshan Ali was in possession of some paper chits containing some phone numbers from which it could be ascertained that the S.T.D. booth phone number tallied with the mobile number. P.W.31 denied the suggestion that he had never apprehended the appellants Rajan Mishra and Roshan Ali and accused Pradeep Srivastava and he did not recover any papers from their possession.

In the cross-examination on behalf of Rajan Mishra (appellant), Atul Pandey and Shamim Sidique (appellant), P.W.31 stated that he was not called to identify the accused persons in any T.I. Parade and those accused persons were interrogated by the police inspector for a long time in the police station. He simply handed over the accused persons to the police inspector but no report in writing was submitted before him. He denied the suggestion that he had not prepared those documents at the instance of his superior officers and deposing falsehood at their instance. Further he denied the suggestion that the appellant Rajan Mishra was apprehended from Gandhi Bag from the house of one Dillp Godbole. Rest of the accused declined to cross-examine P.W.31.

An analysis of the evidence of P.W.31 shows that it corroborates the evidence of P.W.22 and P.W.16 as the appellants-Roshan Ali and Rajan Mishra were apprehended at about the same time, just after when P.W.16 was talking with Roshan Ali. P.W.31 collected Telephone Bill (Ext.58), which contained booth telephone number and mobile number of P.W.16. With regard to contradiction between statement of P.W.31 and P.W.33 on P.W.31 not stating before P.W.33 that the papers seized from Roshan Ali contained phone numbers from which it could be ascertained that S.T.D. booth number tallied with mobile phone number, it can only be stated that this is not a serious contradiction as P.W.32 has proved Ext.58 seized from Roshan Ali, which is a telephone receipt containing both the above numbers. Though with regard to collection of telephone bill, there is a contradiction between the version of P.W.31 and P.W.32, however, such contradiction cannot be treated as major

contradiction affecting core prosecution story as has been stated by eye-witnesses-P.W.2, P.W.7, P.W.8 and P.W.17 relating to abduction for ransom, illegal confinement of P.Ws.7 and 8 by the appellants with common intention.

P.W.32 was the Officer-in-Charge of Sitawardi Police Station. In his examination-in-chief, he stated that on 9.2.2004, he received a telephonic direction at about 6.30 P.M. from the Deputy Commissioner of Police, Zone-I, Nagpur that some persons were telephoning from Nagpur to Rourkela for ransom and the number of the Telephone was 9861027400 (belonging to P.W.16). He was also directed to keep watch and to arrest the culprits. Again at about 7.40 P.M., he received information from the Deputy Commissioner of Police that the culprits were contacting Rourkela for ransom from a Telephone booth of Munje Chowk. Accordingly, P.W.32 directed P.W.22 and P.W.31 to surround the concerned telephone booth. Accordingly, P.W.22 detained a person outside the S.T.D. booth and another person was inside the booth. The said person was coming out of the Kiran Shop. He was also detained. P.W.32 asked those persons regarding the place and person to which they were contacting over phone. The two persons disclosed that they were telephoning to Rourkela for ransom of Rs.3 crores since a very rich person (SETH) had been abducted. When P.W.32 asked their names, they disclosed their names as Roshan Ali (appellant) and Rajan Mishra (appellant). Roshan Ali further disclosed that they along with Virendra Jaiswal (appellant), Atul Pandey, Shamim Sidique (appellant), Pahilwan, late-Rajendra Prasad, Pradeep Srivastava and another two persons, the names of whom he could not recollect, had abducted one Seth, namely, P.W.8 along with his driver P.W.7. Roshan Ali further disclosed that after abducting P.W.7 and P.W.8 they had confined them in the farm house of Virendra Jaiswal (appellant) at Hartoli under Shankargarh Police Station. P.W.32 further stated that Roshan Ali had a telephone bill in his hand and P.W.32 took the same from him. Roshan Ali also disclosed that he was staying in Room No.108 of Kamal Hotel of Sitawardi. Thereafter, P.W.32 along with other staff proceeded to Kamal Hotel along with Roshan Ali and Rajan Mishra and verified the register of the said hotel regarding the occupants of Room No.108. On verification P.W.32 came to know that the names were falsely written as Ramesh Agarwal and Dinesh Garg. He went inside Room No.108 along with other police staff and took search of the room. He could not find any incriminating articles on search of the room. But on personal search of Roshan Ali, he recovered P.C.O. bill and some papers having some telephone numbers along with addresses which were marked Exts.58, 58/1, 58/2 and 58/3. Ext.59 is another document recovered from Roshan Ali. Exts.61 & 20 are the relevant seizure lists. Ext. 58 is very very important. A perusal of the same indicates that it contains the date of call, i.e., 9.2.2004 and the phone number of the S.T.D. booth as well as the mobile number of P.W.16. Thereafter, P.W.32 returned to the police station along with recovered documents and Roshan Ali and Rajan Mishra. Thereafter he informed the Deputy Commissioner of Police. Ext.60 is the bill of Hotel Kamal for room rent of Room No.108 was proved by P.W.32. On 10.2.2004, P.W.32 arrested Roshan Ali and Rajan Mishra and prepared arrest memo. Ext.61 is the seizure list in respect of the documents recovered from Roshan Ali and Ext.61/1 is the signature of P.W.32. On 11.2.2004, P.W.32 produced Rajan Mishra and Pradeep Srivastava and Roshan Ali in the court of J.M.F.C., 1st Class, Nagpur. According to the order passed by the Magistrate, he handed over the above persons to (P.W.13), IIC, Sundergarh Police Station.

In the cross-examination on behalf of Roshan Ali (appellant), Rajednra Prasad and Pradeep Srivastava, P.W.32 stated that he did not know Roshan Ali and Rajan Mishra-

appellants before hand. He left the police station for Madhu Kiran Shop after about two minutes of the departure of P.W.22 and other police staff. The Deputy Commissioner of Police had informed him about the telephone number from which call was being made to Rourkela. He admitted that he did not hear any telephonic conversation by Roshan Ali and Rajan Mishra and did not see the above two persons while telephoning. He further stated that he did not talk over any telephone to contact the number of Rourkela to which the above two persons were contacting. Except the bills and documents which he seized he did not verify the telephone number of Rourkela. Except the self-identification of the above persons, he did not make any enquiry to ascertain their names. He verified from the Hotel that the above two persons Roshan Ali and Rajan Mishra had written their names falsely in the hotel register and the hotel keeper identified them. He did not verify the signatures of the occupants of Room No.108 from the hotel register and did not collect their signatures for verification by any expert. He did not take their specimen signatures. On 9.2.2004, Roshan Ali and Rajan Mishra were neither arrested nor kept inside the hazat. He did not make any list while taking personal search of the accused regarding ornaments, wrist watch used by them. He did not recollect if the above two persons had put on any such articles or not and did not verify the telephone numbers of the telephone bill recovered from Roshan Ali. He denied the suggestion that on 9.2.2004 he arrested one Ramesh Agarwal and Dinesh Garg later he had arrested Roshan Ali and Rajan Mishra and thereafter released Ramesh Agarawal and Dinesh Garg. Only basing on the confession of Roshan Ali, P.W.32 arrested accused Pradeep Srivastava. He admitted that he was examined by P.W.33 on 3.6.2004. He denied the suggestion that he did not state before the I.O. that the appellant Roshan Ali and Rajan Mishra were telephonining to Rourkela for ransom since they abduct a very rich person. He further denied the suggestion that he did not state before P.W.33 that after abducting P.Ws.7 and 8, they were kept confined in the farm house of Virendra Jaiswal at Haratoli of Shankargarh. P.W.32 denied the suggestion that he did not state before the I.O. (P.W.33) that the telephone bill vide Ext.58 was recovered from the appellant Roshan Ali and that Roshan Ali was staying in Room No.108 and that P.W.32 apprehended Rajan Mishra and Roshan Ali from Munjer Chowk and implicated them in a false case.

In the cross-examination on behalf of Rajan Mishra (appellant), Atul Pandey and Shaim Sidique (appellant), P.W.32 denied the suggestion that when he received telephonic direction from the Deputy Commisioner of Police, P.W.22 and P.W.31 were not present in the police station. He gave oral direction to P.Ws.22 and 31 to proceed to Madhu Kiran Shop. No entry was made in the station diary when they left the police station. He denied a suggestion that Roshan Ali and Rajan Mishra were not apprehended and were not brought to the police station. He denied the suggestion that he apprehended Rajan Mishra from Gandhibag Mohala at Nagpur on 10.2.2004 from the house of Dillip Godbole due to the conspiracy of P.W.8. He denied the suggestion that he apprehended Dinesh Garg and Ramesh Agarawal, left them free and falsely showed the apprehension of the appellants Roshan Ali and Rajan Mishra. He admitted that he had taken photographs of accused persons after arrest.

An analysis of evidence of P.W.32 would show that he is a witness to arrest of accused Roshan Ali and Rajan Mishra and seizure of documents. Most important document proved by him is Ext.58, which was seized from Roshan Ali. But P.W.33 has stated that neither P.W.31 nor P.W.32 stated him about seizure of Ext.58 from Roshan Ali. No doubt these reflect some contradictions, but taking a broad view of the matter and taking into

account the timing of phone call to P.W.16 on 9.2.2004 and timing of apprehension of Roshan Ali and Rajan Mishra at Nagpur on the very same evening only show that it was these accused who were giving call to P.W.16 in his mobile number 9861027400 from the telephone booth. Prosecution has proved that the number of S.T.D. telephone booth from Nagpur to be 2563746. Here Ext. 58 assumes significance as the same contains both the telephone numbers. In such background as to who seized the same and this being not stated by P.Ws.31 and 32 to P.W.33 do not appear to be major contradiction vis-à-vis core prosecution story as revealed from the evidence of P.Ws.1, 2, 7,8,16 and 17.

P.W.33 is the main Investigating Officer, who submitted charge sheet against the appellants. P.W.33 in his examination-in-chief had stated that he was the Inspector-In-Charge of Sadar P.S., Sundergarh on 24.1.2004. On that date at about 11 P.M., P.W.1, son of P.W.8 appeared at the police station and submitted a written report to him. Since the report revealed a cognizable case under Sections 342/365/307/34 of I.P.C. and under Section 25 of the Arms Act, he registered P.S. Case No.7 of 2004 on 24.1.2004 and took up investigation. The report submitted by P.W.1 was marked as Ext.1. Thereafter, he drew up formal F.I.R., which was marked as Ext.62. He informed S.P., Sundergarh and sent messages to bordering police stations regarding the occurrence. He proceeded to the spot immediately which was at Karamdihi, Sundergarh. During his spot visit, he found one Maruti Zen Car bearing No.OR-16A-5921 lying abandoned by the side of the road. He seized the car and prepared the seizure list under Ext.14/2. He sent requisition to the Scientific Officer, Rourkela to visit the spot. After visit by the Scientific Officer with regard to inspection of the car, P.W.33 seized one Sweater, Towel, one muffler, xerox copy of the R.C. Book of the said car and insurance certificate. He prepared two spot maps - one from where the car was found and the second the place from where P.W.8 and P.W.7 were abducted, which were marked as Exts.63 and 64. On 25.01.2004, P.W.33 examined the witnesses P.Ws.2, 3 and 4 and some other witnesses. P.W.2 identified him the spot from where P.W.8 and P.W.7 were abducted. P.W.33 also seized mobile phone of P.W.2 and prepared the seizure list. On the same date, i.e., on 25.01.2004, S.P. Sundergarh sent wireless messages to all S.S.Ps. of India and Commissioners of Police, Kolkata, Mumbai and Delhi. On 26.1.2004, different police teams of Sundergarh proceeded to different States. On 27.1.2004, he released the seized Maruti Zen car in the zima of one Raju Gardia, the driver of the informant along with other seized articles. On 28.1.2004, the informant-Rajesh Gadodia (P.W.1) disclosed before P.W.33 that a telephonic information was received by a friend of his father, Ram Bhagat Agarwal regarding confinement of his father-P.W.8 and the culprits were demanding Rs.15 crore. P.W.1 also disclosed that the culprits would contact him in his land phone as stated by Ram Bhagat Agarwal. On the same date, P.W.1 disclosed P.W.33 that he received a fax message (Ext.2) written in Hindi by his father to give money for his release. On 29.1.2004, P.W.1 disclosed that he received threatening calls from the culprits three to four times to give money. Accordingly, P.W.33 seized the telephone sets having numbers 220820 and 220840, a fax message dated 28.1.2004 written in Hindi and one cassette in which the conversation of the culprits was recorded by the informant, (P.W.1). The seized telephones and the fax belonged to P.W.1 and he was allowed to use the same. On 2.2.2004, P.W.1 disclosed before P.W.33 that the culprits were demanding Rs.10 crore from him. On 8.2.2004, P.W.1 received another fax message (Ext.4) from his father which was written in Hindi. P.W.33 seized the same along with fax machine. On 9.2.2004 information was received by S.P., Sundergarh that the culprits have been apprehended at Nagpur and S.P., Sundergarh deputed two teams

of police - one team to Nagpur and another team to Shankargarh Police Station in the State of Chhatisgarh.On 10.2.2004, it was learnt that the culprits-Roshan Ali (appellant), Rajan Mishra (appellant) and Pradeep Srivastava were arrested by the police of Sitawardi P.S., Nagpur in connection with Sitawardi P.S. case No.3 of 2004. Similarly, information was received that the culprits, Pandit @ Abdul kaiyum and Virendra Jaiswal (appellant) were arrested by Shankargarh P.S. vide Shankargarh P.S. Case No.4 of 2004 under Sections 364-A/342/34 I.P.C. and that P.W.8 and P.W.7 were rescued by Shankargarh police. On 10.2.2004, S.I., K.C.Bag of Rajgangpur P.S. proceeded to Bilaspur to seize the Bolero Jeep in which the culprits abducted P.W.8 and 7. On 11.2.2004 at 2 P.M. S.I., K.C. Bag of Rajgangpur P.S. arrived at Sadar P.S. Sundergarh along with the Bolero Jeep. It was learnt that culprit-Santosh Jha (since acquitted) was arrested by the Town Inspector, Civil Line Bilaspur in P.S. Case No.2 of 2004 under Section 379 I.P.C. P.W.33 further stated that the sub-inspector, K.C. Bag had already died. On the same day information was received that P.W.8 and P.W.7 have been brought to Rajgangpur by the Inspector-Fagua Singh of Town P.S. Sundergarh. Accordingly, he (P.W.33) proceeded to Rajgangpur on 11.2.2004 and examined P.W.7 and P.W.8 and released the seized telephones and fax machine, tape recorder in the zima of P.W.1. On the same day, he went to Rourkela and examined late Rajendra Prasad (since acquitted) in his house. He arrested late Rajendra Prasad and seized one Bajaj Boxer motor cycle. On 12.2.2004, P.W.13 returned to Sadar P.S. Sundargrh with Roshan Ali (appellant), Rajan Mishra (appellant) and Pradip Srivastava. On the same date, he seized a Titan wrist watch from appellant-Roshan Ali and according to him the said watch belonged to P.W.8. On the same day at about 5 P.M. he forwarded the above culprits to court after recording their statements. During examinations of Roshan Ali, Rajan Mishra and Pradeep Srivastava, P.W.33 came to know that Shamim Ahamad Sidique, Atul Pandey, Birendra Jaiswal, Pandit @ Abdul Kaiyum, late-Rajenda Prasad and Santosh Jha were also involved in commission of crime. He made prayer before the S.D.J.M. Sundergarh for holding T.I. parade of the appellants-Roshan Ali and Rajan Mishra inside the jail. He also prayed before the S.D.J.M. to issue production warrant in respect of the culprits - Pandit @ Abdul Kaiyum and Virendra Jaiswal who were detained in Central Jail, Ambikapur. On 15.2.2004, he deputed P.W.26 to Ambikapur to handover the remand report and to proceed to Shankargarh P.S. for the purpose of investigation. On 15.2.2004, he handed over the seized Titan wrist watch to P.W.8. The inspector, C.S. Mohanty brought the culprit-Shamim Mohamad Sidique from Allahabad and produced before him. P.W.33 examined the said culprit on 16.2.2004, seized his mobile phone and arrested him on the same day at 8 P.M. On 17.2.2004, P.W.33 forwarded culprit-Samim Mohamad Sidique to the court of S.D.J.M., Sundergarh and gave requisition for holding T.I. parade. On 18.2.2004, he visited hotel - Bishnu palace at Jharsuguda and seized the Entry Register, visitor cards dated 17.1.2004. In the said visitor cards, the names of the culprits-Rajan Mishra (appellant), Shamim Ahmad (appellant), Abdul Kaiym, Virendra Jaiswal (appellant) and Atul Pandey were there. On 18.2.2004, S.I.-R.K. Giri (P.W.26) returned from Shankargarh P.S. and produced the copy of the F.I.R. of Shankargarh P.S. Case No.4 of 2004 and the map of the place, where P.W.8 and P.W.7 were confined. On 22.2.2004, P.W.33 gave requisition to P.W.26 to proceed to Bilaspur for the purpose of investigation. On 24.2.2004, P.W.26 returned to Sadar P.S., Sundergarh and produced the copies of the case record of Civil Line P.S., Bilaspur Case No.2 of 2004 under Section 379 I.P.C. in which Santosh Jha (since acquitted) was arrested. He requested Station Officer, Shankargarh P.S. for transfer of P.S. Case No.4 of 2004 on the point of jurisdiction. On 25.2.2004, he arrived at Shankargarh P.S., examined the I.O. of

Shankargarh P.S. Case No.4 of 2004 and visited Harageon, Haratoli where P.W.7 and P.W.8 were confined in the farm house of appellant-Virendra Jaiswal. On the same day, he received reliable information that the appellant-Atul Pandey was available in his house at Bara and sent wireless message to the Station Officer, Bara P.S. for apprehension of the said culprit. On the strength of production warrant issued by S.D.J.M., Sundergarh, the culprits-Abdul Kayum and Virendra Jaiswal were produced from Central Jail, Ambikapur. On 17.3.2004, P.W.33 examined some witnesses at Bilashpur. On 29.3.2004, P.W.13 produced before him the supplementary case diary and the documents of Sitawardi P.S. On 2.4.2004, he received the case record of Shankargarh P.S. Case No.4 of 2004. He also seized one country made pistol, five nos. of ammunitions, one Nokia Mobile phone, Rs.1500/-, one country made revolver, six nos. of ammunitions, some aluminium tin plates in which Mahindra and Mahindra Engine number and chasis number were written, two small plastic Diba containing alphabets and digits being produced by the constable-M. Khalko of Shankargarh P.S. He identified the seized articles marked as M.Os. IV to XI. On 10.5.2004, Santosh Jha (since acquitted) was brought from Central Jail, Bilaspur on the strength of production warrant, who was examined by him. On 28.5.2004, he deputed P.W.26 and other police staff to Bara P.S., Allabahad for apprehension of appellant-Atul Pandey. On 30.5.2004, P.W.33 examined P.W.16 and two others. On the same date, P.W.33 seized a mobile phone bearing No.9861027400 of Kedarnath Kedia (P.W.16), which was later released in zima of P.W.16.

On 31.5.2004, P.W.26 and his staff returned to Sadar P.S. Sundergarh along with appellant-Atul Pandey from Bara P.S. area. P.W. 33 further stated that he examined Atul Pandey. On 1.6.2004, P.W.33 forwarded Atul Pandey to court with a prayer before the S.D.J.M., Sundergarh for holding T.I. Parade. On 2.6.2004, S.P. Sundergarh gave requisition to the Chief Vigilance Officer, C.J.M.T., Bhubaneswar and Manager, Reliance Telecom Ltd. Kharvelnagar, Bhubaneswar to supply the call chart of mobile phone No.986127400 and some other telephones. On 3.6.2004 at Nagpur he examined P.W.32 and his staff. He visited the telephone booth from where the appellants Roshan Ali and Rajan Mishra were contacting P.W.16. On the same day, P.W.33 seized the telephone bearing No.2563746 of New Madhu Kirina Store, Munje Chowk Nagpur. He kept the phone in zima of its owner. On the same date i.e., 3.6.2004 at 3.30 P.M. he seized the Entry Register of hotel Kamal, Nagpur in which the names of Ramesh Agarwal and Dinesh Garg were entered on 8.2.2004. He kept the register in zima of the hotel receptionist (P.W.20). On 4.6.2004, S.P., Sundergarh sent requisition to Vigilance officer, P.G.M., Telecom District, Nagpur to supply the call chart and ownership of P.C.O. bearing No.0712-2563746 for 8/9.2.2004. On 5.6.2004, the S.D.J.M., Sundergarh forwarded the seized arms and ammunitions to Dy.Director, R.F.S.L.,Ainthapalli, Sambalpur for examination. On 6.6.2004, he made a prayer to the S.D.J.M., Sundergarh to record the sample voice of appellants-Roshan Ali and Rajan Mishra. On 8.6.2004, the sample voice of the appellants-Roshan Ali and Rajan Mishra was recorded by the S.D.J.M., Sundergarh (P.W.29) in separate cassette. Ext.67 is the transcript of the telephone voice of the above two culprits. On the same day at 2.00 P.M., P.W.33 seized one sealed envelope in which the sample voice of the appellants-Roshan Ali and Rajan Mishra were recorded in the cassette and sent by the S.D.J.M. Sundergarh through the C.S.I. On 9.6.2004, on his requisition, the S.D.J.M.,Sundergarh sent the sample voice cassette of the culprits and the cassette seized from P.W.1 earlier to C.F.S.L., Chandigarh. P.W.33 had also made a prayer to the District Magistrate, Sundergarh to sanction prosecution under the

Arms Act. On 9.6.2004, P.W.33 filed charge sheet against the culprits under Sections 364A/342/395/120-B/34 I.P.C. and under Sections 25/27 of the Arms Act.

In the cross-examination on behalf of Rajan Mishra (appellant), Atul Pandey and Shamim Sidique(appellant), P.W.33 stated that he was not at the police station from the time of incident at 4.30 P.M. till registration of the F.I.R. at 11 P.M. On 24.01.2004, he had made station diary entry at 4.50 P.M. on getting V.H.F. about the occurrence. An information was given to him that some persons lifted an elderly person at the point of pistol and took away him towards Rourkela in a Bolero Jeep. P.W.33 further stated in the cross-examination that he went outside to verify the incident but he could not get any clue. He admitted that he did not inform P.W.1 that prior to lodging of the F.I.R., he had already received information over V.H.F. and made station diary entry. He did not reflect the fact in the case diary and he also contacted P.W.3 over phone to Town P.S. He ascertained about the spot from the witnesses during investigation and prepared the spot map at 0.15 a.m. on 25.1.2004. He examined P.W.7 and P.W.8 after they were rescued. He had taken P.W.7 and P.W.8 to the spot and they identified the spot to him. He denied a suggestion that he prepared the spot maps at the instance of P.W.1. He accompanied the Scientific Team of D.F.S.L., Rourkela to the spot. He examined P.W.2, who stated that three to four persons on the point of revolver forcibly took away an aged person wearing Dhoti and made him to sit in a Bolero Jeep. P.W.7 told him about the distance of the spot where his master got down to attend the call of nature as 3 K.M.s from Sundergarh. P.W.7 did not state before him that the culprits left the Maruti Car about 3 to 4 K.M.s. away on the road from the place of abduction.

In the cross-examination, P.W.33 further stated that neither P.W.7 nor P.W.8 described before him the physical features of the culprits regarding their colours and height. He again said that P.W.8 stated about the age of the culprits and also the height before him. When asked by P.W.33, P.W.8 disclosed before him that he was proceeding to Sundergarh on the date of occurrence in connection with some official work. He examined P.W.16 on 30.5.2004. P.W.33 has explained that P.W.16 could not be examined earlier as he was not available. P.W.33 also stated that P.W.16 was abducted in the year 2002 and some of the culprits of this case were involved in his abduction. He denied a suggestion that he had implicated Roshan Ali (appellant), Atul Pandey, Rajan Mishra (appellant) and Virendra Jaiswal (appellant) in this case falsely after they were apprehended in the case of abduction of Kedarnath Kedia (P.W.16). He also denied a suggestion that the culprits were shown to P.W.16. However, he admitted that he did not examine any witness regarding the voice recording of the culprits when they demanded money over telephone from P.W.1. After seizure, the telephone set and the voice recorder were not sealed. He denied a suggestion that the photographs of the appellants, namely, Roshan Ali, Rajan Mishra were taken by him and shown to the witnesses. He also denied a suggestion that the photograph of appellant-Shamim Sidique was taken at the police station and shown to the witnesses and that P.W.8 offered Rs.1.00 lakh to appellant-Shamim Sidique if he turned to be an approver. He denied a suggestion that the culprits were innocent and had been falsely implicated by him.

In the cross-examination on behalf of culprits-Roshan Ali (appellant), Pradip Srivastava and Late Rejendra Prasad, P.W.33 stated that during investigation and when appellant Roshan Ali was in custody, P.W.8 lodged an F.I.R. against appellant-Roshan Ali under Sections 294/506 I.P.C. P.W.33 denied a suggestion that due to enmity, he filed a number of false cases against the culprits. Pradeep Srivastav and Late Rajendra Prasad were

not put to T.I. parade as there was no direct evidence against them with regard to abduction of P.Ws.7 & 8 demanding any ransom from P.W.8 or his son. The Collector, Sundergarh who sanctioned the prosecution under the Arms Act was not cited as witness. The seized weapons were kept inside police station in Malkhana after the seizure till they were sent for expert's opinion. The Malkhana register of the P.S. would show the custody of the arms inside the Malkhana. The Malkhana register has not been seized. P.W.33 denied a suggestion that neither any arms nor any M.Os/ ammunitions had been seized by him. He further stated in the cross-examination that neither P.W.7 nor P.W.8 stated before him about the name of the culprit nor gave description of the culprit, who took away the wrist watches and the cash from them. No cash has been seized from culprits-Roshan Ali (appellant), Rajan Mishra (appellant), Shamim Siddique (appellant) and Atul Pandey. He did not seize any cash memo of the Titan watches. No T.I. parade has been conducted in connection with the seized watch. He denied a suggestion that there was no such seizure of any watch and the seizure list had been manufactured. The culprits were not known to P.W.7 and P.W.8 prior to the date of incident. The Scientific Officer inspected the Maruti Zen car and submitted the report. He did not mark any impact or violence on the seized Maruti Car and did not find any tyre mark of the Bolero vehicle at the spot. P.W.33 further stated that he examined the informant on 24.1.2004, i.e., on the date of filing of F.I.R. but he did not record the statement of P.W.1 separately under Section 161 Cr.P.C. But he had mentioned this fact in the case diary. He gave requisition to the BSNL Department to ascertain the land line number and fax number of P.W.1 but he did not receive any intimation. P.W. 33 further stated that he did not send the xerox copy of the fax messages under Exts.2 and 4 to any Handwriting Expert. According to him, the information received in writing in fax would immediately evaporate unless the xerox copy of the same was kept. Again, he stated that copy of the information in a fax would evaporate after about 7-10 days. P.W.33 did not seize the original information sent through fax. He did not investigate from which number and place the information was sent to the informant. He seized Exts.2 and 4 on 29.1.2004 and 8.2.2004 respectively. He denied a suggestion that the informant (P.W.1) had no land line phone or any fax machine and that Exts.2 and 4 were manufactured documents. On 25.1.2004, the F.I.R. was despatched to the court of S.D.J.M., Sundergarh. On 27.1.2004, F.I.R. was received in the court of S.D.J.M., Sundergarh. P.W.33 further stated in the cross-examination that P.W.1 presented the written F.I.R. and he could not say who scribed the F.I.R. While he received the V.H.F. message from P.W.3, the name of P.W.2 was not disclosed to him as an eye-witness to the occurrence. The VHF message was limited to the information that one aged person was abducted in a Bolero Jeep by some culprits. P.W. 33 further stated that after getting V.H.F. message, he proceeded to the spot at about 5 P.M. on 24.1.2005. After visiting the spot, he did not find any clue of the case. He also examined some neighbouring witnesses of the Bazar and he did not get any clue. While he examined P.W.3, he came to know that P.W.2 was an eye-witness to the occurrence. Accordingly, he examined P.W.2 on 25.1.2004 and went to the spot along with P.W.2. He denied a suggestion that he examined P.W.2 on 24.1.2004 and stated that the date of examination of P.W.2 under Section 161 Cr.P.C. has been wrongly noted by him as "24.1.2007" instead of "25.1.2004". He denied a suggestion that Ext.1 was not the real F.I.R. and the F.I.R. has been suppressed and that he cited P.W.2 as a witness to fabricate the case. He denied a suggestion that the statements of P.W.1 and P.W.2 have been manufactured by him. When he seized the tape recorder and the cassette, he cited P.W.6 and another as witnesses. After seizure, the tape recorder and the cassette were neither wrapped nor sealed. The cassette was with him at the police station Malkhana. Prior to sending the cassette to

Chandigarh for expert's opinion, the culprits were already apprehended. He could not say if Pitter Kulu and P.W.6 were the employees of the P.W.1. A police team was deputed to rescue P.Ws.7 and 8 from Chattisgarh. On 11.2.2004, he examined P.W.8. Prior to his examination, no police officer of Orissa had examined them. The case diary revealed that P.W.7 and 8 narrated the incident before P.W.17 of Shankaragarh P.S. prior to his examination. It also revealed from case record that P.W.17 examined the above two persons and recorded their statements. He denied a suggestion that the earlier statements of P.W.7 and P.W.8 recorded under Section 161 Cr.P.C. have been suppressed. He had seen the place from which P.W.7 and P.W.8 were rescued. The place of confinement was the farm house of appellant-Virendra Jaiswal. He did not seize any document regarding ownership of the farm house. He denied a suggestion that the farm house did not belong to appellant-Virendra Jaiswal. He could not say who were the neighbouring persons of the said farm house. He did not seize the original of Exts.2 and 4 written by P.W.8. The seizure witnesses in Ext.19 regarding seizure of the wrist watch, namely, P.Ws.9 and 10 were serving as Gram Rakhis. The wrist watch was seized on 12.2.2004 from appellant-Roshan Ali who was arrested on 10.2.2004. P.W.13 along with another S.I. Sanjib Mohanty had gone to Nagpur to bring Roshan Ali, Rajan Mishra and Pradeep Srivastava. They did not examine any witnesses. P.W.33 examined the witnesses of Nagpur on 3.6.2004 and by the said date P.W.7 and P.W.8 were already rescued. He did not give any requisition to the S.D.J.M., Sundergarh for any voice identification parade of the culprits. However, the voice recording of culprits was made in presence of the S.D.J.M., Sundergarh before submission of charge sheet. The sample voice of appellants-Roshan Ali and Rajan Mishra was recorded on 8.6.2004 and on 9.6.2004 and the sample voice cassette was sent for the expert's opinion. He further stated that he knew appellant-Virendra Jaiswal by name when he examined P.W.7 and P.W.8. There was no statement either by P.W.7 or P.W.8 specifically that appellant-Virenddra Jaiswal was demanding ransom. He did not re-examine P.W.7 and P.W.8 after the T.I. Parade. No arms or ammunitions were seized from appellant-Roshan Ali. He denied a suggestion that the cassette sent to Chandigarh along with the sample voice cassette of appellant-Roshan Ali and Rajan Mishra was a manufactured one and that the same cassette containing the voice of the above two appellants recorded before the S.D.J.M., Sundergarh was never sent to Chandigarh. He denied a suggestion that P.W.16 and the witnesses from Nagpur were all procured to suit the case. He also denied a suggestion that the photographs of the appellants-Roshan Ali and Rajan Mishra were shown to the identifying witnesses P.W.7 and P.W.8. He denied a suggestion that his investigation was perfunctory. Thereafter, at paras-36 to 40 of his deposition, he referred to various facts not stated before him by P.Ws.1,2,7,8,17,22,31 and 32.

In the cross-examination on behalf of Virendra Jaiswal (appellant), P.W.33 stated that P.W.26 prepared the spot map of the farm house where P.Ws.7 and 8 were in confinement. In the cross-examination on behalf of Santosh Jha (since acquitted), P.W.33 stated that he examined Santosh Jha on 10.5.2004. He denied a suggestion that he filed charge sheet against Santosh Jha without proper investigation. P.W.33 was subjected to re-examination on recall on 8.2.2007, wherein P.W.33 stated that the Balestic Expert's report was sent to the court of S.D.J.M., Sundergarh regarding examination of the seized arms after filing of the charge sheet. In the cross-examination on behalf of Roshan Ali (appellant), Pradeep Srivastava and late-Rajendra Prasad, P.W.33 stated that the report of the Balestic Expert was forwarded by the S.D.J.M., Sundargrh to the Sessions Court. He could not say

the name of the General Manager, BSNL, Rourkela as he had no acquaintance with him. The fax message did not contain the P.S. number, G.R. case number of this case. He denied a suggestion that Ext.71 is a manufactured document. There was no cross-examination on behalf of rest of the culprits.

An analysis of evidence of P.W.33 reveals that he conducted the investigation more or less in a fair manner. With regard to non-registration of F.I.R. immediately after receiving the V.H.F. message, he has stated that from the V.H.F. message, the name of P.W.2 was not disclosed to him as an eye-witness to the occurrence. It was limited to the information that one aged person was abducted in a Bolero Jeep by some culprits. After getting V.H.F. message, he proceeded to the spot at 5 P.M. but did not find any clue of the case though he examined some neighbouring witnesses of the Bazar. Further, his evidence reveals that on 24.1.2004 from 4.30 P.M. to 11 P.M., P.W.33 was not there at the police station. Therefore, after receipt of F.I.R. under Ext.1 at 11 P.M. he registered the F.I.R., and thereafter took up the investigation. This seems a satisfactory explanation of registration of F.I.R. at 11 P.M. and broad probabilities are that after receipt of F.I.R. under Ext.1 he examined P.W.3 and from him he came to know about P.W.2 as an eye-witness to the occurrence. Accordingly, P.W.33 examined P.W.2 on 25.1.2004 as has been stated by him at para-26. So far as delay in sending the F.I.R. to the S.D.J.M. Court, it has to be remembered that P.W.33 received the F.I.R. at 11 P.M. on 24.1.2004 and started investigation and para-25 of his deposition reveals that F.I.R. was despatched to S.D.J.M. court on 25.1.2004 and same was received by S.D.J.M. on 27.1.2004. It may be noted here that 26.1.2004 was a National Holiday being Republic Day. So far as contradictions are concerned, as has been indicated in Paras-36 to 40 of the cross-examination of P.W.33, all these have been dealt with individually while analysing the evidence of the witnesses of P.Ws.1,2,7,8,17,22,31 and 32. These contradictions no way affect the core prosecution version of abduction for ransom and confinement of P.Ws.7 and 8 with common intention of appellants. With regard to non-examination of P.W.16 immediately, P.W.33 has stated that delay was on account of non-availability of P.W.16.

On behalf of defence, appellant-Roshan Ali examined only one defence witness, namely, Khaleda Parken. She stated in her examination-in-chief that appellant-Roshan Ali was a resident of Jugsalai, Jamshedpur, who was her close neighbourer. In the year 2004 on 24.1.2004, appellant-Roshan Ali was called to her school for hoisting the National Flag on the occasion of "Republic Day". On 9.2.2004 at about 12 A.M. Maharashtra Police came to her hamlet and took away appellant-Roshan Ali. Later on, she came to know from newspaper that appellant-Roshan Ali had been implicated in this case.

In the cross-examination D.W.1 admitted that she did not have any document regarding the proprietorship of the school in question. She denied a suggestion that there was no such school of which she was the proprietor. Further in her cross-examination, she admitted that she did not give any invitation letter to appellant-Roshan Ali for the Republic Day. She admitted that the appellant-Roshan Ali was not holding any elected post on the above date but he was a respectful person. She further stated that her house and the house of appellant-Roshan Ali were within a distance of about 25 meters and the school in question was situated within the compound of appellant-Roshan Ali's house. She denied a suggestion that appellant-Roshan Ali did not go for flag hoisting on the above date and that she was

deposing falsehood as the school situated within the premises of appellant-Roshan Ali's residence. The evidence of D.W.1 is highly contradictory in nature and not trustworthy.

The overall scanning of the evidence as discussed and analysed above would show that the core prosecution story relating to abduction for ransom by the appellants has been proved by the prosecution. The same would be clear from the evidence of P.Ws.1,2,7,8,16,17,22 & 32. The evidence of other prosecution witnesses except P.W.12 also broadly support the core prosecution story as pointed out by P.Ws.1,2,7,8,16 & 17. Though the prosecution witnesses have been subjected to lengthy cross-examination however, we are satisfied that the core prosecution story relating to abduction for ransom by the appellants in pursuance of their common intention remains undemolished. With regard to illegal confinement of P.Ws.7 and 8 at Hartoli in the farm house of the appellant-Virendra Jaiswal enough material has come out from the evidence of P.Ws.7, 8 and 17 relating to the same. Here also their versions relating to illegal confinement at the hands of the appellants remain undemolished. The factum relating to confinement, as stated by P.W.8 and amply corroborated by P.Ws.7 and 17, clearly implicates all the appellants. Thus, prosecution has clearly made out a case under Sections 364A/34 and 342/34, IPC against the appellants.

However, we are of the view that with regard to the charge framed under Section 120-B, IPC, the evidence on this point, as has come out from the mouths of P.Ws., more particularly, P.Ws.11,20,22 and 32, is not satisfactory to prove the said charge. Except for the fact that two of the appellants, namely, Rajan Mishra and Roshan Ali operated during certain period from Nagpur and some other persons were staying in a hotel at Jharsuguda, no conclusive evidence exists indicating a meeting of minds of the appellants and others prior to the date of occurrence. The evidence relating to concert among conspirators and transmission of thoughts for committing unlawful act is not that clinching and thus is not beyond reasonable doubt. P.W.11 has also not identified any of the accusd though according to Entry Register of Bishnu Palace Hotel, Jharsuguda; 3 to 4 persons stayed there from 17.1.2004 to 19.1.2004, which included appellant-Shamim Siddique. The evidence of P.W.20 relates to a period after the conspiracy was over. The learned Sessions Judge has mainly relied on Roshan Ali's confession before P.Ws.22 and 32 to rope in Section 120-B, IPC completely forgetting that under Section 27 of the Indian Evidence Act, 1872, his statement that he along with others have abducted a Seth from Odisha was not admissible in evidence. Even the alleged statement of Roshan Ali was never put to him during his examination under Section 313, Cr.P.C.

10. Now we will discuss pointwise submissions made by the learned counsel for the appellants as has been noted earlier.

11. With regard to the 1st submission of Mr. D. Panda, learned counsel for the appellant-Rajan Mishra, where he doubted the timing of lodging of F.I.R. by P.W.1 under Ext.1 on the basis of time factor in travelling the distance from Rajgangpur to Sundergarh, it may be noted here that there exists no evidence about the exact distance from Rajgangpur to Sundargarh. Further, P.W.1 in his evidence stated that he received the call from Deepak Sharma at about 10.30 P.M. Thus, the same indicates an approximate timing. Morever one cannot ignore the mental condition of P.W.1 when he received the message over telephone. Further, in any case, it is well settled that F.I.R. is not an encyclopaedia of facts relating to a particular offence. Moreover, in the background of core prosecution story of abduction and

illegal confinement remaining undemolished on the basis of versions of the eye-witnesses, nothing much turns on such argument. Similarly, the point raised by Mr. Panda in delay in despatch of F.I.R. may at best be a procedural irregularity but the same cannot in any way demolish the core prosecution story as indicated earlier. F.I.R. under Ext. 1 was registered at 11 P.M. on 24.1.2004, sent to court on 25.1.2004 and was received at the court on 27.1.2004. Such delay can not be described as unusal as 26.1.2004 was a holiday being Republic Day. Further there is nothing to show that the accused has been prejudiced by such delay.

With regard to the 2nd submission of Mr. Panda relating to non-establishment of charge of criminal conspiracy, we are inclined to accept such submission of Mr. Panda. He is right in his submission that no credible evidence is available beyond reasonable doubt to the effect that before 24.1.2004, i.e., the date of occurrence, the appellants conspired to abduct P.W.8 for ransom and confined him till ransom was paid. As we have indicated earlier the fact that P.W.11 failed to identify the accused, who stayed in the Hotel also helps the defence in this regard. Further, the evidence of P.W.20 relates to a stage after the conspiracy was over. Accordingly, we do not agree with the finding of the learned Sessions Judge on this point. We reiterate our reasonings on this issue, given a little earlier.

With regard to the 3rd submission of Mr. Panda, that there is nothing to show that the appellant-Rajan Mishra was a party to the illegal confinement of P.Ws.7 & 8, we are unable to accept such contention inasmuch as P.W.7 has clearly stated that the persons, who committed the crime, were eight in numbers and he identified Shamim Sidique (appellant), Rajan Mishra (appellant), Atul Pandey and Roshan Ali (appellant) in the T.I. Parade and in the court. He also identified Virendra Jaiswal in the court. He stated that all the miscreants eight in number, who brought him and P.W.8 to the place of confinement, came inside the room where P.W.8 was sitting on the cot and all of them talked to P.W.8 for sometime. Two hours thereafter they took P.W.7, which obviously included Rajan Mishra, to the other room of the said house and confined him in that room by locking the door from outside. P.W.8 remained confined in the room in which he was talking with the culprits. P.Ws.7 and 8 remained confined there for 17 days. Similarly, P.W.8 in his evidence while identifying Roshan Ali, Rajan Mishra, Shamim Sidique, Atul Pandey and Virendra Jaiswal, who were present in the court, stated that these culprits being armed with Revolver in their hands forcibly dragged him and P.W.7 into the Bolero and after the Bolero stopped at the end of a five hours drive, these culprits took them (P.W.7 and P.W.8) from Bolero forcibly inside a tile roofed house in which they were confined for 17 days. Therefore, the submission of Mr. D. Panda, learned counsel on this account fails.

With regard to the 4th submission of Mr. Panda on intrinsic contradictions in the evidence of P.Ws.2,7, & 8 with regard to their description of commission of offence of abduction and identification of Rajan Mishra in the T.I. Parade as well as in court, it may be noted that a perusal of evidence of P.Ws.2,7 & 8 would show that they corroborate one another in material aspect relating to abduction of P.Ws.7 & 8. P.W.2 as well as P.W.7 & P.W.8 have stated that P.Ws.7 & 8 were forcibly taken to Bolero at Pistol point. The contradiction with regard to being dragged either while urinating or from inside Maruti Car, according to us, is a minor contradiction and no way demolishes the version relating to abduction of P.Ws.7 & 8. Moreover, P.W.2 has witnessed the incident as a passer-by. With regard to identification in T.I. Parade, Mr. Panda raised the various objections like the identifying writnesses not stating the specific part played by Rajan Mishra and about

identifying features. In this context, law is well settled as per the decision of of the Hon'ble Supreme Court reported in **(1976) 3 SCC 454 (State of Andhra Padesh** v. **K. Venkata Reddy and others)** that non-stating of specific part played by the culprit in crime would not render the evidence of such identification inadmissible. He also attacked the same saying that P.W.32 in his cross-examination has admitted that he had taken photograph of the appellants Rajan Mishra and Roshan Ali after their arrest. Thus, holding of T.I. Parade had no meaning. In this context, Mr. Panda also relied on the deposition of P.W.16 to the effect that he also admitted to have seen the photographs of all these four appellants in newspaper. In such background, he submitted that once photographs of the appellants were taken and published in the newspaper, there was no point in holding the T.I. Parade vis-à-vis the appellant- Rajan Mishra. He also took exception to not putting Virendra Jaiswal, Pradip Srivastava and late Rajendra Prasad to T.I. Parade. No doubt P.W.32 has stated about taking of photographs and P.W.16 has stated about seeing all the photographs in the newspaper but there is no evidence on record to show that prior to conducting the T.I. Parade, such photographs were published in the newspaper or that such photographs were handed over to the Orissa Police and shown to P.Ws.2,7 & 8. In such background, the submission of Mr. Panda on this point has no legs to stand.

With regard to not putting Virendra Jaiswal, Pradeep Srivastava and late-Rajendra Prasad to T.I. Parade, we would say that there was no point in putting Virendra Jaiswal to T.I. Parade as he remained there at Hartoli with P.Ws.7 and 8 guarding them and was caught red handed during rescue operation. So far as Pradeep Srivastava (since acquitted) and late-Rajendra Prasad (since acquitted) are concerned, P.W.8 in his evidence has clearly stated that these two were not involved in abducting him or P.W.7 and that he never saw these two persons in the place of confinement or anywhere and for the first time P.W.8 saw these two persons standing in the court. Similarly, P.W.7 while identifying Atul Pandey and four appellants-Rajan Mishra, Roshan Ali, Shamim Sidique and Virendra Jaiswal in the court on 29.9.2005 never identified Santosh Jha, Pradeep Srivastava or late Rajendra Prasad though they were present in the court. In such background, putting these persons to T.I.Parade would have served no purpose. The decision cited by Mr. Panda as reported in **AIR 2010 SC 3000** (**Siddanki Ram Reddy** v. **state of Andhra Pradesh**) is factually distinguishable and is of no help.

Similarly, with regard to 5th submission of Mr. Panda that the reasons for which the appellants were acquitted of the charges under Section 395, IPC should also have been the reasons for the trial court to disbelieve the other charges against him, we refuse to accept such a submission simply because as per the analysis made earlier of the evidence, more particularly, of P.Ws.1,2,7,8,16 &17 there exists enough material against the appellants to bring home charges against them relating to Sections 364A/34, IPC and Sections 342/34, IPC.

With regard to sixth and seventh submissions of Mr. Panda that the evidence of P.Ws.7 & 8 should have been discarded with regard to Rajan Mishra's complicity in the alleged abduction and demand of ransom on account of inherent contradictions in the evidence of P.Ws.7 and 8 and the fax messages under Exts.2 and 4 should have been ignored as a person like P.W.8 who can only understand Hindi and cannot speak it correctly cannot be expected to write letters in Hindi, it is reiterated here that as per the earlier analysis made, the evidence of P.Ws.1,2,7,8,16 & 17 make it clear that Rajan Mishra was a party to the alleged abduction and demand of ransom. The evidence of these witnesses along with

other prosecution witnesses clearly show he along with other appellants had a common intention to abduct P.W.8 for ransom and therefore presence or otherwise of P.W.7 at the time of demand of ransom is not a major contradiction as the ransom was not demanded only once but on several occasions. P.W.7 earlier had made it clear in his deposition that eight culprits committed the crime which included Rajan Mishra. In his evidence, he had made it clear that after confining them at Hartoli, these miscreants were persuading P.W.8 to write letters to his son (P.W.1) to arrange a huge amount of money or cash so that P.W.8 could be released failing which they threatened to kill both P.Ws.7 and 8. Similarly, P.W.8 in his evidence has stated that six culprits armed with revolver abducted him and P.W.7 and they took him and P.W.7 to the place of confinement and in the court he identified the culprits by name which included Rajan Mishra. According to him, during the period of confinement these culprits were regularly coming to him and threatened him to give Rs.15 crores to relieve him from wrongful confinement. They also forced him to write letters to P.W.1 and threatened to kill him, if he failed to write according to their dictation. In such background, it cannot be said that the appellant Rajan Mishra was not a party to the demand of ransom as because there exists no evidence that he made phone calls personally demanding ransom. Much has been made by Mr. Panda with regard to ability of P.W.8 to write letters in Hindi which were communicated to P.W.1 through fax messages under Exts. 2 and 4 on the ground that person who can only understand Hindi and cannot speak Hindi correctly and properly cannot be expected to write letters in Hindi. In this context, it is important to note here that no question has been put to P.W.8 in cross-examination with regard to his ability to write in Hindi. Merely because a person cannot speak Hindi correctly and properly cannot ipso-facto lead to a conclusion that he cannot also write in Hindi. Nothing prevented the defence to cross-examine P.W.8 on this aspect which they have not done. Further, it is in the evidence of P.W.8 that he was forced to write these letters as per dictation. In Paragraph-5 of his deposition he stated that the culprits threatened to kill him if he failed to write according to their dictation. Also the fact that P.W.1 identified the messages under Exts.2 and 4 to be in the handwriting of his father (P.W.8) would also show that P.W.1 who must have earlier acquaintance with the handwriting of his father in Hindi, identified correctly. The culprits forced P.W.8 to write as they knew his handwriting would carry more weight with his son, who could identify his father's handwriting. Conceding for a moment but not admitting that the demand for ransom was not conveyed to P.W.1 even then the appellants including Rajan Mishra cannot get benefit as the law is well settled that there is no straitjacket formula that the demand for payment has to be made to a person, who ultimately pays. After making the demand to the abducted person merely because the demand cannot conveyed to person who is supposed to make payment does not take away the offence out of purview of Section 364A, IPC. In such a case, it is to be seen what was the object of abduction. This has ben laid down by Hon'ble Supreme Court in **Malleishi –vrs- State of Karnataka (2004) 8 SCC 95**. The very fact that he was a party to the abduction and immediately thereafter the fax messages containing demand of ransom were received by P.W.1 would make it clear that Rajan Mishra along with rest of the appellants were party to the demand of ransom.

With regard to the eighth submission of Mr. Panda that his client Rajan Mishra has been made a scapegoat in place of Ramesh Agarwal and Dinesh Garg because in his statement recorded under Section 313, Cr.P.C., Rajan Mishra clearly took such a stand and the same should not have been brushed aside lightly by the learned trial court; it may not be out of place to indicate here that both Rajan Mishra and Roshan Ali were apprehended from

nearby the telephone booth at Nagpur pursuant to the direction of Deputy Commissioner of Police, Nagpur to keep a close watch of the said booth as at that time calls were being made from that telephone booth to Rourkela in the mobile number of P.W.16. P.W.16 has clearly stated that Roshan Ali was enquiring about the financial condition of P.W.8 - obviously, under the circumstances to decide about the quantum of demand. P.W.22 & P.W.32 through telephone receipt-Ext.58 have proved that on 9.2.2004 in the evening such a call was made from that telephone booth to mobile number of P.W.16. Ext.58 is the relevant receipt seized from Roshan Ali showing the telephone number of STD booth at Nagpur and the mobile number of P.W.16. Rajan Mishra was caught along with Roshan Ali near the STD booth at Nagpur. There they disclosed their names to be Roshan Ali and Rajan Mishra. Further, as per P.W.20, these two persons were staying in the Hotel Kamal in the assumed name of Ramesh Agarwal and Dinesh Garg. In such background, it is not open for Mr. Panda to contend that Rajan Mishra has been made a scapegoat. The evidence of P.Ws. 1,2,7 & 8 and P.W.22 & P.W.32 clearly establish his culpability in committing the crime under Sections 364A/34, IPC and 342/34, IPC.

With regard to the 9th submission of Mr. Panda, that the evidence of P.W.2 being a chance witness is of no value; we cannot accept the same in view of authoritative pronouncement of Hon'ble Supreme Court on the said issue in the case of **Rana Pratap and others –vrs- State of Haryana** reported in **(1983) 3 SCC 327**. There it has been held as under;

> "We do not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that that they are mere chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses' even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."

In such background, we cannot ignore the evidence of an eyewitness like P.W.2 by dubbing him a chance witness, particularly when his version has been well corroborated by P.Ws.7 & 8.

With regard to the last submission of Mr. Panda that since the appellant-Rajan Mishra stands on the same footing like Pradeep Srivastava, he also should have been acquitted of all the charges; we refuse to accept such submission because while Rajan Mishra was identified by P.Ws.2,7, & 8, however, Pradeep Srivastava despite being present in the court was not identified by P.W.7 and moreover P.W.8 made it clear that Pradeep Srivastava had no role to play in the abduction and he had never seen him either in the place of confinement or anywhere else.

12. Now we will deal with the submissions of Mr. Y.Dash, learned Senior Advocate ably assisted by Ms.Bharati Dash and Mr. Rajee Ray, Advocates, who appeared on behalf of the appellant Shamim Sidique and Virendra Jaiswal.

With regard to their 1st submission that Ext.1 is hit by Section 162, Cr.P.C. as the same is not the first information with regard to occurrence that took place on 24.1.2004 and that the first information has been suppressed which was given by P.Ws.2 and 3, it can only be said that it is well settled by Hon'ble Supreme Court in **AIR 2003 S.C. 4414** (**Damodar v. State of Rajsthan**) that any telephonic information about commission of a cognizable offence, irrespective of the nature and details of such information cannot be treated as first information report. If the telephonic message is cryptic in nature and the officer in charge, proceeds to the place of occurrence on the basis of that information to find out the details of the nature of the offence then it cannot be said that the information which had been received by him on telephone shall be deemed to be an FIR. The object and purpose of giving such telephonic message is not to lodge the first information report but to make the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on the basis of that information the officer in charge is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information to investigate such offence then any statement made by any person in respect of the said offence including about the participants shall be deemed to be a statement made by a person to the police officer in the course of investigation covered by Section 162 of the Code. In this case, P.W.33 in the cross-examination has made it clear that the VHF message received by him was limited to the information that one aged person at point of Pistol was abducted in the Bolero by the culprits. After receiving such VHF message, P.W.33 only made station diary entry and proceeded to the spot. After visiting the spot, he did not find any clue to the case despite examining some neighbouring witnesses of the Bazar. He further made it clear that VHF message did not disclose that P.W.3 was an eye-witness to the occurrence. Thus, it appears, he received a very cryptic message, which as per settled principle of law as indicated above cannot be treated as an F.I.R. and accordingly, it cannot be said that Ext.1 is hit by Section 162, Cr.P.C.

With regard to the 2nd submission of Mr. Dash that there exists material contradictions with regard to prosecution story if one carefully goes through the depositions of P.Ws.2,7 & 8; it is needless to say that as pointed out earlier there exists minor contradictions in their depositions without affecting the core prosecution story which clearly reflects P.Ws.7 and 8 were abducted by a number of culprits which included Rajan Mishra, Shamim Sidique, Virendra Jaiswal and Roshan Ali with a common intention to extract ransom. In order to extract ransom they confined P.W.8 at Hartoli in the farm house of Virendra Jaiswal. Thus, there does not exist material contradictions in the versions of P.Ws.2,7 & 8 with regard to core prosecution story. With regard to the submission of Mr. Dash regarding violation of principles of natural justice as circumstances appearing against his clients from deposition of P.Ws.7 & 8 not being put to them while recording their statements under Section 313, Cr.P.C.; a perusal of evidence of P.Ws.7 & 8 and statements of appellants Shamim Siddique and Virendra Jaiswal under Section 313 Cr.P.C. do not show any substantial incriminating circumstances against them being not put to them. Both Shamim Sidique and Virendra Jaiswal have been put questions on the basis of the evidence of P.Ws.7 and 8. Therefore, it cannot be stated that his clients have been greatly prejudiced.

With regard to the 3rd submission of Mr. Dash that when the statements made by P.Ws.7 & 8 are very inextricably mixed up and it is not possible to separate the grain from the chaff and therfore, the appellants-Shamim Siddique and Virendra Jaiswal ought to have

been acquitted of all the charges as they have been acquitted under Section 395, IPC. In this context, he relied a decision of the Hon'ble Supreme Court reported **in (2007) 9 SCC 589** (**Jakki @ Selvaraj and another** –vrs- **State represented by I.p. Coimbatore**). An analysis of the evidence of P.Ws.7 and 8 would show that so far as their allegations relating to involvement of Virendra Jaiswal and Shamim Sidique are concerned, there exists cogent evidence with regard to their participation in abduction for extracting ransom as well as in illegal confinement of P.Ws.7 and 8 with common intention. Such evidence cannot be said to be inextricably mixed up or any confusion exists on such evidence. Therefore, it cannot be said that in the present case, it is not possible to separate the grain from chaff and accordingly the decision cited by Mr. Dash would be of no help to his clients. Rather in the said decision it has been made clear that even when the testimony of a witness is discarded on part vis-à-vis some accused, that cannot be per se the reason to discard his evidence in toto. With regard to submission of Mr. Dash regarding Pradeep Srivastava, analysis of evidence would show that unlike Praddep Srivastava, there exists solid evidence against appellants-Virendra Jaiswal and Shamim Sidique as stated by eye-witnesses like P.Ws.2,7 & 8. Thus, appellants-Virendra Jaiswal and Shamim Sidique are not similarly placed as Pradeep Srivastava.

With regard to the 4th submission of Mr. Dash raising doubt relating to writing of letters under Exts.2 & 4 in Hindi by P.W.8, the same has already been dealt with while dealing with the 6th submission of Mr. D. Panda, learned counsel for the appellant-Rajan Mishra. Therefore, there is no need to disucss the same here again.

With regard to the 5th submission of Mr. Dash, taking exception to non-examination of Rambhagat Agarwal, Deepak Sharma and Prabin Patra, it can safely be said that it is the quality of evidence that matters not the quantity. Here the prosecution has proved its case with regard to charges under Section 364A/34 & 342/34, IPC beyond reasonable doubt. The same would be clear from the versions of all the P.Ws. barring P.W.12 with special emphasis on the evidence of P.Ws.1,2,7,8,16,17,22 and 31. Moreover this is not a case of circumstantial evidence. The star witnesses in this case are eye-witnesses are like P.Ws.2,7 & 8. Rambhagat Agarwal, Deepak Sharma and Prabin Patra were never eye-witnesses to the crime of abduction for ransom or illegal confinement. So nothing turns in favour of the defence on account of their non-examination.

With regard to 6th submission of Mr. Dash that not putting Virendra Jaiswal and Rajan Mishra to T.I. Parade was fatal and since photographs of the appellants - Shamim Sidique and Virendra Jaiswal were published in the newpaper as stated by P.Ws.2 and 16, such publication clearly defeated the object of holding the T.I. Parade, we would only that such contention has been answered by this Court while answering the 4th submission of Mr. Panda and accordingly, we do not want to discuss the same here again.

However, we accept the last submission of Mr. Dash taking exception to conviction of the appellant Shamim Sidique and Virendra Jaiswal for having committed the offence under Section 120-B, IPC for reasons which have already been given by us earlier and again while dealing with second submission of Mr. Panda. In such background, there is also no necessity of repeating the same.

13. Now we will deal with the contention of Mr. Mohapatra, learned counsel for the appellant-Roshan Ali.

With regard to the 1st submission of Mr. Mohapatra that the trial court has committed illegality by considering the hearsay evidence of P.W.1, in Paragraphs-2,7 and 8 of the judgment in violation of Section 60 of the Indian Evidence Act, we would observe that paragraph-2 of the judgment only refers to the FIR story and different things done by the police officer during course of investigation. There, no inference has been drawn with regard to the culpability or otherwise the appellant Roshan Ali. In Paragraph-7, the trial court has only analysed the evidence of P.W.1 and has come to a finding that P.W.1 corroborated his version made in the F.I.R. Further in Paragraph-7, the learned Sessions Judge has not jumped into a conclusion relating to the culpability of Roshan Ali or any other appellants. In Paragraph-8 there is a discussion relating to the statement of one Rambhagat Agarwal as relied on by P.W.1 and demand of ransom and so also the fax messages written by his father (P.W.8) marked as Ext.2. There also learned Sessions Judge has not jumped into any conclusion relating to guilt of appellant-Roshan Ali. Probably the appellant here has taken exception to P.W.1 relying on the version of Deepak Sharma, Prabin Patra and Rambhagat Agarwal without they being examined in the case. On this, it may be said that it is up to the prosecution to decide as to whom to examine and whom not to examine. Further, the present case is not a case based on circumstantial evidence but is based on versions of the eye-witnesses like P.Ws.2,7 and 8 supported by other prosecution witnesses barring P.W.12. Therefore, to say that on the basis of analysis made in Paragaphs-2,7 and 8 of the judgment, the learned Sessions Judge has convicted the appellant Roshan Ali is not correct.

With regard to second submission of Mr. Mohapatra to the effect that since none of the eye-witnesses like P.Ws.2,7 and 8 had ever named Roshan Ali during investigation, conviction of Roshan Ali is bad in law; we would say that a perusal of evidence of P.Ws.2,7 and 8 would make it clear that the appellant Roshan Ali was named as one of the culprits by all these three eye-witnesses. Mr. Mohapatra further submitted that identification of Roshan Ali by P.W.8 in the T.I. Parade was a farce because as per evidence of P.W.8, he knew him before as he had lodged a case against him. Such contentions of Mr. Mohapatra have no legs to stand. P.W.8 in the cross-examination by Roshan Ali stated that while identifying the accused in jail, accused-Roshan Ali of this case abused him and threatened him. Such deposition is to be read along with the deposition of P.W.33 in the cross-examination at Paragraph-20 where he stated that during investigation and when accused Roshan Ali was in custody, P.W.8 lodged a case under Section 506, IPC and the said case ended in acquittal. A conjoint reading of the same leads to the inference that the appellant-Roshan Ali abused P.W.8 when he was being identified by him in this case. Therefore, it may not be proper to say that P.W.8 has seen Roshan Ali prior to T.I. Parade. However, conceding for a moment but not admitting that P.W.8 had seen him earlier even then Roshan Ali cannot escape as P.Ws.2 and 7 also identified Roshan Ali in the T.I. Parade as being culprit involved in the crime. His identification in T.I. Parade by P.Ws.2 and 7 is free from any defect.

With regard to the photographs being taken by P.Ws.32 and P.W.16 seeing the photographs in the newspaper, already that part has already dealt with while dealing with the 4th submission of Mr. Dash, learned Senior Counsel. Therefore, the same may not be discussed here again. In this context, it may be noted that the decisions cited by Mr. Mohapatra reported in **(1998) SCC (Crl) 1527** (**Ravindra @ Ravi Bansi Gohar** v. **State of Maharashtra and others**), **1970 CrLJ 1149** (**Budhsen and another v. State of U.P.), 1977 CrLJ 173** (**Sri Ravindra Kumar Dey** v. **State of Orissa**) and **AIR 2007 SC 1729** (**Ravi @ Ravichandran v. State represented by Inspector of Police)** are also distinguishable on

facts. In **(1998) SCC (Crl) 1527** (**Ravindra @ Ravi Bansi Gohar** v. **State of Maharashtra and others**), photographs of accused were shown to identifying witnesses like P.W.2 and P.W.12, who also happended to be Constables. They also had opportunity of seeing accused in lock up. Further in that case conviction was based only on identification of P.Ws.2 and 12. So facts are different in that case. In the case reported in **1970 CrLJ 1149** (**Budhsen and another v. State of U.P.),** T.I. Parade was held in a casual manner as described in Paras 9,12 and 14 of the judgment unlike the present case. The nature of evidence of identifying witnesses there was peculiar with strong indiciation of such witnesses having seen the accused earlier. **1977 CrLJ 173** (**Sri Ravindra Kumar Dey** v. **State of Orissa**) is totally irrelevant to the present case. In **AIR 2007 SC 1729** (**Ravi @ Ravichandran v. State represented by Inspector of Police)** there the photographs of the culprits were published in newspaper Dinakaran on 16.8.1993 and the T.I. Parade was held on 24.8.1993. In the presnt case, there exists no such evidence.

With regard to the 3rd submission of Mr. Mohapatra relating to misappreciation of the evidence of P.W.16 as he was examined on 30.5.2004, i.e., much after the incident and rescue of P.Ws.7 and 8 and that his version with regard to Roshan Ali ought not to be believed as he admitted earlier that he was abducted by Roshan Ali himself; our response would be that such submissions are without any legal basis. Law is well settled that a mere delayed examination does not destroy the evidentiary value and will not affect the prosecution case as enunciated in **AIR 2002 SC 3164** (**Bodh Raj @ Bodha and others v. State of Jammu and Kashmir**). However, P.W.33 in the cross-examination has also indicated that he could not examine P.W.16 as he was not available. Similarly because he was abducted earlier by Roshan Ali would not be a ground to throw out his evidence as the fact situation in its totality shows his version relating to receiving telephone call from Nagpur from Roshan Ali at Rourkela ultimately led to apprehending Roshan Ali from the booth from which the telephone was coming to his mobile. Telephone receipt under Ext.58 that was seized from Roshan Ali operates as a bridge connecting Roshan Ali's conduct through STD booth at Nagpur to the mobile calls received by P.W.16 in his mobile at Rourkela. Therefore, we cannot shut our eyes to the evidence of P.W.16, who all through out from the beginning kept the police personnel in loop which ultimately resulted in DCP, Nagpur supervising the operation through P.Ws.22 and 32 leading to apprehension of appellant Roshan Ali and Rajan Mishra from Nagpur. Further, it is important to note here that while cross-examinining P.W.16, no suggestion was given from the side of Roshan Ali that P.W.16 was deposing against him on account of enmity.

With regard to the 4th submission of Mr. Mohapatra that the version of P.W.2 should not have been believed as he has given a totally contradictory version of abduction, we would say that though there exists minor contradiction regarding modus operandi of abduction, however, all the three eye witnesses, namely, P.Ws.2,7 and 8 have deposed that both P.Ws.7 and 8 were taken to Bolero on pistol point. Therefore, such contradiction as highlighted by Mr. Mohapatra as to from which place the victims-P.Ws.7 and 8 were dragged, is only a minor contradiction which does not affect the core prosecution story relating to abduction by the appellant-Roshan Ali along with others with common intention of demanding ransom.

With regard to 5th submission of Mr. Mohapatra that though P.W.2 claimed himself to be an eye-witness, it was strange that P.Ws.7 and 8 - the victims never whispered anything about his presence in their evidence and accordingly the evidence of P.W.2 carried no value;

we would say that such a submission ignores the basic human conduct in a crisis like situation. The situation at the time of abduction for P.Ws.7 and 8 was grave one for them. Then they were being dragged to Bolero by six persons on the point of pistol when P.W.2 witnessed the incident. In such background, their minds must have been preoccupied by fear for their lives and they must be thinking about how to save themselves. With regard to the submission of Mr. Mohapatra that P.W.2 had not identified P.Ws.7 and 8, it can only be said that the same is not true. P.W.2 in his evidence made it clear that the gentleman who was forcibly taken into the Bolero was wearing one Dhoti and Punjbani of white colour. P.W.33 in his evidence at Paragraph-18 has also stated that P.W.2 stated before him that on the point of Revolver the culprits took away the aged person, who was wearing Dhoti. P.W.8 in his examination-in-chief at Paragraph-3 has also stated that on the date of occurrence he was wearing a Dhoti and Punjabi. From this it cannot be said that P.W.2 had not identified P.W.8 in any manner. In any case core prosecution story relating to abduction by Roshan Ali along with others at Pistol point as stated by P.W.2 has been corroborated by P.Ws.7 and 8.

The 6th submission of Mr. Mohapatra was there was no prosecution evidence to connect Roshan Ali with demand of ransom for release of P.Ws.7 and 8 as P.W.1 had not identified the persons, who made calls to him and there existed no evidence as to from which telephone, calls and messages had come. Further, P.W.33 did not send fax messages to any handwriting expert and have not seized the original letters sent through fax, which did not reveal any name. It is once again reiterated here that analysis of evidence of both P.Ws.7 and 8 would show that there is enough material to connect Roshan Ali with demand of ransom. P.W.7 identified Roshan Ali in the T.I. Parade as well as in the court as one of the eight culprits who committed the crime. According to him eight culprits took him in the Bolero, which ultimately reached a tile roofed house at Hartoli. There those culprits told P.W.8 to write letters to his son (P.W.1) to arrange a huge amount for their release. Abduction took place on 24.1.2004. On 28.1.2004 as per P.W.16 he received the phone call from Roshan Ali who wanted to know the financial condition of P.W.8. Similarly, P.W.8 in his evidence indicated clearly that Roshan Ali was one of the culprits who along with others abducted him and his driver and they demanded Rs.15 crores and kept them confined in two separate rooms. The culprits forced him to write letter to P.W.1 by giving dictation as to what to write for ransom. These culprits, which obviously included Roshan Ali threatened to kill him if he failed to write as per their dication. Accordingly, he wrote Exts.2 and 4. Thus, it is clear that Roshan Ali along with others abducted P.Ws.7 and 8 and kept them in illegal confinement with common intention to extract ransom. PW.16 had made it clear that it was Roshan Ali who had contacted him from a telephone booth which was ultimately found to be situated at Nagpur and as per the timing given by P.W.16 and P.W.22, in the evening of 9.2.2004 after the phone conversation between Roshan Ali and P.W.16 was completed, he was apprehended at Nagpur by P.Ws.22 and 31. So far as P.W.1 is concerned he has received Exts.2 and 4 which he deposed to be in the writing of his father. These two exhibits were also identified by P.W.8 to be in his own handwriting containing demand of ransom. In any case this is not a case of circumstantial evidence because as indicated earlier it is a clear case of eye-witnesses identifying and deposing against Roshan Ali about his conduct and culpability. Non-seizure of original Exts.2 and 4 from the custody of the appellants cannot in any way weaken the case of the prosecution in the light of deposition made by eye-witnesses P.Ws.2,7 and 8 and other attending circumstances in support of the version of the eye witnesses. Ext.58 seized from Roshan Ali and proved by P.W.32 also connects the booth telephone with

the mobile telephone number of P.W.16. Therefore, there exists no doubt about the complicity of the appellant Roshan Ali in committing the offence under Section 364A/34, IPC.

With regard to collection of voice samples, we need not deal with Mr. Mohapatrra's submission as the learned Sessions Judge has not relied on such evidence.

With regard to 7th submission of Mr. Mohapatra regarding non-examination of Rambhagat Agrawal, Prabin Patra, Deepak Sharma and Sudhir Das being fatal to the prosecution case, we make it clear that this aspect of the matter has been taken care by us while examining 5th submission of Mr. Y. Dash, learned Senior Advocate. Therefore, we do not want to repeat the same version while refuting the 7th submission of Mr. Mohapatra. In this context, though Mr. Mohapatra relied on the decisions of the apex Court reported in **AIR 1954 SC 41** (**Purnendu Nath Tagore v. Administrator General of West Bengal)** and **(2007) 1 SCC (Cri) 744** (**Ritesh Chakravarti** v. **State of Madhya Pradesh**), however, the said decisions are factually distinguishable. **AIR 1954 SC 41** (**Purnendu Nath Tagore v. Administrator General of West Bengal)** lays down that when a material witness is withheld, adverse inference should be drawn. There, one top ranking police officer Ghulam Afzal Biabani though present at the scene of occurrence was not examined. So the Hon'ble Supreme Court noted that this has greatly prejudiced the accused. But here no eye-witness has been withheld. **In (2007) 1 SCC (Cri) 744** (**Ritesh Chakravarti** v. **State of Madhya Pradesh**) one S.K. Bajpai despite being eyewitness was not examined by prosecution. This greatly prejudiced the accused.

With regard to 8th and 10th submissions of Mr. Mohaptra, that Roshan Ali has been convicted under Section 120B, IPC without any proper evidence against him and by relying on his alleged confessional statement before P.Ws 22, 31 and 32; we accept this contention of Mr. Mohapatra for reasons stated earlier with regard to contention raised by Mr. D. Panda, leaned counsel for Rajan Mishra on the same issue.

With regard to 9th submission of Mr. Mohapatra that there exists no evidence to convict Roshan Ali under Sections 342/34, IPC, we reject such submission as there exists enough evidence which would be clear from a perusal of evidence of P.Ws.7 and 8. P.Ws.7 and 8 not only identified Roshan Ali in the T.I. Parade and also in the court but as indicated earlier both have said that he was one of the culprits who took active part in abduction and bringing them to the tile roofed house at Hartoli. P.W.7 in his evidence stated that all the culprits, which obviously included Roshan Ali brought them to that place inside the house and confined them there. During Confinement the miscreants which obviously included Roshan Ali persuaded P.W.8 to write letters to his son to arrange a huge amount of cash for their release. P.W.8 also stated that after the Bolero moved for about 5 hours, it stopped in the road in an isolated place. Thereafter, the culprits which obvisouly included Roshan Ali took them from Bolero to a tile roofed house with a mud compound wall forcibly and they demanded huge amount. P.W8 further stated that he and P.W.7 were kept in two separate rooms of that house for a period of 17 days. During this period of confinement, the culprits were regularly coming to him and threatening him to pay huge amount for release from the wrongful confinement.

With regard to 11th submission of Mr. Mohapatra that Roshan Ali has been seriously prejudiced for bringing Exts.58/1,58/2,58/3 and Ext.59 on record, which were never seized from his possession and no copy of seizure list was ever prepared, we refuse to accept such

contention as such contention is not factually correct. Exts.58,58/1,58/2,58/3 and Ext.59 were seized vide Ext.61 dated 9.2.2004 and Ext.20 dated 29.3.2004. Ext. 61 has been signed by Roshan Ali and P.W.32. Thus those records were seized by P.W.32 and P.W.33 in course of investigation. Ext.61 shows those were recovered from the possession of Roshan Ali and the same has been reitereated in Ext.20. With regard to no questions being put about the above noted documents to Roshan Ali under Section 313, Cr.P.C it can be said that though about these documents PW.32 has deposed in his evidence but while cross-examining him on behalf of Roshan Ali no question has been put on the above noted documents. Though the documents under Exts.58/1,58/2,58/3 and Ext.59 has not been specifically indicated in the statement of Roshan Ali recorded under Section 313, Cr.P.C., however, question nos. 11,12,19 would show that the questions were put to him on his telephone calls to P.W.16 from Nagpur. The above noted exhibits mainly contain the various telephone numbers seized by P.W.32 from Roshan Ali. Thus it cannot be said that Roshan Ali was totally unaware of the reasons for such examination, which obviously was based on such exhibits. Thus in the facts and circumstances, it cannot be said that any prejudice has been caused to Roshan Ali on this account. Further, even if we ignore the above noted documents, then also Roshan Ali can not go scot free as his role in abducting and confining P.W.7 and P.W.8 for ransom is well established from the evidence of eye-witnesses like P.Ws.2,7 & 8.

With regard to the 12th submission of Mr. Mohapatra that though P.W.8 has stated that all the eight persons were very much present and they were talking with him during the period of two hours and threatening that if ransom would not be paid, his children and family members would be killed and finished and though Santosh Jha, Pradeep Srivastava and late-Rajendra Prasad were acquitted, however, Roshan Ali has been convicted. In this context, a careful reading of evidence of P.W.8 would show that at para-21 he has referred to the eight accused persons however, in para-23 he has made it clear that out of the eight accused persons, who had abducted him, five accused persons were presnt in the court. He further stated that the accused persons like Pradeep Srivastava, late-Rajendra Prasad and Santosh Jha were not involved in abducting him and they had no role to play in abducting him or his driver. He also made it clear that he did not see these three persons in the place of confinement or anywhere and for the first time he saw those three persons namely, Santosh Jha, late Rajendra Prasad and Pradeep Srivastava in the court only. Moreover, P.W.7 though identified Shamim Sidique, Atul Pandey, Rajan Mishra, Virendra Jaiswal and Roshan Ali in the court, however he also did not identify Santosh Jha, Rejendra Prasad and Pradip Srivastava despite their presence in the court. Therefore Roshan Ali is not similarly placed as that of three persons who have been acquitted. Also in such background not carrying out of T.I. Parade with regard to Santosh Jha, Pradeep Srivastava and late-Rajendra Prasad in no way weakens the prosecution case. Had they been put to T.I. Parade, no fruitful purpose would have been served in the above noted background.

With regard to the last submission of Mr. Mohapatra that all the documents exhibited in the case being unauthenticated xerox copies, the court below has gone wrong in relying on such xerox copies, such submission is not factually correct. A perusal of exihibits would show that there exists xerox copies only of Exts.2,4,52 and 71. The xerox copies of Exts.2 and 4 no way weakens the case of the prosecution as the original of the same may have been destroyed by the culprits which were in their possession. Taking a borad view of facts namely, the circumstances under which Exts.2 and 4 were despatched, i.e., in the background of abduction and demand of ransom and that P.W.8 has owned up his own

handwriting as appearing from Exts.2 and 4 and the fact that handwriting appearing in Exts.2 and 4 have been identified by P.W.1 as the handwriting of P.W.8, no exception can be taken in the circumstances for making use of xerox copies of fax messages demanding ransom in the background of immediate and recent abduction. With regard to Ext.47, it shows the name of Ramesh Agarwal and Ramesh Garg in the Register of Hotel Kamal at Sitawardi, even if we ignore the same, it will no way weaken prosecution case as after being apprehended Rajan Mishra and Roshan Ali had revealed their true identities at Nagpur and moreover they were correctly idetnfified in the T.I. Parades and in the court by eye-witnesses like P.Ws.2,7 & 8. With regard to Ext.52, the appellant can not raise any objection now as it was admitted in evidence by the trial court without any objection. With regard to Ext. 71 containing some phone numbers, even if we ignore the above noted exhibit then also no benefit can accrue to Roshan Ali as he has been implicated by eye-witneses like P.Ws.2,7 and 8 of committing the crime of abduction along with others with common intention to extract ransom from P.Ws.7 and 8 by keeping them under illegal confinement.

14. With regard to submissions of Mr. J.P. Patnaik, learned Additional Government Advocate, since we have accepted most of his submissions except his submission with regard to Section 120B, IPC, we will deal with the decision cited by him on this issue. Earlier, we have made it clear in course of analysis of evidence and submission of learned counsel for the appellants regarding deficiency of evidence on this issue. Now coming to decision cited by Mr. Patnaik, learned Additional Government Advocate, i.e., **(2010) 3 SCC 56** (**Vikram Singh and others** v. **State of Punjab**), we would say that particular case is factually disntingushable. In that case unlike this case, all the accused were apprehended from a single spot. Similarly decision of Hon'ble Supreme Court reported in **(2012) 1 SCC 406 (Akram Khan v. State of West Bengal)** is also factually distinguishable.

15. For all these reasons, while we uphold the conviction of the appellants under Sections 364A/34, IPC and 342/34, IPC we acquit the appellants of charges under Section 120B, IPC. Since we are upholding the conviction of the appellants under Sections 364A/34, IPC and 342/34, IPC, we also uphold the sentences awarded by the learned Sessions Judge, Sundargarh with regard to the above noted offences and make it clear that all the substantive sentences are to run concurrently and U.T.P. period be set off.

16. Before concluding, we want to make it clear that the analysis made by us in the present appeals and findings given on different aspects shall in no way affect and influence disposal of CRLA No.523 of 2007 filed by Atul Pandey, which is pending before this Court and future trial, if any, of Abdul Kayum @ Pandit @ Tippu. Accordingly, the CRLAs are partly allowed.

Appeals allowed in part.

2016 (I) ILR - CUT-314

I. MAHANTY, J. & DR. D.P.CHOUDHURY,J.

STREV NO. 56 OF 2013

M/S. KALINGA FOOTWEAR ……Petitioner

.Vrs.

STATE OF ORISSA ……....Opp. Party

ODISHA V.A.T. ACT, 2004 –S.4

Disposal of Second Appeal – Duty of the Tribunal – The Second appellate forum being the final court of facts ought to call for the L.C.R. and dispose of the matter so that justice is not only done but also appears to be done.

In this case the Tribunal disposed of the appeal without going through the L.C.R. which was available before it – Disposal of Second Appeal without perusing L.C.R. is not only vulnerable but also affects the rights of the parties – Held, impugned order is setaside – Matter is remanded to the Tribunal for fresh disposal in accordance with law.

(Para 10,11)

For petitioner : M/s. Satyajit Pattanaik & C.M.Singh
For opposite party : Mr. R.P.Kar, Standing Counsel

Date of hearing : 03.11.2015
Date of judgment : 18.11.2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the order dated 08.03.2013 passed by the learned Odisha Sales Tax Tribunal (in short 'the Tribunal'), Cuttack in Second Appeal No. 221(VAT) of 2011-12.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner is a Proprietary Unit engaged in the business of Footwear and duly registered under the Value Added Tax Act, 2004 (hereinafter called OVAT Act) being assigned with the TIN No. 21111204678. For the period from 1.4.2005 to 15.10.2009 the learned Sales Tax Officer made audit assessment under section 42 of the OVAT Act. The learned Assessing Officer found

excess stock worth Rs.3,52,00.28 and accordingly raised tax turnover by raising the same. The learned Assessing Officer directed the petitioner to pay Rs.1,42,831.15 under 12.5% taxable goods and Rs.7,81,717.16 under 4% taxable goods as excess amount. Thus, the dealer was to pay Rs.14,513.47 towards tax and Rs.29,269.94 towards penalty. The total due including tax penalty comes to Rs.43,540.41. Besides the amount of Rs.1,11,424.00 claimed by the dealer towards ITC is disallowed which is added to the above due.

3. Against the order of the learned Assessing Officer the petitioner preferred appeal before the learned Joint Commissioner of Sales Tax. The First Appellate Authority observed that the learned assessing Officer committed error as the audit report does not reflect any stock discrepancy. He further held that the order of assessment has been passed without documentary evidence adduced for which, it cannot be sustainable in the eye of law. So he found the order of assessment was wrong. He observed that there is no evidence on record to establish the order of assessment. Since the order of assessment is wrong without being confronted the same with the dealer, he set aside the order by allowing the appeal.

4. Against the order of the learned First Appellate Authority Second Appeal was preferred by the appellant-petitioner before the tribunal. Learned Single Member of the tribunal after hearing observed that the First Appellate Authority without verifying any books of account of the petitioner passed order. He found that the impugned order is not a speaking order. He further found that the L.C.R. was not available in the case record, but remanded the matter to the learned Assessing Officer by setting aside the impugned order on allowing the appeal.

SUBMISIONS

5. Learned Counsel for the petitioner submitted that without calling for the L.C.R. the learned Second Appellate Authority erred in law by remanding the case for fresh assessment. He further submitted that the learned Second Appellate Authority without application of mind and without verifying the L.C.R. has remanded the matter to the Assessing Officer instead of confirming the order of the learned First Appellate Authority. It is also the submission of learned Counsel for the petitioner that the Tribunal has not applied his mind to the documents available before it at the time of hearing of the Second Appeal. Learned counsel for the petitioner further submitted that the Second Appellate Authority has committed error by observing that the

impugned order does not reveal that the First Appellate Authority has verified the books of account of the dealer and by passing a non-speaking order. It is also stated that the learned Second Appellate Authority has erred in law by remanding the case, when all the materials were available before it for its consideration in the Second Appeal. On the whole it is submitted to allow the Revision by setting aside the order of the Tribunal.

6. Learned counsel for the Revenue opposing the submission of the learned counsel for the petitioner, submitted that the assessment order was correct and the First Appellate Authority had failed to appreciate the facts of the case. He further submitted that remand order passed by the learned Second Appellate Authority is justified, in as much as the order of the learned First Appellate Authority was perverse, therefore a fresh assessment by the Assessing Officer was required. Ultimately he urged to dismiss the Revision.

DISCUSSION

7. We have considered the respective submissions of both parties, perused the petition, counter and copy of the impugned order. It is the admitted fact that the petitioner is a dealer in footwear. The order of assessment shows that the petitioner was dealing with 4% and 12.5% of taxable goods. On verification of the accounts the learned Assessing Officer found that 12.5% taxable turnover of goods sold by the Respondent came to be Rs.11,25,049.22 and the turnover of 4% taxable goods was found to be Rs.1,92,08,574.01. Since the petitioner was found to have excess stock worth Rs.3,52,005.28, the petitioner was directed to pay Rs.9,24,550.00 payable against which the petitioner has paid VAT for Rs.3,54,487.00 and there was claim of ITC of Rs.5,55,549.84.

At the same time the learned Assessing Officer directed the petitioner to pay Rs.14,513.47 towards tax and Rs.29,026.94 towards penalty. At the same time he disallowed ITC of Rs.1,11,424.00.

8. The order of the learned First Appellate Authority shows that no discrepancy was found in stock during audit assessment and there has been no service of notice upon the petitioner for production of necessary documents. He observed that when the books of account were not produced by the petitioner obviously there could be no examination of the books of account by the Assessing Officer. He observed that, order of assessment was passed without any documentary evidence and without justification for which the same was set aside by allowing the Appeal.

9. It is revealed from the impugned order preferred against the order of the First Appellate Authority, that the learned Tribunal has observed that no notice under section 42 of the OVAT Act was issued before taking up the assessment. At the same time it has been observed in the impugned order that the First Appellate Authority has verified the books of account and he found the impugned order is not a speaking order. It is true that a proceeding before the First Appellate Authority is a continuation of the original proceeding, but the order of the First Appellate Authority shows that he has gone through the materials available on record. Moreover, the observation of the learned Second Appellate Authority that "L.C.R. is not available" in the case records is clearly surprising. If the L.C.R. was not available though called for it was not proper on the part of learned Second Appellate Authority to proceed with the Second Appeal. It would have been appropriate for the learned Tribunal to insist upon the production of the L.C.R. and then proceed to dispose of the case on merit after going through the L.C.R. In such circumstances the order of remand is not sustainable.

10. The First Appellate Authority and the Assessing Officers are Officers of the Finance Department, who are also quasi-judicial authority. When the Second Appeal provision was added to the statute to prefer appeal against the First Appeal, such Tribunal being the second Appellate Authority was constituted under section 3 of the Orissa Sales Tax Act (Sic Section 4 of the OVAT Act) having Revenue Officers and Judicial Officers together to decide the Second Appeal. The very purpose of constitution of the Tribunal having Judicial Officer as Chair Person and Member, is to uphold the sanctity of the tribunal with judicial flavor, so that right of the parties can be well adjudicated. On the other hand, the constitution of Tribunal having Judicial Member requires judicial propriety is to be maintained. The Second Appellate forum being the final court of facts ought to call for the L.C.R. and dispose of the matter, so that justice is not only done but also appears to be done. It should not be forgotten that the Sales Tax Tribunal being the apex body on the Commercial Tax matter and manned with equal number of Judicial Member, one will expect that the procedure of law as prevalent in judicial course is maintained to the extent possible, even if it is a quasi-judicial Tribunal. No appellate court ought to dispose the appeal without going through the L.C.R. So the Tribunal ought not to proceed to dispose without L.C.R. being available before it. So in the instant case we are constrained to observe that disposal of the Second Appeal without perusing L.C.R. is not only vulnerable, but also affects the rights of the parties.

11. We therefore without expressing any opinion on the merits of the case remand the matter to the Tribunal for fresh disposal in accordance with law. In the facts and circumstances of the case and submissions of learned counsel for the respective parties, it is proper for the learned Second Appellate Authority to call for the L.C.R. and dispose of the case after hearing both the parties. Hence we hereby set aside the order of the learned Second Appellate Authority and direct the Tribunal to dispose of the appeal after going through the L.C.R. and upon hearing the parties preferably before the end of January, 2016.

12. The revision petition is allowed to the extent indicated herein above.

Revision allowed.

2016 (I) ILR - CUT-318

B. K. NAYAK, J.

W.P.(C). NO.1879 OF 2015

GUNJIBADI LAMPCS LTD. ……..Petitioner.

.Vrs.

THE CONTROLLING AUTHORITY UNDER THE P.G. ACT-CUM-ASSISTANT LABOUR COMMISSIONER & ORS. ……..Opp. Parties

PAYMENT OF GRATUITY ACT, 1972 – S. 4 (1)

Payment of gratuity – Liability – An employer under whom the employee superannuated shall be liable to pay gratuity to the employee calculated on the basis of last wages drawn by him – An employer under whom the employee was working years back before transfer of his service to another employer can not be made liable to pay gratuity on the basis of the last wages drawn by employee at the time of superannuation – Held, petitioner is liable to pay gratuity to O.P. No.3 for the entire period of his service. (Para 8,9)

For petitioner : Mr. Sanjay Ku. Mishra
For Opp. Parties : M/s. A. A. Dash, B.K. Parida, A.Mishra, A.N.Pattanayak, S.A.Pattanaik.
: M/s. S.L.Patnaik & S. Parida.

Date of hearing : 06.10. 2015
Date of judgment: 15.10. 2015

JUDGMENT

B.K.NAYAK, J.

The petitioner, Gunjibadi LAMPCS Ltd. has filed this writ petition challenging the order dated 26.10.2013 of the Controlling Authority under the Payment of Gratuity Act-cum-Assistant Labour Commissioner, Cuttack in P.G. Case No.56 of 2006 (Annexure-1) and the confirming appellate order dated 03.07.2014 passed by the Appellate Authority under the Payment of Gratuity Act-cum-Deputy Labour Commissioner, Cuttack in P.G. Appeal No.7 of 2013 (Annexure-2).

2. Opposite party no.3 was an employee (Salesman) under the Tribal Development Co-operative Corporation Ltd. in its fair price shop at Baliguda with effect from 28.09.1973 and continued as such till 30.06.1979. In pursuance of circular no.14285 dated 11.06.1979 of the Registrar, Co-operative Societies, Orissa the fair price shop along with the services of opposite party no.3 and other staff of TDCC Ltd were transferred and absorbed permanently under the petitioner with effect from 01.07.1979. Opposite party no.3 continued as such under the petitioner and retired from service on superannuation on 31.07.2005. After his retirement, opposite party no.3 applied to the petitioner-employer for payment of gratuity of Rs.1,11,045/- claiming his last pay as Rs.6,730/- per month. Opposite party no.3 also raised the claim for gratuity before the Controlling Authority under the P.G. Act-opposite party no.1. His claim was resisted by the petitioner on the ground that his last pay was Rs.2,100/- per month and that the petitioner was only liable to pay gratuity for the period from 01.07.1979 till the date of retirement of opposite party no.3.

3. The Controlling Authority by his order dated 31.08.2009 directed the petitioner to pay gratuity of Rs.1,28,129/- for the entire period from 27.09.1973 till the date of his retirement accepting Rs.6,730/- as the last pay of opposite party no.3. In P.G. Appeal No.11 of 2009 filed at the instance of the petitioner, the aforesaid order was confirmed and the appeal dismissed. The petitioner thereafter filed writ petition bearing WP.(C) No.17003 of 2011, which was disposed of by this Court by order dated 11.04.2013 setting aside both the original and appellate orders of the authorities under the P.G. Act and remanded the matter to the Controlling Authority to dispose of the same afresh. After such remand, opposite party no.3 by his application dated

18.05.2013 submitted a revised claim of gratuity for Rs.39,980.76 on the basis of his last monthly pay at Rs.2,100/-. He also claimed interest @ 10% per annum on the above gratuity amount for the period from 2005 to 2010 since the petitioner had already deposited gratuity amount of Rs.31,500/- before the Controlling Authority in 2010. The petitioner resisted the claim stating that it was liable to pay gratuity for the period from 01.07.1979 to 31.07.2005 and not from 1973. The TDCC Limited, which was also impleaded as opposite party no.2 before the Controlling Authority, filed its counter admitting the employment of opposite party no.3 under it from 28.09.1973 to 30.06.1979 whereafter opposite party no.3's service was transferred to the LAMPCS Ltd (petitioner). It was further contended that after his retirement opposite party no.3 has not applied to it for gratuity. It is further submitted that as per order in E.P. Case No.7 of 1993-94, Rs.72,000/- is to be realized from opposite party no.3.

4. The Controlling Authority by his impugned order under Annexure-1 held that opposite party no.3 was entitled to gratuity for the entire period of service from 28.09.1973 to 31.07.2005 from the present petitioner since as per the Government Circular the fair price shop and its assets and liabilities along with the services of opposite party no.3 were transferred to the petitioner and therefore, the petitioner is liable to pay gratuity for the entire period. Accordingly, the Controlling Authority assessed the gratuity amount at Rs.38,769/- and after adjustment of Rs.31,500/- already deposited by the petitioner directed it to pay balance amount of Rs.7,269/- along with interest @ 10% for the period from 19.05.2006 to 11.02.2010.

The petitioner challenged the aforesaid order of the Controlling Authority before the Appellate Authority under the Payment of Gratuity Act-cum-Deputy Labour Commissioner, Cuttack, who dismissed the appeal and communicated the order to the petitioner under Memo dated 03.07.2014 (Annexure-2).

5. Learned counsel for the petitioner submitted that since opposite party no.3 was an employee of the TDCC Limited (opposite party no.4) from 1973-79, the petitioner is not liable for payment of gratuity for the said period. Learned counsel for opposite party no.4 has only reiterated the stand taken by it before the Controlling Authority.

Learned counsel for opposite party no.3 submits that there is no infirmity in the impugned orders passed by the authorities under the P.G. Act.

6. The only question that arises for consideration is whether the petitioner is liable to pay gratuity from 1973 till 30.06.1979 during which period opposite party no.3 worked under opposite party no.4.

Sub-section (1) of Section 4 of the Payment of Gratuity Act,1972 (in short, 'the Act') provides that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

(a) on his superannuation, or
(b) on his retirement or resignation, or
(c) on his death or disablement due to accident or disease.

Where termination of service of the employee is due to death or disablement continuous service of five years shall not be necessary as a requisite for payment of gratuity.

Sub-section (2) of Section 4 of the Act provides for the manner of calculation of gratuity which is as under :

"**(2)**. For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of [an employee who is employed in a seasonal establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days' wages for each season."

From the aforesaid provisions it is clear that gratuity shall be paid to the employee on the termination of service by superannuation or otherwise by the employer, calculated on the basis of wages last drawn by the employee concerned.

7. Section 2 (f) of the Act defines the term "employer" as follows :

"(**f**) "employer" means, a relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop-

(i) belonging to, or under the control of, the Central Government or a State Government, a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the head of the Ministry or the Department concerned,

(ii) belonging to, or under the control of, any local authority, the person appointed by such authority for the supervision and control of employees or where no person has been so appointed, the chief executive officer of the local authority,

(iii) in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person;"

From the aforesaid definition, it is crystal clear that the term "employer" does not include a past "employer".

8. A combined reading of the aforesaid provisions of the Act makes it clear that it is an employer under whom the employee superannuated shall be liable to pay gratuity to the employee calculated on the basis of last wages drawn by him. An employer under whom the employee was working years back before transfer of his service to another employer cannot be made to pay gratuity on the basis of the last wages drawn by employee at the time of superannuation.

In the instant case, as per the Government order, the fair price shop of opposite party no.4 with its assets, liabilities and services of opposite party no.3, who was working in the said shop, were transferred to the present petitioner, who accepted the same without any objection. There is nothing in the Government order to suggest that the petitioner shall not accept the past liability of the employer.

9. In the light of the aforesaid discussion, it must be held that the petitioner is liable to pay gratuity to opposite party no.3 for the entire period of his service. Therefore, there is no infirmity in the impugned orders and accordingly the writ petition is dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT-323

S. K. MISHRA, J.

CRLMC NO. 5088 OF 2015

NIHAR RANJAN PARIDA ……..Petitioner

.Vrs.

SOOCHNA DHAL & ORS. ……..Opp. Parties

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – S.12

Petitioner and aggrieved persons live separately since 06.05.2011 – Aggrieved persons filed petition U/s. 12 of the Act for compensation in the year 2015 – Whether the petition is barred by limitation U/s. 468 Cr.P.C. ? Held, Section 468 Cr.P.C. has no application to this case as it applies only to offences under the Penal Code – However in the present case the aggrieved persons are denied basic necessity of household expenses for which an economic abuse is committed which comes under the definition of domestic violence – Such offence being a continuing process, the cause of action occurs whenever there is a continuing neglect, hence there can not be any limitation even after three years of cessation of joint residence and an application U/s. 12 of the Act is maintainable. (Paras 11 to 18)

For Petitioner : Mr. Biswajit Nayak
For Opp. Parties: ..

Date of Order : 03.12.2015

ORDER

S.K.MISHRA, J.

1. Heard learned counsel for the petitioner.

2. Perused the records. The petitioner, who is the husband and father of the aggrieved persons who have been arrayed as opposite party nos.1 and 2 in this application, has filed this application under Section 482 of the Cr.P.C. challenging the order dated 14.9.2015 passed by learned S.D.J.M., Panposh at Rourkela on a petition filed by him for dismissal of the petition filed by the opposite party nos.1 and 2 as aggrieved party under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the "Act" for brevity) on the ground that the order suffers from non-application of judicial mind and the learned Judge has not dealt with law governing the field and misread the purpose of such enactment.

3. Learned counsel for the petitioner very emphatically submitted that in the petition under Section 12 of the Act, aggrieved persons have stated that

4. on 6.5.2011 the respondent and his family members forced the father of the aggrieved person, i.e., opposite party no.1, to take her back and finding no other way, the aggrieved person returned to her parents house in Rourkela. It is an admitted fact that the aggrieved persons and the respondent are living separately since 6.5.2011. It is also the admitted fact that there was domestic relationship between them prior to 6.5.2011. The aggrieved persons, in the mean time, initiated a criminal case for the alleged commission of offence under Section 498-A of the I.P.C. and Section 4 of the D.P. Act in G.R. Case No.978/2011 of the court of learned S.D.J.M., Panposh at Rourkela. The said matter is still pending. The aggrieved persons also filed a case being C.P. No.216/2015 and I.A. No.85/2011 under Sections 18 and 20 of Hindu Maintenance and Adoption Act before the learned Judge, Family Court, Rourkela, the same is still pending. The main contention of the learned counsel for the petitioner is that the cause of action arose in the year 2011, but after lapse of more than three years, the aggrieved persons have filed C.M.C. No.122/2015, which is barred by limitation. It is contended that as per Sections 28 and 32 of the Act read with Section 15(6) of the Rules, the provisions of Cr.P.C. is applicable. It is, therefore, contended that as such Section 468 of the Cr.P.C. is applicable to filing of the cases under the Act. Thus, it is argued that the limitation of filing of cases under the Act is one year from the date when the cause of action arose. Since the proceeding before the learned Magistrate has been initiated after lapse of more than three years from the date of cause of action, the case is not maintainable and the same should be dismissed.

5. Section 12 of the Act provides that an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person to seek redressal from the Magistrate having jurisdiction regarding reliefs referred under the Act.

6. Section 2(a) of the Act defines that an aggrieved person means any women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

7. Section 2(f) of the Act defines that “domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

8. Thus, a simple reading of the aforesaid provisions show that the parliament in its wisdom thought it proper to give protection to women who was in addition to live together in the present or in the past, in a shared hold house when they are related (i) by consanguinity or (ii) by marriage or (iii) by relationship in nature of marriage or (iv) on account of relationship of adoption or (v) they are related to each other as family members living together as joint family.

9. The objects and reasons leading to the legislation of the Act make its abundantly clear that it was enacted to "provide a remedy in the civil law" in as much as the then existing civil law would not address the phenomenon of domestic violence in its entirety. Thus, the Act has been enacted to give relief to certain aggrieved person who has been subjected to domestic violence by person with whom she has domestic relationship. It does not define any offence nor does it give punishment for any offence of domestic violence. In Section 31 of the Act, if a person who has been directed to pay compensation etc. as envisaged under the provisions of the Act does not comply the same then a criminal case can be initiated against him. For better appreciation of the said provision, it is quoted below:-

> "31. Penalty for breach of protection order by respondent. – (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.
>
> (2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who has passed the order, the breach of which has been alleged to have been caused by the accused.
>
> (3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498-A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions."

10. A careful examination of the aforesaid provision makes it clear that it provides penalty for breach of protection order by the respondent. It provide punishment to the respondent for a breach of protection order or interim protection order and the same has been defined under the Act. Such offender shall be punishable with imprisonment of either description which

may extend to one year or with fine which may extend to twenty thousand rupees or with both.

11. Section 468 of the Cr.P.C. provides for the Bar to taking cognizance after lapse of the period of limitation. It reads as follows:-

> "468. Bar to taking cognizance after lapse of the period of limitation.-(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
>
> (2) The period of limitation shall be –
>
> (a) six months, if the offence is punishable with fine only;
>
> (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
>
> (3) For the purpose of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

12. A bare reading of the aforesaid provision leaves no doubt in the mind of the Court that the limitation prescribed under Section 468 of the Cr.P.C. applies only to offences punishable under the provisions of any of the Penal Act. It does not speak about initiation of a proceeding under Section 12 of the Act or instituting a case Section 125 of the Cr.P.C. So the matter should not be confused. There is no limitation prescribed in the Act for instituting a proceeding under Section 12 of the said Act. Once a proceeding is initiated a protection order is given and then the respondent violates the protection order, then the offence under Section 31 of the Act would be attracted.

13. Only from the date of breach of protection order, the limitation shall be calculated and if it is beyond one year the Magistrate shall not take cognizance of offence under Section 31 of the Act. That situation has not as yet arisen in this case. No protection order or interim order has been passed. So there is no question of applying the provisions of Section 468 of the Cr.P.C. to the case as there is no need to take cognizance of any offence at this stage. When a Magistrate accepts a petition filed by the aggrieved person

under Section 12 of the Act and direct to issue notice to respondent, it does not take cognizance of any offence. So in that view of the matter, the order of issuance of notice at this stage, the Court is not required to look at any provisions of law guiding limitation.

14. In that view of the matter, the contentions raised by the learned counsel for the petitioner is devoid of any merit and the same is rejected.

15. Learned counsel for the petitioner filed an unauthentic copy of the order purported to have down loaded from the internet in which the District Judge, Saket, New Delhi, has allowed an appeal under Section 29 of the Act. Such judgment has no binding effect. Moreover, the issue therein is whether the interim order of maintenance passed by the learned Magistrate is correct or not. The District Judge himself was not in seisin of the matter where the proceeding was to be quashed for limitation.

16. Another unreported decision of the Bombay High Court has been filed. As per the order dated 7th March, 2013 a single Judge of the Bombay High Court has held that the petition under Section 12 of the Act should be filed within a reasonable time. The learned Judge held that a wife who has returned from the USA and consequently from the domestic relationship and lived in India for one year cannot file an application with regard to that relationship after such time.

17. In that case the domestic relationship existed in USA and she went away from the domestic relationship and then lived in India for one year. Thereafter she filed an application in India, i.e. is not entertain and the learned Single Judge of Bombay High Court upheld the same. This Court is of the opinion that the aforesaid cases are totally different from the present case.

18. The question involved can also be seen through another angle. A reference to the statement of objects and reasons of the aforesaid Act reveal that parliament proposed to enact a law keeping in view the rights guaranteed under Articles 14,15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. Furthermore, domestic violence has been defined to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Economic abuse has been defined at Clause-iv of Section-3 of Chapter-II of the Act. It is appropriate to take note of the exact provisions laid down:-

"xxx xxx xxx

(iv) "economic abuse" includes –

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved persons requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household".

19. It is apparent from the aforesaid provision at sub-clause (a) that deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved persons requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children shall be included as economic abuse. So a lady who is denied the basic necessity of meeting the household expenses of herself and her children than economic abuse is committed and it comes within the definition of domestic violence. As such this economic abuse is a continuous process and the cause of action occurs whenever there is a continuing neglect by the respondents to share the economic and financial resources with the aggrieved persons. In such cases, there cannot be any limitation and even after three years of cessation of joint residence and an application under Section 12 of the Act is maintainable.

20. In that view of the matter, this Court is of the opinion that the CRLMC is devoid of any merit and the same is, accordingly, dismissed in limine.

Application dismissed.

2016 (I) ILR - CUT-329

C. R. DASH, J.

WP(C) NO. 11412 OF 2013

BILASH MAJHI ……..Petitioner

.Vrs.

COLLECTOR & DISTRICT MAGISTRATE KALAHANDI & ANR. ……..Opp. Parties

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 26 (2)

Whether the collector, in exercise of his power and jurisdiction U/s 26 (2) of the O.G.P. Act, 1964 can decide the question of disqualification of a candidate U/s 11 (a) (i) of the Act to contest for the post of sarpanch of a Grama Panchayat ? Held, yes.

(Paras 18.19)

Case Laws Rreffered to :-

1. 2008 (I) OLR – 230 : Raghunath Sahoo vrs. Collector & District Magistrate, Keonjhar and others

For Petitioner : M/s. Suryakanta Dash & H.K. Maharana.
For Opp. Parties : Additional Govt. Advocate.

Date of Judgment : 23.09.2015

JUDGMENT

C.R. DASH, J.

Whether the Collector, in exercise of his power and jurisdiction under Section 26 (2) of the Orissa Grama Panchayat Act, 1964 ('the Act' for short) can decide the question of disqualification of a candidate under Section 11(a)(i) of the Act to contest for the post of Sarpanch of a Gram Panchayat, is the sole question that arises for consideration in this writ petition.

2. Petitioner is the elected Sarpanch of Rajpur Gram Panchayat under Junagarh Block in the district of Kalahandi. She impugns the order dated 22.04.2013, Annexure-7, passed by the Collector and District Magistrate,Kalahandi in a suo motu proceeding being numbered G.P. Case No.4 of 2012, declaring the petitioner disqualified to hold the post of Sarpanch of Rajpur Gram Panchayat.

3. By notification dated 14.12.2011 the State Election Commission, Orissa notified the schedule of the Panchayat Election. According to the said Notification, date of nomination for the post of Ward Member as well as the post of Sarpanch of the Grama Panchayat was fixed from 07.01.2012 to 12.01.2012. The scrutiny of the nomination paper was scheduled to be held on 13.01.2012. The date of publication of the valid nomination list was fixed to 16.01.2012 and withdrawal of candidature was fixed up to 18.01.2012. In consonance of the schedule in the said notification, the petitioner chose to put her nomination for the post of Sarpanch of Rajpur Gram Panchayat on 11.01.2012. She had also submitted her nomination for the post of Ward Member of Ward No.9 of Rajpur Gram Panchayat on 12.01.2012. On 13.01.2012 nomination papers were scrutinized and the petitioner was found to be the only valid nominee for the post of Ward Member of Ward No.9 of Rajpur Gram Panchayat. Hence, she was declared elected uncontested as the Ward Member of Ward No.9 of Rajpur Gram Panchayat. So far as the post of Sarpanch of the Rajpur Gram Panchayat is concerned, the nomination papers so submitted by the petitioner was also accepted, as it was found to be valid and she contested the election on being allowed by the Election Officer. She was declared elected as the Sarpanch of Rajpur Gram Panchayat upon counting of the votes.

4. While the matter stood thus, the Collector & District Magistrate, Kalahandi vide Notice dated 22.03.2012 called upon the petitioner to show cause as to why she shall not be declared disqualified to hold the post of Sarpanch of Rajpur Gram Panchayat, she having been elected in contravention of the provisions contained in Section 11 (a)(i) of the Act. The petitioner filed her show-cause taking the stand that the petitioner being a rustic 'Adivasi' lady, she had no idea about the provision of law; she was declared uncontested for Ward No.9 of Rajpur Gram Panchayat, her nomination being the only valid nomination filed for the post and she was not conveyed about the statutory restriction to contest for the post of Sarpanch and her nomination was also not rejected and she was allowed to contest for the post of Sarpanch. Learned Collector, after hearing the counsel engaged by the petitioner, held the petitioner to be disqualified by passing the impugned order vide Annexure-7.

5. The petitioner has assailed the order under Annexure-7 on the following grounds :-

(i) The restriction imposed under Section 11 of the Act has no application to the present case, in as much as there was no occasion

for the petitioner to withdraw her candidature after being declared elected uncontested as the Ward Member of Ward No.9 on the date of scrutiny itself, which is before the schedule date of withdrawal of the nomination. Moreover, her resignation from the post of Ward Member was not accepted on the ground of awaiting publication of result in terms of Rule 52 of the Orissa Gram Panchayat Election Rules, 1968.

(ii) In a proceeding under Section 26 of the Act, the Collector is only empowered to determine and give effect to the disqualification specified in Section 25 of the Act. The present case does not speak of a disqualification, which is one among enumerated in Section 25 of the Act and, therefore, the Collector & District Magistrate, Kalahandi had exceeded his jurisdiction while deciding the case under Section 26 of the Act. In other words, a proceeding under Section 26 of the Act is not at all maintainable for determining the eligibility of a person to stand in an election as a Sarpanch, as envisaged under Section 11 (a)(i) of the Act. The stand of the petitioner is fortified by Sub-section 2(a) of Section 25 of the Act. Hence, if at all any such disqualification is required to be determined, then the only remedy that is available under the Act is a proceeding before the Election Tribunal, seeking relieves in terms of Section 39 of the Act.

6. Counter affidavit has been filed on behalf of opposite party no.1. It is specifically averred in the said counter that the petitioner after being declared elected uncontested as the Ward Member of Ward No.9, should not have proceeded to contest the election for the post of Sarpanch. The discrepancy in the election and ineligibility of the petitioner to contest for the post of Sarpanch was taken cognizance of by the State Election Commission, Odisha, which, vide Annexure-A/1 to the Counter Affidavit, advised the Collector to initiate a proceeding under Section 26 of the Act to do the needful. Accordingly, proceeding under Section 26 of the Act was initiated against the petitioner. As per the election schedule the scrutiny of the nomination paper was taken up at about 11 A.M. on 13.01.2012. As there was single nomination of the petitioner for Ward No.9, she was declared elected uncontested for the post of Ward Member of Ward No.9 on 13.01.2012. On the same day the nomination paper of the petitioner for the post of Sarpanch was scrutinized and declared as valid. The petitioner contested the election for the post of Sarpanch of Rajpur Gram Panchayat and was declared elected by the Election Officer-cum-B.D.O., Junagarh. As the

withdrawal of nomination paper was fixed to 18.01.2012, the petitioner could have withdrawn the nomination for the post of Sarpanch after being declared elected uncontested as Ward Member of Ward No.9. She could have also withdrawn the nomination before 18.01.2012 so far as the post of Ward Member is concerned, though declared elected uncontested. It is further averred in the counter affidavit that, as per the instruction of the State Election Commission necessary disciplinary proceeding vide D.P. No.111, dated 09.04.2012 has already been initiated against the erring Election Officer and he has already been suspended vide Letter No.879/GP dated 09.04.2012. It is further averred that, the Collector has jurisdiction to decide the issue under Section 26 (2) of the Act.

7. Learned Additional Govt. Advocate supports the impugned order and submits that the Collector is authorized under Section 26 of the Act to decide the question whether any Sarpanch or Naib-Sarpanch or any other Member is disqualified or has become disqualified. The petitioner being disqualified from the very outset, the question has rightly been decided by the Collector under Section 26(2) of the Act.

8. Remedy for disqualification of a Sarpanch, Naib-Sarpanch or a Ward Member has been provided in Section 26 and Section 30 of the Act. Under Section 26 of the Act, the Collector is the authority to decide the issue; under Section 30 the Election Tribunal is the authority to decide the issue, as outlined in Section 39 of the Act. This Court in the case of ***Raghunath Sahoo vrs. Collector & District Magistrate, Keonjhar and others, 2008 (I) OLR – 230*** has held that, simultaneously proceeding under Section 26 and a proceeding under Section 30 are maintainable. In paragraph-6 however it has been held that, in a proceeding initiated under Section 26 the Collector has to only consider the disqualification, as specified under Section 25 (2) of the Act. Such an observation however by this Court in the aforesaid decision is not the ratio of the said case, if the issue in question that was raised before the Court in the aforesaid case is taken into consideration.

9. For convenience in discussion and for ready reference, provisions contained in Sections 26, 25, 11(a)(i) and 39 of the Act are extracted below.

> **"26. Procedures of giving effect to disqualifications** – (1) Whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other member **is or has become** disqualified or whenever any such person is himself in doubt whether or not he **is or has become** so disqualified, such person or any other member may, and the Sarpanch at the request of

the Grama Panchayat shall, apply to the Collector for a decision on the allegation of doubt.

(2) The Collector may *suo motu* or on receipt of an application underSub-section (1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of being heard, determine whether or not such person is or has become disqualified and make an order in that behalf, which shall be final and conclusive.

(3) Where the Collector decides that the Sarpanch, Naib-Sarpanch orany other member is or has become disqualified, such decision shall be forthwith published by him on his notice-board and with effect from the date of such publication the Sarpanch, Naib- Sarpanch or such other member, as the case may be, shall be deemed to have vacated office, and till the date of such publication he shall be entitled to act, as if he was not disqualified."

"25. Disqualification for membership of Grama Panchayat – (1) A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he –

(a) is not a citizen of India; or

(b) is not on the electoral roll in respect of the Grama or of the ward, as the case may be; or

(c) is of unsound mind; or

(d) is an applicant to be adjudicated as an insolvent or is an undischarged insolvent; or

(e) is a deaf-mute, or is suffering from tuberculosis; or in the opinion of the District Leprosy Officer is suffering from an infectious type of leprosy; or

(f) is convicted of an election offence under any law for the time being in force; or

(g) is convicted for an offence involving moral turpitude and sentenced to imprisonment of not less than six months unless a period of five years has elapsed since his release or is ordered to give security for good behavior under Section 110 of the Code of Criminal Procedure, 1898 (5 of 1898); or

(h) holds any office of profit under the State or Central Government or any local authority; or

(i) is a teacher in any school recognized under the provisions of the Orissa Education Code for the time being in force; or

(j) holds the office of a Minister either in the Central or State Government; or

(k) has been dismissed from the service of the State Government or of any local authority; or

(l) being a member of a Co-operative Society, has failed to pay any arrear of any kind accrued due by him to such society before filing of the nomination paper in accordance with the provisions of this Act and the rules made thereunder;

Provided that, in respect of such arrears a bill or a notice has been duly served upon him and the time, if any, specified therein has expired; or

(m) is in the habit of encouraging litigation in the Grama and has been declared to be so on enquiry by the Collector in the prescribed manner or by any other authority under any law for the time being in force; or

(n) is interested in a subsisting contract made with or in any work being done for the Grama Panchayat or the Samiti, or any overnment except as a shareholder other than a Director in an incorporated company or as a member of a Co-operative Society; or

(o) is a paid and trained legal practitioner on behalf of the Grama Sasan; or

(p) is a member of the Orissa Legislative Assembly or of either of the Houses of Parliament; or

[(q) is a member of the Samiti elected under Clause (h) of Subsection (1) of Section 16 of the Orissa Panchayat Samiti Act, 1959 (Orissa Act 7 of 1960); or]

[(r) is disqualified by or under any law for the time being in force for the purposes of an election to the Legislature of the State; or

(s) is disqualified by or under any law made by the Legislature of the 1[State; or]

1[(t) is in arrear of any dues payable by him to the 3[Grama

Panchayat; or]

4[(u) has more than one spouse living; or

(v) has more than two children;

Provided that the disqualification under Clause (v) shall not apply to any person who has more than two children on the date of commencement of the Orissa Grama Panchayats (Amendment) Act, 1994 or, as the case may be, within a period of one year of such commencement; unless he begets an additional child after the said period of one year.]

(2) A Sarpanch or any other member of a Grama Panchayat shall be disqualified to continue and shall cease to be a member, if he –

(a) incurs any of the disqualifications specified in Clauses (a) to

(j) 4[Clauses (m) to (p) and Clauses (t) to (v)] of Sub-section (1); or

(b) has failed to attend three consecutive ordinary meetings held during a period of four months commencing with effect from the date of the last meeting which he has failed to attend; or

(c) being a legal practitioner appears or acts as such against the Grama Sasan; or

(d) Being a member of a Co-operative Society has failed to pay any arrears of any kind accrued due by him to such society within six months after a notice in this behalf has been served upon him by the society.

(3) Without prejudice to the provisions of the foregoing Sub-sections, the Sarpanch of a Grama Panchayat shall be disqualified to continue and cease to be the Sarpanch, if he fails to attend three consecutive ordinary meetings of the Samiti, of which he is a member, without the previous permission in writing of the said Samiti.

(4) Notwithstanding anything contained in the foregoing sub-sections-
(a) the State Government may remove any one or more of the disqualifications specified in Clauses (f), (g), (k) and (l) of Sub-section (1);

(b) when a person ceases to be a Sarpanch or Naib-Sarpanch or any other member in pursuance of Clause (g) of Subsection (1) he shall be

restored to office for such portion of the term of office as may remain unexpired on the date of such restoration, if the sentence is reversed or quashed on appeal or revision or the offence is pardoned or the disqualification is removed by an order of the State Government; and any person filling the vacancy in the interim period shall on such restoration vacate the office."

---

1. Substituted *vide* Orissa Act No.4 of 1993.
2. Inserted *vide* Orissa Act No.9 of 1991.
3. Substituted *vide* Orissa Gazette Ext. No.426/18.4.1934-Notfn. No.6139-Legis./18.4.1994.
4. Inserted *ibid.*

"11. Qualification for membership in the Grama Panchayat – Notwithstanding anything in Section 10, no member of a Grama Sasan shall be eligible to stand for election –

(a) as a Sarpanch, if he –

(i) is a candidate for election [* * *] as a member of the Grama Panchayat in respect of any ward; or

xx xx xx

xx xx xx "

"**39. Grounds for declaring election void –** (1) The 1[Civil Judge (Junior Division)] shall declare the election of a returned candidate void, if he is of the opinion –

(a) that, on the date of his election the candidate was not qualified or was disqualified to be elected under the provisions of this Act or the rules made thereunder; or

(b) that, any corrupt practice has been committed by the candidate; or

(c) that, any nomination paper has been improperly rejected or accepted; or

(d) that, such person was declared to be elected by reason of the improper rejection or admission of one or more votes for any other reason was not duly elected by a majority of lawful votes; or

(e) that, there has been any non-compliance with or breach of any of the provisions of this Act or of the rules made thereunder :

Provided that, in relation to matters covered by Clause (a) the 1[Civil Judge (Junior Division)] shall have due regard to the decision, if any, made under Section 26 before making a declaration under this section.

(2) The election shall not be declared void merely on the ground of any mistake in the forms required thereby or of any error, irregularity or informality on the part of the officer or officers charged with carrying out the provisions of this Act or of any rules made thereunder unless such mistake, error, irregularity or informality has materially affected the result of the election."

---

1. Substituted *vide* O.G.E. No.993 Notfn. No.7703-Legis. Dt.28.5.2001.

10. A cursory reading of Section 25 of the Act shows that the disqualifications specified in Clauses (a) to (j), (m) to (q) and (t) to (v) are disqualifications attached to a person as an individual. In other words, these disqualifications are incurred by a person by his acts, deeds, deformity or disease as an individual. So far as the disqualifications in Clauses (k) and (l) are concerned, these are disqualifications acquired by delinquency and default on the part of the individual, who has filed nomination for election or has been elected despite the disqualifications. So far as the disqualifications in Clauses (r) and (s) are concerned, these are disqualifications under law, which can be said to be present and existing from the very outset and an individual does not have to incur the same by his acts, deeds, deformity, disease, delinquency or default. Disqualifications, as specified in Clauses (r) and (s) are there from the very beginning and holding of office or entry into office by a person, though elected with these disqualifications under law, amounts to usurpation of the office concerned. Clause (b) of Sub-section (2) speaks of disqualifications due to default on the part of a Sarpanch, Naib-Sarpanch or a Ward Member in attending three consecutive ordinary meetings held during a period of four months commencing with effect from the date of the last meeting. Clause (c) of Subsection (2) speaks of misdemeanor on the part of a Member, who is a legal practitioner to appear or acts as such against the Grama Sasan. Clause (d) of Sub-section (2) speaks of default on the part of a Member, Sarpanch or Naib- Sarpanch, who is a member of a co-operative society. Sub-section (3) speaks of default on the part of the Sarpanch of a Grama Panchayat in not attending three consecutive ordinary meetings of a Samiti, of which he is a member.

11. Learned counsel for the petitioner harps heavily on Sub-section (2)(a) of Section 25 and submits that the Collector, in exercise of his power under Section 26(2) of the Act, can only decide questions relating to disqualifications specified in Clauses (a) to (j), Clauses (m) to (q) and Clauses (t) to (v) of Sub-section (1). A Sarpanch or a Naib-Sarpanch of a Grama Panchayat cannot be held to be disqualified to continue and shall not cease to be a member on any other ground by the Collector except the disqualifications specified in Clause (a) of Sub-section (2) of Section 25.

12. Such a submission by the learned counsel for the petitioner is wholly misconceived in as much as the key word with which Clause (a) of Subsection (2) of Section 25 begins is the word 'incurs'. The word 'incur', as defined in Merriam – Webster Dictionary, is *"to clause oneself to have or experience (something unpleasant or unwanted)"*. To become liable or subject to bring down upon oneself. Origin of the word is from the middle English *"incurren"*, derived from latin *'incurrere'*, which literally means *"to run into"*.

13. As I have discussed supra, the disqualifications specified in Clauses (a) to (j), (m) to (q) and (t) to (v) are disqualifications which are incurred by a person as an individual by his acts, deeds, deformity or disease. The disqualification might be there before the election or the same might have been incurred after assuming office, as the case may be.

14. Clause (a) of Sub-section (2) of Section 25 only specifies that, if the aforesaid disqualifications specified in Clauses (a) to (j), Clauses (m) to (q) and Clauses (t) to (v) are incurred, a Sarpanch or any other Member of the Grama Panchayat shall be disqualified to continue and shall cease to be a Member. That does not mean that disqualifications specified in Clauses (k), (l),(r) and (s) cannot be decided by the Collector, because Section 25 in no express terms limit the power of the Collector to the disqualifications specified in Clause (a) of sub-section (2) of Section 25 of the Act only. Disqualifications specified in Clause (k) and (l) are occurred by delinquency and default on the part of an individual. If those delinquencies and default are alleged, the Collector has the necessary power to decide the issue of disqualification. So far as disqualifications under Clauses (r) and (s) are concerned, those are disqualifications under law. If those disqualifications are attached to an individual, he is debarred from filing nomination and contesting the election. If those disqualifications are raised before the Collector, those questions can also be decided by the Collector under Section 26 of the Act.

15. My above view is fortified by the provisions contained in Subsection (1) of Section 25, which unequivocally states that a person shall be disqualified for being **elected or nominated** as a Sarpanch or any other Member of the Grama Panchayat constituted under this Act. The Collector is authorized under Section 26 of the Act to decide even the question of illegal and improper nomination and not only the question of disqualification that has been incurred after the election or before the election.

16. Clause (s) of Section 25(1) clearly states that, if a person is disqualified by or under any law made by the Legislature of the State, that amounts to a disqualification. In the present case, the petitioner is disqualified by Section 11(a)(i) of the Act and his disqualification comes under Clause (s) of Section 25(1). The power vested in the Collector under Section 26 of the Act and conspectus of the iscussion supra regarding disqualifications specified in each of the Clauses (1), (2) & (3) of Section 25 quoted supra clearly shows that the Collector has the power to deal with the question of disqualification specified in all the Clauses of Sub-sections (1), (2) & (3). However, the State Government, in Sub-section 4 (a) has been empowered to remove any one or more of the disqualifications specified in Clause (f), (g), (k) & (l) of Sub-section (1).

17. Perusal of Sub-section (1) of Section 25 and Clause (a) of Subsection (1) of Section 39 shows that both the Collector and the Election Tribunal can go into the question of improper and illegal nomination and the question of disqualification. Sub-section (1) of Section 26 puts emphasis on the words – "whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other Member is or has become disqualified……." The aforesaid emphasis on "is or has become" clearly spells out the power of the Collector to decide the question whether a Member is disqualified or has become disqualified. The verb 'is' refers to "pre-existing disqualification or disqualifications" incurred or attached to a member prior to election, and the words "has become" refers to "disqualification incurred after assumption of the office". Same is the power of the Election Tribunal under Section 39 of the Act. The Election Tribunal has to see as to whether on the date of the election the candidate was not qualified or was disqualified to be elected under the provisions of the Act or the Rules made thereunder. The Election Tribunal under Section 39 therefore can also go into the question whether a Sarpanch, Naib-Sarpanch or Ward Member is disqualified or has become disqualified. It is no more *res integra* that a proceeding under Section 26 and a proceeding under Section 39 can run simultaneously. [*see* Raghunath Sahoo *vrs.* Collector & District

Magistrate, Keonjhar and others, 2008 (I) OLR – 230]. Taking into consideration the overlapping of powers between the Collector and the Election Tribunal, the legislature in the proviso to Section 39(1) has provided that, in relation to matters of disqualifications the Election Tribunal shall have due regard to the decision, if any made under Section 26, before making a declaration under Section 39 of the Act.

18. After the Full Bench decision in the case of Debaki Jani *vrs.* The Collector & another, A.I.R. 2014 Orissa 138, any person now can move the Collector under Section 26(2) of the Act for a *suo motu* proceeding to be initiated by him (Collector). The only difference between the two proceedings is that the proceeding before the Collector is a quasi judicial proceeding and Sub-section (2) of Section 26 provides that provision of natural justice regarding opportunity of being heard to the affected parties is to be complied with. So far as the Election Tribunal is concerned, though the Election Tribunal does not act as a Civil Court, it proceeds in the matter in the trapping of a Civil Court and provision of the Civil Procedure Code, as nearly as may be applicable, applies to the proceeding. The proceeding before the Election Tribunal is judicial in nature. So far as outcome of the proceeding is concerned, the Election Tribunal can declare an election void and he can further declare any contesting candidate, who has polled second highest votes, to be elected. Such declaration cannot however be made by the Collector in a proceeding under Section 26 of the Act. Section 26 is not concerned either with declaration of an election as void or with any consequential declaration as to who should have been elected. It merely enables the persons specified in sub-section (1) of Section 26 and the Collector in a *suo motu* proceeding on being moved by any person to seek a decision of the Collector on the question of disqualification of a Member, Naib Sarpanch or Sarpanch.

19. In the present case, it is an admitted fact that the petitioner was elected uncontested as a Ward Member. It is further admitted that she had filed nomination paper for the post of Sarpanch. Being an elected Ward Member, though uncontested, her nomination for the post of Sarpanch was accepted and she was allowed to contest the election. She however got elected and assumed the office. The disqualification specified in Section 11(a)(i) has a bearing on Section 10 read with Section 4 of the Act. There being provisions for direct election of the Sarpanch and of the Ward Member, a Ward Member has been debarred from contesting for the post of Sarpanch.

The disqualification, as specified in Section 11 (a)(i) under law is attached to the petitioner from the very outset, and the Collector, in exercise of his power under Section 26(2), has rightly decided the issue in view of Clause (s) in Section 25 (1) of the Act.

20. In view of the above discussions, I do not find any merit in the writ petition, and the same is accordingly dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT-341

DR. A. K. RATH, J.

W.P.(C) NO. 5756 OF 2005

PRAFULLA KUMAR DASH ……..Petitioner

.Vrs.

JAGANNATH DAS ……..Opp. Party

CONSTITUTIION OF INDIA,1950 – Art. 226,227

Advocate and client relationship – Whether the learned Civil Judge (Sr. Division) Aska was justified in closing execution proceeding No 16 of 1989 on the basis of a memo filed by the learned counsel for the decree-holder when the decree-holder had not authorized the learned counsel to do so ? – Held, No.

In this case learned counsel for the decree-holder filed a memo in the execution proceeding not to proceed with the case and learned Court below dropped the case – Immediately there after the petitioner filed a petition to set aside the order on the ground that he had not instructed his counsel not to proceed with the case – Application dismissed – He filed FAO which was also dismissed – Hence this writ petition – The valuable night of the petitioner to execute the decree cannot be extinguished on the basis of a memo filed by the learned counsel – Held, Impugned orders are quashed – Learned trial Court is directed to proceed with the execution proceeding.

(Para 7 to 9)

For petitioner : Mr. Sujata Jena
For opposite party : None

Date of hearing :26.08. 2015
Date of judgment:04.09.2015

JUDGMENT

DR. A.K.RATH, J.

By this petition under Article 227 of the Constitution of India, the petitioner seeks to quash the order dated 24.2.2005 passed by the learned Addl. District Judge, Fast Track, Aska in FAO No.8 of 2004 dismissing the same and thereby confirming the order dated 28.7.2001 passed by the learned Civil Judge (Senior Division), Aska in MJC No.14 of 1997 whereby and whereunder the application filed by the petitioner to review the order dated 4.2.1997 passed in Execution Proceeding No.16 of 1989 was rejected.

2. The short facts of the case are that the petitioner as plaintiff filed a suit being T.S. No.34 of 1987 for a declaration of right, title and interest and recovery of possession of suit schedule land in the court of learned Subordinate Judge, Aska (now designated as Civil Judge (Senior Division), Aska). The suit was decreed on 6.1.1989. Thereafter, he filed Execution Case No.16 of 1989 for execution of the decree. The case was posted to 4.2.1997. The advocate for the petitioner filed a memo stating therein that the decree-holder did not want to press the execution proceeding. On the basis of the said memo, executing court closed the execution proceeding.

3. While the matter stood thus, on 18.2.1997 a petition was filed under Order 21 Rule 106 CPC by the petitioner-decree-holder to set aside the order dated 4.2.1997 and to restore the case to file on the ground that he had not instructed his advocate not to press the execution proceeding, nor any compromise was effected between the parties. The said petition was registered as MJC No.14 of 1997. During pendency of the said case, the petitioner filed a petition on 16.3.2001 to amend the original petition to convert the same to a petition under Order 47 Rule 1 CPC read with Section 151 CPC. The same was allowed by the learned court below. The opposite party filed a counter to the said petition contending, inter alia, that the compromise entered into between the parties out of court for which the advocate for the petitioner filed a compromise petition on 4.2.1997. By order dated 28.7.2001, the learned Executing Court dismissed the petition and dropped the execution case. The petitioner had unsuccessfully challenged the same before the learned Addl. District Judge, Fast Track, Aska in FAO No.8 of 2004. The same was eventually dismissed on 24.2.2005.

4. Heard Mrs. Sujata Jena, learned counsel for the petitioner. None appears for the opposite party in spite of valid service of notice.

5. The seminal point that hinges for consideration of this Court is as to whether the learned Civil Judge (Senior Division), Aska was justified in closing Execution Proceeding No.16 of 1989 on the basis of a memo filed by the learned counsel for the decree-holder, when the decree-holder had not authorised the learned counsel to do so ?

6. The subject-matter of dispute is no more res integra. An identical matter came up for consideration before the apex Court in the case of Himalayan Coop. Group Housing Society v. Balwan Singh and others, (2015) 7 SCC 373. The appellant therein is a Co-operative Society registered under the provisions of the Delhi Cooperative Societies Act. The appellant-Society comprised of 150 members, including the respondents, who had enrolled themselves with the Society for allotment of residential quarters/apartments. The appellant-Society raised a demand for payment towards allotment of residential quarters/apartments on 28.05.1998. The respondents failed to comply with the demand. They continued to be defaulters in spite of continuous demand notices. Thereafter, the appellant-Society had passed a resolution expelling the respondents from the membership of the Society after following the due procedure. Since the resolution required confirmation of the Registrar of the Co-Operative Societies under Rule 36 of the Delhi Co-Operative Societies Rules, the same was placed before the Registrar for his consideration and approval. By order dated 29.01.2004, the Registrar, Cooperative Societies approved the resolution passed by the appellant-Society. The Registrar provided a last opportunity to the respondents to pay their outstanding dues to the appellant-Society within four weeks, failing which, their expulsion from the appellant-Society would come into effect. The respondents had not complied with the aforesaid order. The said resolution stood confirmed and the respondents ceased to be the members of the appellant-Society. Thereafter, the respondents filed an appeal before the Presiding Officer, Delhi Co-operative Tribunal challenging, inter alia, the aforesaid order. On a later date, they withdrew the said appeal and preferred Revision before the Financial Commissioner, Government of NCT of Delhi. The Revisional Authority came to hold that Registrar has rightly confirmed the expulsion of the membership of the Society and dismissed the revision petitions by order dated 24.02.2005. Thereafter, the respondents approached the writ court. In the writ petition filed, their main prayer was to set aside the orders passed by the Registrar and the revisional authority by exercising supervisory jurisdiction of the Court. The writ court on consideration of the contentions raised in the writ petition came to hold that the Registrar and the

revisional authority had not committed any error in arriving at their respective conclusions and had rightly confirmed the resolution expelling the respondents from the membership of appellant-Society. It was observed that the respondents had not made out a case for interference with the orders of the authorities below. However, on a request made by the respondents seeking issuance of direction to the appellant-Society for consideration of their request to construct and allot the additional quarters/apartments to them, the same being agreeable to by the learned counsel appearing for the appellant- Society, the Court had issued certain directions to the appellant-Society for construction of additional quarters/apartments and their allotment to the respondents, by judgment and order dated 25.11.2010. Thereafter, the appellant-Society had filed review petitions against the aforesaid common judgment and order of the writ court contending, inter alia, that the appellant-society had not authorized the learned counsel to appear for them before the writ court to make any concession in favour of the respondents. The said review petitions were confined to the limited question of feasibility of implementation of the directions issued by the writ court in the impugned judgment and order. The High Court dismissed the review petitions on 12.10.2012. Thereafter, the appellant-society filed special leave petitions before the apex Court assailing the judgment and order of the High Court. Interpreting the provisions of the Bar Council of India Rules, 1975, the apex Court in paragraphs 22, 31, 32 and 33 of the report held as follows:

21. Apart from the above, in our view lawyers are perceived to be their client's agents. The law of agency may not strictly apply to the client – lawyer's relationship as lawyers or agents, lawyers have certain authority and certain duties. Because lawyers are also fiduciaries, their duties will sometimes be more demanding than those imposed on other agents. The authority-agency status affords the lawyers to act for the client on the subject matter of the retainer. One of the most basic principles of the lawyer-client relationship is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe to their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his

employment he has no implied or ostensible authority to bind his client to a compromise/ settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel.

xxx xxx xxx

31. Therefore, it is the solemn duty of an advocate not to transgress the authority conferred on him by the client. It is always better to seek appropriate instructions from the client or his authorized agent before making any concession which may, directly or remotely, affect the rightful legal right of the client. The advocate represents the client before the court and conducts proceedings on behalf of the client. He is the only link between the court and the client. Therefore his responsibility is onerous. He is expected to follow the instructions of his client rather than substitute his judgment.

32. Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics

without consulting the client, while the client has a right to make decisions that can affect his rights.

33. We do not intend to prolong this discussion. We may conclude by noticing a famous statement of Lord Brougham:

"an advocate, in the discharge of his duty knows but one person in the world and that person is his client."

The law laid down by the apex Court in the case of Balwan Singh (supra) applies with full force to the facts and circumstances of the present case.

7. The Execution Proceeding was posted to 4.2.1997. On that day, the learned counsel for the decree-holder entered appearance and filed a memo stating therein not to proceed with the case. Basing on the said memo, learned court below dropped the case. Immediately thereafter the petitioner filed a petition to set aside the said order on the ground that neither he had instructed his counsel not to proceed with the execution proceeding, nor there was any compromise between the parties. Though subsequently an application for amendment was filed to convert the same to a petition under Order 47 Rule 1 CPC, but this Court is of the opinion that the same is misconceived. The petitioner, who was examined as P.W., in his evidence stated that he had not authorized his advocate not to proceed with the case. Though he was subjected to extensive cross-examination, but nothing substantial was elicited. The judgment debtor-opposite party had no occasion to know what transpired between the petitioner and his advocate. He made a bald statement that there was a compromise between the parties out of court, which had been categorically denied by the petitioner.

8. Thus the irresistible conclusion is that the learned counsel for the petitioner in the court below had travelled beyond his jurisdiction and filed a memo. The valuable right of the petitioner to execute the decree cannot be extinguished on the basis of a memo filed by the learned counsel. The courts below have not considered the case in its proper perspective and adopted a hyper-technical approach.

9. In view of the same, the order dated 24.2.2005 passed by the learned Addl. District Judge, Fast Track, Aska in FAO No.8 of 2004 and the order dated 28.7.2001 passed by the learned Civil Judge (Senior Division), Aska in MJC No.14 of 1997 are quashed. The learned trial court is directed to proceed with the Execution Proceeding No.16 of 1989. The petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT-347

DR. A. K. RATH, J.

W.P.(C) NO. 1730 OF 2008

RAJAKISHORE BISWAL ……..Petitioner

.Vrs.

MOHAN CHARAN BISWAL & ANR. ……...Opp. Parties

CIVIL PROCEDURE CODE,1908 – O-18,R-3

Rebuttal evidence – When can be adduced – Provision does not prescribe any particular stage – However there must be several issues involved in the suit and it should be exercised before the party (exercising the option) begins his evidence and in no case after evidence from the otherside has began.

In this case plaintiff was cross-examined on 18.12.2007 and filed an application for time to adduce further evidence and the same having been allowed the suit was posted to 18.01.2008 and on that day he filed another application under order 18, Rule 3 C.P.C. praying to permit him to adduce rebuttal evidence which is before defendants began their evidence – The application was rejected – Hence the writ petition – There being several issues in the suit, burden lies on the defendants to proof some of the issues – Held, the impugned order rejecting the application of the plaintiff under order 18 Rule 3 C.P.C. is quashed – Direction issued to the trial Court to allow the plaintiff to adduce rebuttal evidence. (Paras 7,8.9)

For petitioner : Mr. B.K.Bhuyan
For opposite parties : Mr. M.R.Satapathy

Date of Hearing : 21.9.2015
Date of Judgment: 21.9.2015

JUDGMENT

DR.A.K.RATH, J.

Aggrieved by and dissatisfied with the order dated 22.1.2008 passed by the learned Civil Judge (Sr.Division), Jagatsinghpur in T.S.No.77 of 2002, the instant petition is filed under Article 227 of the Constitution of India. By the said order, the learned trial court rejected the application of the petitioner under Order 18 Rule 3 of C.P.C. to adduce rebuttal evidence.

2. To appreciate the case, it is not necessary to delineate the entire facts of the case. Suffice to say that the petitioner as plaintiff filed a suit for

permanent injunction along with other consequential reliefs in the court of the learned Civil Judge (Sr.Division), Jagatsinghpur, which is registered as T.S.No.77 of 2202. Pursuant to issuance of summons, the defendants entered appearance and filed written statement along with counter claim praying inter alia for partition of the suit schedule land. The plaintiff filed written statement of the counter claim. In course of hearing, he was examined and cross-examined as P.W.1. On 10.1.2008 an application was filed on behalf of the plaintiff under Order 18 Rule 3 C.P.C. praying therein to permit him to adduce rebuttal evidence. The defendants have filed objection to the said petition. It is stated that after closure of the evidence of the plaintiff, the petition filed by him is not maintainable. The learned trial court came to hold that the plaintiff could have filed petition before beginning of his evidence. So at this stage his option to adduce further evidence to reply the questions of the defendants is not maintainable. Such an option is available before beginning of the evidence of the plaintiff at least, in course of his evidence. But after closure of the evidence of the plaintiff, he is not allowed to adduce evidence when the evidence of the defendants side has started. Having held so, the learned trial court rejected application.

3. Heard Mr.Bhuyan, learned counsel for the petitioner and Mr.Satpathy, learned counsel for the opposite parties.

4. Mr.Bhuyan, learned counsel for the petitioner submits that the learned trial court has committed a manifest illegality and impropriety in holding that after closure of evidence of plaintiff, he cannot be allowed to adduce rebuttal evidence. Drawing attention of this Court to the order dated 18.12.2007, vide Annexure-6, he submits that the plaintiff was examined and cross examined at length. A petition was filed on 18.12.2007 for time to adduce further evidence. The same was allowed and the suit was posted to 10.1.2008 for further evidence. On 10.1.2008 a petition was filed on behalf of the plaintiff under Order 18 Rule 3 C.P.C. supported by affidavit praying to permit him to adduce rebuttal evidence. Thus, before hearing of the plaintiff was closed, the application for rebuttal evidence was filed. He cited decisions of this Court in the case of ***Sri Nilakantha Rath Vrs. Sri Natha Maharana,*** 72(1991) C.L.T. 509 *and* ***Smt.Prativa Kar Vrs. Sri Ananda Chandra Das,*** 109 (2010) CLT 507.

5. Per contra, Mr.Sathpathy, learned counsel for the opposite parties supports the order passed by the learned trial court.

6. Order 18 Rule 3 C.P.C., which is the hub of the issue, is quoted hereunder:-

> "**3.Evidence where several issues.-** Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produce by the party beginning; but the party beginning will then be entitled to reply generally on the whole case."

7. On an interpretation of the said Rule, a Bench of this Court in the case of *Sri Nilakantha Rath (supra)* held that for its application the first condition to be satisfied is that there must be several issues involved in the suit. The issues referred to in the said provision obviously mean issues of fact, because evidence is required to be led only on issues. Therefore, in order to attract the provision, there must be more than one issue of fact. It was further held that although the provision does not prescribe any particular stage at which the option should be exercised, it is only fair and reasonable that the same should be exercised before the party (exercising the option) begins his evidence and in no case after evidence from the other side has began. That is because, the other party must know clearly before he begins his evidence that the first party has actually not finished adducing his entire evidence in the suit. The same view was taken in the case of *Smt. Prativa Kar (supra) (emphasis laid).*

8. On 18.12.2007, the plaintiff was cross-examined at length and an application was also filed by the plaintiff for time to adduce further evidence. The same was allowed and the suit was posted to 10.1.2008. On 10.1.2008, the plaintiff filed an application under Order 18 Rule 3 C.P.C. praying therein to permit him to adduce rebuttal evidence. Thus, before the defendants began their evidence, the plaintiff filed application. There are several issues in the suit. Burden lies on the defendants to proof some of the issues. In view of the same, the plaintiff has exercised option to adduce rebuttal evidence before defendants began.

9. In view of the same, the learned trial court has committed a patent error of law in rejecting the application of the plaintiff. The order dated 22.1.2008 passed by the learned Civil Judge (Sr.Division), Jagatsinghpur in T.S.No.77 of 2002 is quashed. The learned trial court shall allow the plaintiff to adduce rebuttal evidence. Accordingly, the petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT-350

DR. A. K. RATH, J.

W.P.(C) NO. 14687 OF 2008

THE ORIENTAL PIGMENT (P) LTD., ……..Petitioner

.Vrs.

O.S.F.C. & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE,1908 – O-33,R-1

Whether the petitioner-Company can be declared as an indigent person ? Held, yes. – The word person in order 33 includes not only natural person but also other juridical person.

(Paras 4 to 9)

For petitioner : Mr. R.Pradhan
For opposite parties : Mr. Abinash Routray

Date of Hearing :10.11.2015
Date of Judgment: 20.11.2015

JUDGMENT

DR.A.K.RATH, J.

In this petition under Article 227 of the Constitution of India, challenge is made to the order dated 6.8.2008 passed by the learned Civil Judge (Sr.Division), Berhampur in I.A.No.50 of 2008. By the said order, the learned trial court rejected the application of the petitioner for declaring it as an indigent person and to allow it to prosecute the suit.

2. The petitioner as plaintiff instituted a suit for passing a decree of delivery of possession of the Schedule-B property and damages amounting to Rs.5,00,000/- impleading the opposite parties-defendants in the court of the learned Civil Judge (Sr.Division), Berhmapur, which was registered as C.S.No.100 of 2008. The aforesaid suit was filed when the properties of the company had been seized by the opposite parties under Section 29 of the State Financial Corporation Act (hereinafter referred to as "the Act"). The petitioner had also filed an application under Order 33 Rule 1 C.P.C. to declare it as an indigent person and to allow it to prosecute the suit as such. In support of the claim, the Managing Director of petitioner-company was examined as P.W.1. By order dated 6.8.2008, the learned trial court rejected the application holding inter alia that P.W.1 was maintaining the passbook of the company and did not produce the same. She could not be able to say the earlier case number. The learned trial court further held that Ext.1 cannot be

taken into consideration for declaring the petitioner-company as an indigent person at present.

3. Heard Mr.Pradhan, learned Counsel for the petitioner and Mr.Routray, learned Counsel for the opposite parties 1 and 2.

4. The seminal point that hinges for consideration before this Court is as to whether the petitioner-company can be declared as an indigent person ?

5. Order 33 Rule 1 C.P.C. provides for institution of suits by indigent person, which is quoted hereunder:-

> **"1. Suits may be instituted by [indigent person]**.-Subject to the following provisions, any suit may be instituted by [an indigent person].
>
> *[Explanation I*: A person is an indigent person,—
>
> (a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or
>
> (b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.
>
> *Explanation II.*- Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.
>
> *Explanation Ill.*- Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity."

6. Order 33 Rule 1 of C.P.C. is an enabling provision. In the event the plaintiff succeeds in the suit, the Court would calculate the amount of court fee, which would be paid by the plaintiff.

7. What is the meaning of 'person' appearing in the Order 33 Rule 1 C.P.C. After survey of decisions of various High Courts, the apex Court in the case of Union Bank of India Vrs. Khader International Construction and others, AIR 2001 Supreme Court 2277 held that the word 'person' has to be given its meaning in the context in which it is used. It refers to a person who

is capable of filing a suit and this being a benevolent provision, it is to be given an extended meaning. It is further held that a public limited company, which is otherwise entitled to maintain a suit as a legal person, can very well maintain an application under Order 33 Rule 1 C.P.C. The word 'person' mentioned in Order 33 includes not only a natural person, but other juridical persons also.

8. In Mathai M.Paikeday Vrs. C.K.Antony, 2011 (II) OLR (SC)-502, the apex Court had the occasion to consider the case of eligibility of a person to sue in forma pauperis. Paragraph-18 of the said report is quoted hereunder:-

> "18. To sum up, the indigent person, in terms of explanation I to Rule 1 of Order 33 of the Code of Civil Procedure, is one who is either not possessed of sufficient means to pay court fee when such fee is prescribed by law, or is not entitled to property worth one thousand rupees when such court fee is not prescribed. In both the cases, the property exempted from the attachment in execution of a decree and the subject-matter of the suit shall not be taken into account to calculate financial worth or ability of such indigent person. Moreover, the factors such as person's employment status and total income including retirement benefits in the form of pension, ownership of realizable unencumbered assets, and person's total indebtness and financial assistance received from the family member or close friends can be taken into account in order to determine whether a person is possessed of sufficient means or indigent to pay requisite court fee. Therefore, the expression "sufficient means" in Order 33 Rule 1 of the Code of Civil Procedure contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee."

9. On the anvil of the decisions cited supra, the case of the petitioner may be examined. In the application filed under Order 33 Rule 1 C.P.C., it is stated that the Managing Director of the Company (though mentioned as firm in the petition) had incurred loan from the opposite parties. The factory could not be established since the sanctioned amount was not released. Thereafter the opposite parties in exercise of power under Section 29 of the Act put the property to auction. The plaintiff had no other property except the properties described in the petition. The plaintiff had not possessed of sufficient means enabling it to pay the court fees. Further the plaintiff was declared as an indigent person by the same court in MJC No.51 of 1998. The Managing

Director of the petitioner-company was examined as P.W.1 in support of the case. P.W.1 has stated that by order dated 19.3.1999 the company was declared as an indigent person in M.J.C.No.51 of 1998. After being declared as indigent person, the company has neither purchased, nor sold any property. The company has no other property except moveable property mentioned in the petition amounting to Rs.330/-. Though P.W.1 was subjected to extensive cross-examination, but nothing was elucidated from her.

10. In view of the impeccable evidence on record, the inescapable conclusion is that the petitioner-company is an indigent person. Accordingly, the order dated 6.8.2008 passed by the learned Civil Judge (Sr.Division), Berhampur in I.A.No.50 of 2008 is quashed. The petitioner-company is allowed to prosecute the lis in forma pauperis.

11. Accordingly, the petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT-353

DR. A.K. RATH, J.

O.J.C. NO. 3139 OF 1998

PRATAP CHANDRA DIKHIT & ANR. ……..Petitioners

.Vrs.

DIST. JUDGE, GANJAM, & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-9, R-13

Setting aside of exparte decree – If the defendant satisfies the Court that the summons was not duly served or he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the exparte decree upon such terms as to costs etc. – But the Court shall not set aside a decree passed exparte on mere irregularities in the service of summons or in a case where the defendants had notice of the date of hearing and sufficient time to appear in the Court – The expression "Sufficient Cause" is not defined in C.P.C. – However "sufficient cause" means that the party had not acted in a negligent manner or there was bonafides on its part in view of the facts and circumstances of the case or the party can not be alleged to have been "not acting diligently" or "remaining inactive" – Every good cause is a sufficient cause and must offer an explanation for non- appearance – Held,

there being no illegality or perversity in the orders passed by the Courts below this Court is not inclined to interfere with the same.

(Paras 7 to 10)

Case Law Relied on

1. (2011) 3 SCC 545 : Parimal vs. Veena @ Bharti

For Petitioners : Mr. A.K.Choudhury
For Opp. Parties : Mr. G.D. Kar

Date of Hearing : 27.07.2015
Date of Judgment: 31.07.2015

JUDGMENT

DR. A.K. RATH, J.

In this application under Article 227 of the Constitution, the petitioners have challenged, inter alia, the order dated 6.2.1998 passed by the learned District Judge, Ganjam, Berhampur in C.R. No.33 of 1996 vide Annexure-3. By the said order, learned District Judge dismissed the revision and confirmed the order dated 27.6.1996 passed by the learned Civil Judge (Sr. Divn.), Berhampur in M.J.C. No.95/92, whereby and whereunder the application filed by the opposite party nos.3 to 5 under Order 9 Rule 13 C.P.C. was allowed.

2. The petitioners as plaintiffs laid a suit for permanent injunction restraining the defendants/opposite party nos.3 to 5 from interfering with their possession of the suit schedule land and for mandatory injunction directing the defendants to leave the suit house in the court of the Sub-Ordinate Judge, Berhampur (now the learned Civil Judge (Sr. Divn.), Berhampur), which was registered as Title Suit No.60 of 1985.

3. The suit was posted to 6.4.1992 for ex-parte hearing. The same was decreed ex-parte. While the matter stood thus, the defendants filed an application under Order 9 Rule 13 C.P.C. to set aside the ex-parte decree, which was registered as M.J.C. No.95/92. It is stated that the defendant no.3 was looking after the case on behalf of the other defendants. He was ill and absent on that date. The Advocate for the defendants prayed for adjournment on the ground of illness of the defendant no.5. But then the same was rejected on 6.4.1992. The suit was posted to 27.4.1992 for ex-parte hearing. Finally, the same was decreed ex-parte. After recovery from illness, the defendant no.5 contacted his Advocate on 5.7.1992 and came to know that the ex-parte decree was passed. Thereafter an application under Order 9 Rule 13 C.P.C. along with an application under Section 5 of the Limitation Act for

condonation of delay was filed. The plaintiffs-petitioners regist the prayer of the defendants that the defendant no.5 was not ill. On the date of ex-parte hearing, he had come to Berhampur with them in the same Bus. The application has been filed to prolong the litigation.

4. To substantiate the case, the defendants had examined three witnesses and the plaintiffs had examined two witnesses. On a thread bare analysis of the evidence on record, the learned trial court came to hold that the defendants were prevented by sufficient cause in attending the court at the time of hearing and accordingly set aside the ex-parte decree subject to payment of cost of Rs.100/-. The petitioners filed a revision being C.R. No.33 of 1996 before the learned District Judge, Ganjam, Berhampur. By order dated 6.2.1998, the learned District Judge dismissed the revision petition.

5. Heard Mr. A.K. Choudhury, learned counsel for the petitioners and Mr. G.D. Kar, learned counsel for the opposite party nos.3 to 5.

6. The provisions of Order 9 Rule 13 C.P.C. is quoted hereunder.

> "**13. Setting aside decree *ex parte* against defendant**—In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:
>
> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:
>
> [Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]"

7. On a conspectus of the said order, it is evident that if the defendant satisfies the Court that the summons was not duly served or he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him

upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. But then, the Court shall not set aside a decree passed ex parte on mere irregularities in the service of summons or in a case where the defendants had notice of the date of hearing and sufficient time to appear in the Court. The second proviso is mandatory in nature.

8. The expression "sufficient cause" has not defined in the C.P.C. Sufficient cause is an elastic expression for which no rule of universal can be laid down. The same should be construed liberally. The Court has wide discretion in the matter. Whether a particular cause is sufficient cause will depend upon the facts and circumstances of the each case.

9. "Sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive" as held by the Hon'ble apex Court in the case of *Parimal vs. Veena @ Bharti,* (2011) 3 SCC 545. It was further held that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". While deciding whether there is a sufficient case or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. In order to determine the application under Order 9 Rule 13 C.P.C., the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence.

10. The case of the petitioners may be examined on the anvil of the decision cited supra. Both the courts on an appreciation of the evidence on record came to hold that the defendants were prevented by sufficient cause in appearing in the suit. Though a plea was taken by the plaintiffs/petitioners that the Doctor (P.W.1) in the habit of issuing false certificate, the plaintiffs failed to substantiate the said plea. Thus, there being no illegality or perversity in the orders passed by the courts below, this Court is not inclined

to interfere with the same in exercise of jurisdiction under Article 227 of the Constitution of India. Accordingly, the writ petition is dismissed.

11. The trial court has allowed the application subject to payment of cost of Rs.100/-. The same is modified to the extent of Rs.2000/-. Since the suit is of the year 1985, the learned Civil Judge (Sr. Divn.), Berhampur is directed to conclude the hearing of the suit by end of December, 2015.

Writ petition dismissed.

.

2016 (I) ILR - CUT-357

DR. B.R. SARANGI, J.

W.P.(C) NO. 24826 OF 2011

JALLEPALLY NARASINGHAM MURTY ……..Petitioner

.*Vrs.*

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

SERVICE LAW – Petitioner while working as Section Officer Level-II in OUAT, applied for voluntary retirement on 31.12.1996 – By that time he had attained the age of 57 years one month and 27 days and had completed 28 years 11 months in Service – As per statute 38 of 1989 statute the period of qualifying service was 58 years for determination of pensionary benefits and accordingly his pension etc, was sanctioned w.e.f. 01.01.1997 by adding weightage of 10 months three days till he attained the age of 58 years – In the meantime this Court in the writ petition filed by some retired employees vide Order Dt. 28.03.1997 directed to add two more years of qualifying service for calculating pensionary benefits from the date of superannuation at the age of 60 years – Owing to such order statute 38 of 1989 Statute was amended enhancing the qualifying service from 58 years to 60 years – Thereafter petitioner made a representation Dt. 30.08.2008 for revised pension w.e.f. 01.01.1997 computing the qualifying service upto 60 yrs by adding weightage of three years – His representation was rejected – Hence the present writ petition – Under Rule 42(5) of the OCS (Pension) Rules, 1992 the qualifying service as on date of intended retirement, with or without permission shall be increased by the period not exceeding five years, subject to the conditions that the total qualifying service rendered by the petitioner does not exceed in any case exceed 33 years and it does not take him beyond the date of superannuation – Moreover if the benefit be made in consonance with the amended

provision of statute 38, then it does not exceed five years and the qualifying service do not exceed 33 years – The petitioner having been extended the benefit upto the age of 58 years, the benefit of period of qualifying service should be re-determined upto the time when the petitioner attained the age of 60 years to determine the quantum of pension, Family Pension and Gratuity – Held, the impugned order, not approving to increase the qualifying service of the petitioner upto the age of 60 years towards pensionary benefit is quashed.

For Petitioner : M/s. D.P.Dhalsamant & N.M.Rout
For Opp. Parties : Addl. Govt. Adv.
M/s. Ashok Mishra, Sr. Adv. & S.C.Rath

Date of hearing : 06.11.2015
Date of judgment: 24.11.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as Section Officer Level-II in Orissa University of Agriculture and Technology (in short hereinafter referred to as OUAT), has filed this writ petition seeking to quash the letter dated 03.02.2009 under Annexure-6 communicating him that the Board of Management of OUAT has taken a decision on 16.01.2009 not to approve the increase in the qualifying service for pensionary benefit up to the age of 60 (sixty) years on consideration of his representation dated 30.08.2008. He further seeks for a direction to opposite party no.2 to grant him revised pension and gratuity by adding two more years qualifying service as per Rule-41(4)(i) of the OCS (Pension) Rule,1992.

2. The factual backdrop of the case in hand is that the petitioner joined as Lower Division Clerk on 01.02.1968 under the Orissa University of Agriculture and Technology (in short hereinafter referred to as 'OUAT') and served on different capacities up to 31.12.1996. While working as Section Officer Level-II completing 28 years 11 months of service as well as attaining the age of 57 years one month 27 days had given a three months notice to take voluntary retirement on 31.12.1996. On consideration of his request he was allowed to retire from service voluntarily vide Office order dated 31.12.1996. The retirement age of the University employees at the relevant point of time was 60 years as per the Statute 15 of the OUAT Employees (Condition of Service) Statutes 1989 (in short hereinafter referred to as 1989 Statute. As per Statute 38 of 1989 Statute the period of qualifying service of employees other than Class-IV employees up to the time when

they complete 58 years of age shall be taken into consideration to determine the quantum of their pension, Family Pension and Gratuity. Accordingly, the Pension, Family Pension and Gratuity of the petitioner was sanctioned with effect from 01.01.1997 by adding weightage of 10 months three days till he attained the age of 58 years for the purpose of pensionary benefits. Most of the retired employees of the University filed O.J.C. No.9221/1993 with a prayer for a direction to opposite party no.2 to add two more years of qualifying service while calculating the pensionary benefits from the date of superannuation at the age of 60 years. This Court passed an order on 28.03.1997 to provide pensionary benefits up to the age of 60 years instead of 58 years. On the basis of the order dated 28.03.1997 passed by this Court, opposite party no.2 vide letter dated 16.02.2006 in Annexure-1 sought sanction from opposite party no.1 to amend Statute 38 of 1989 Statute. Accordingly, by notification dated 01.06.2007 Statute 38 of 1989 Statute was amended and as per the amended Statute the period of qualifying service of employees up to the time when they complete 60 years of age shall be taken into consideration to determine the quantum of their Pension, Family Pension and Gratuity vide Annexure-2. Pursuant to such amended Statute 38 of 1989 Statute a clarification was issued on 26.11.2007 under Annexure-3 to the effect that pensionary benefit is applicable to all the retired employees of University who retired prior to June, 2007 taking their period of qualifying service up to the time when they completed 60 years of age which shall be taken into consideration to determine the quantum of their pension, Family Pension and gratuity with effect from 1st August, 2007. Accordingly, the petitioner submitted a representation on 30.08.2008 praying to grant revised pension in accordance with the revised amended Statute 38 of OUAT Employees (Condition of service) Statute 2007 which has been sanctioned to him with effect from 01.01.1997 by computing the qualifying service up to 60 years by adding weightage of three years. His representation was placed before the Board of Management consisting of by the top level Government personnel as well as Vice-Chancellor of the University including other members as mentioned under Section 17 of the Orissa University of Agriculture and Technology Act, 1965 for discussion on 16.01.2009 by way of memorandum but the Board did not approve the same. Basing upon Rule-42 (5) of O.C.S. Pension Rules-1992, he states that in case of voluntary retirement on completion of 20 years of qualifying service, the qualifying service as on the date of intended retirement of the Government servant retiring under the said rule shall be increased by the period not exceeding five years subject to the condition that the total qualifying service rendered

by the Government servant does not in any case exceed thirty three years and it does not take him beyond the date of superannuation. If a Government servant who could be prematurely retired or could have voluntarily retired after completing 30 years of qualifying service before the age of 50 years under Rule 71 (a) of Orissa Service Code, seeks voluntary retirement under the scheme, the weightage in pension should be admissible up to five years if he has not completed 30 years of qualifying service. For determining the quantum of Pension, Family Pension and Gratuity, the period of qualifying service of the employees other than Class-IV up to the time when they complete 58 years shall be taken into consideration and so far as petitioner is concerned he has also been given the weightage in pension up to 58 years. Having not satisfied with the action taken by the Board of Management in not approving the further two years of benefit, the petitioner has filed this present application.

3. Mr. D.P. Dhalsamant, learned counsel for the petitioner submits that in view of the amendment made in Statute 38 of OUAT Employees (Condition of Service) Statute 1989, the period of qualifying service of the employees having been extended to 60 years by notification issued by the OUAT under Annexure-2 for determination of the quantum of Pension, Family Pension and Gratuity, non-approval of the same by the Board of Management on the basis of the provisions contained in Rule-42 (5) of the OCS (Pension) Rules-1992 cannot sustain. As such the petitioner is entitled to get the benefit of another two years as qualifying service as per Rule-41 (4) (i) of OCS (Pension) Rules 1992. Therefore, the decision taken by the Board of Management of OUAT on 16.01.2009 as communicated to the petitioner under Annexure-6 dated 03.02.2009 in not approving to add a further period of two years in qualifying service be quashed taking into consideration the provisions of law governing the field. He further urges that the case of the petitioner is squarely covered by the judgment passed by this Court in O.J.C. No.9221/1993 disposed of on 28.03.1997 wherein the petitioners of the aforesaid case have been extended the pensionary benefits taking into account their retirement age up to 60 years.

4. Per contra, Mr. Ashok Mishra, learned Senior Counsel appearing for opposite party no.2 lays emphasis on various provisions of OCS (Pension) Rules-1992 vis-à-vis OUAT Employees (Condition of Service) Statutes 1989. He submits that the case of the petitioner does not come within the normal superannuation of service rather he having availed voluntary retirement by giving three months notice which has been accepted by the

authority, his case is fully covered by the provisions contained in Rule-42 (5) of the OCS (Pension) Rules-1992. As such, the Board of Management of OUAT is wholly and fully justified in not approving the further extension of two years taking the age of superannuation as 60 years for grant of pensionary benefits to the petitioner in view of decision taken on 16.01.2009 and communication thereof to the petitioner vide Annexure-6 dated 03.02.2009. So far as applicability of the ratio of the judgment passed by this Court in O.J.C. No.9221/1993 dated 28.03.1997 is concerned, the petitioners in that case were the retired employees, who retired in normal course on attaining the age of superannuation at the age of 58 years. By virtue of the judgment passed by this Court, they have been extended the pensionary benefits taking into account their age up to 60 years. Therefore, the case of the petitioners in O.J.C No.9221/1993 stands on a different footing than that of the present petitioner who has retired voluntarily on his own application.

5. On the basis of the facts pleaded above, it appears that two sets of Rules are under consideration, namely, OCS (Pension) Rules-1992 and OUAT Employees (Condition of Service) Statutes-1989. For just and proper appreciation of the relevant Rules, they are extracted for consideration.

Rule-41-**Retiring Pension**.

Xxx xxx xxx

> (4) (i)- The qualifying service as on the date of intended retirement of the Government servant retiring under clause (a) of Sub-rule (1) shall be increased by the period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not in any case exceed thirty-three years and it does not take him beyond the date of superannuation.
>
> (ii) The weightage of five years shall not b admissible in cases of those Government servants who are pre-maturely retired by the Government in the public interest under clause (b) of sub-rule (1).

Statutes 15 and 16 of OUAT Employees (Condition of Service) Statutes-1989 are as follows:

> 15. The date of retirement of a University employee other than a Government servant on deputation to a University shall be the date of which he/she completes the age of sixty years.
>
> Provided that an employee shall retire on the last day of the month in which he/she completes the age of sixty years.

16. Notwithstanding any thing contained in Statute 15:-

(1) an employee may retire voluntarily from service any time after completing thirty years of qualifying service or on attaining the age of fifty years by giving a notice in writing to the competent authority of the University at least three months before the date on which he/she wishes to retire or by giving said notice to the said authority before such shorter period as the University may allow in any case. It shall be open to the said authority to with-hold permission to an employee who seeks to retire under this provision if he/she is under suspension or if enquiries against him/her are in progress.

(2) the competent authority may also require an employee other than a Class-IV employee to retire prematurely in the interest of the University at any time after he/she has completed thirty years of qualifying service or has attained the age of fifty years in case where he/she has completed ten years of qualifying service by giving notice in writing to the employee at least three months before the date on which he/she is required to retire prematurely or by giving three months pay and allowances in lieu of such notice after following the procedure hereinafter specified in Sub-Statute (3)".

Statute 38 of OUAT Employees (Condition of Service) Statute 1989 is quoted below:

"xxx Notwithstanding the age of superannuation, the period of qualifying service of employees other than the Cass-IV employees up to the time when they complete 58 years of age shall be taken into consideration to determine the quantum of their pension, family pension and gratuity in the case of Class-IV employees, the period of service up to the age of superannuation shall be reckoned for the purpose".

The aforesaid Statute 38 has undergone amendment pursuant to notification dated 1st June, 2007 which reads as follows:

38. The period of qualifying service of employees up to the time when they complete 60 years of age shall be taken into consideration to determine the quantum of their Pension, Family Pension and Gratuity".

6. The admitted fact as emanated from the factual backdrop of the case as mentioned above is that the petitioner while working as Section Officer

level-II submitted his application seeking for voluntary retirement on attaining the age of 57 years 1 month and 27 days by giving three months notice on 31.12.1996 which has been considered by the authority and his VRS was accepted by adding weightage of 10 months 3 days till he attains the age of 58 years for the purpose of pensionary benefits. The retirement age of University employees was 60 years as per the Statute 15 of the OUAT Employees (Condition of Service) Statute 1989 and at the relevant point of time when the petitioner availed the voluntary retirement, Statute 38 specifically stated that the period of qualifying service of the employees other than Class-IV employees up to time when they complete 58 years of age shall be taken into consideration to determine the quantum of their Pension, Family Pension and Gratuity. Therefore, on consideration of his application for voluntary retirement the benefit as admissible to the petitioner in consonance with the Statute 38 has been sanctioned with effect from 01.01.1997 by adding weightage of 10 months 3 days till he attains the age of 58 years. The writ petition bearing O.J.C. No.9221/1993 was filed by some of the retired employees of the University with a prayer to add two more years as qualifying services and calculate their pension as if they were superannuated from service at the age of attaining 60 years which was allowed vide judgment dated 28.03.1997. Pursuant to the order passed by this Court, opposite party no.2 sought for sanction from opposite party no.1vide Annexure-1 dated 16.02.2006 for amendment of Statute 38 of OUAT Employees (Condition of Service) Statute 1989. Accordingly, notification was issued in Annexure-2 on 01.06.2007 by which the period of qualifying service of the employees up to the time when they complete 60 years of age shall be taken into consideration to determine the quantum of their Pension, Family Pension and Gratuity. Therefore, the petitioner claims to enjoy the pensionary benefits by computing the qualifying service up to 60 years of his age in view of the amended Statute 38 of 1989 Statute as the pensionary benefits of the University employees are being finalized as per the provisions contained in OCS (Pension) Rules-1992. But the notification issued in Annexure-2 dated 01.06.2007 is silent about the application of the provisions of OCS (Pension) Rules 1992 for further extension of qualifying service to the persons who have exercised option for voluntary retirement. Statute 38 of 1989 Statute which has undergone amendment under Annexure-2 dated 01.06.2007 provided that the qualifying service of the employees up to time when they complete 60 years of age shall be taken into consideration to determine the quantum of their Pension, Family Pension and

Gratuity but that has not dealt with the situation where a person has sought for voluntary retirement.

7. Rule 42 of the OCS (Pension) Rules 1992 deals with voluntary retirement on completion of 20 years of qualifying service as mentioned supra. Sub-Rule 5 of Rule 42 states as follows:

> "The qualifying service as on the date of intended retirement of the Government servant retiring under this rule, with or without permission shall be increased by the period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not any case exceed thirty three years and it does not take him beyond the date of superannuation".

Rule-42(5) of OCS (Pension) Rule 1992 speaks that under the scheme the weightage not exceeding 5 years should be given to the qualifying service to an employee retiring under the said Rule if the qualifying service rendered by him has not exceeded 33 years of qualifying service.

8. Admittedly, as per the Statute 15 of 1989 Statute, the age of superannuation of the OUAT employees has been fixed at 60 years. Under Sub-Statute (2) of Statute-16 an employee other than Class-IV employee may retire prematurely after he/she has completed thirty years of qualifying service or has attained the age of fifty years in case where he/she has completed ten years of qualifying service by giving notice in writing to the employee at least three months before the date on which he/she is required to retire prematurely or by giving three months pay and allowances in lieu of such notice after following the procedure hereinafter specified in Sub-Statute (3).

9. In view of such provision, the petitioner submitted his voluntary retirement application. By the time he submitted such application, he had only completed 28 years 11 months qualifying service and he had attained the age of 57 years 1 month and 27 days. Therefore, he had no qualifying service of 30 years, but he has been sanctioned Pension, Family Pension and Gratuity with effect from 01.01.1997 by adding weightage of 10 months 3 days till he attained the age of qualifying service of 30 years so also the age of 58 years. Therefore, the benefit has been extended to the petitioner in consonance with the provisions contained in Statute 16 which is applicable to the petitioner. Such determination has been made as on 01.01.1997 on the basis of the Statute 38 which was prevailing then. Statute 38 has undergone

amendment pursuant to Annexure-2 dated 01.06.2007 to the extent that the period of qualifying service of the employees up to the time when they complete 60 years of age shall be taken into consideration to determine the quantum of Pension, Family Pension and Gratuity. Therefore, applying the provisions contained in Rule-42(5) of the OCS (Pension) Rules 1992 the qualifying service as on date of intended retirement retiring under the said rule with or without permission shall be increased by the period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not any case exceed thirty three years and it does not take him beyond the date of superannuation. Therefore, applying the said provisions to the present context if the benefit will be made in consonance with the amended provisions of Statute 38, then it does not exceed five years and the qualifying service is not exceeding 33 years and does not take the petitioner beyond the date of superannuation. In other words, if the qualifying service will be taken into consideration at the age of 60 years, the petitioner will only be entitled to get the benefit of 2 years 10 months from the date of submission of his voluntary retirement application towards determination of the qualifying service at the age of 60 years which is the superannuation age as mentioned in Statute 15. The petitioner having been extended the benefit up to the age of 58 years the benefit of period of qualifying service should be redetermined up to the time when the petitioner attained the age of 60 years to determine the quantum of Pension, Family Pension and Gratuity pursuant to notification issued under Annexure-2 dated 01.06.2007 and it shall be in consonance with the Office Order in Annexure-3 dated 26.11.2007. Therefore, non-approval of increase of qualifying service towards pensionary benefits up to the age of 60 years by the Board of Management under Annexure-6 dated 03.02.2009 cannot sustain in the eye of law. Accordingly, the same is quashed. The writ petition is allowed. No order to cost.

Writ petition allowed.

2016 (I) ILR - CUT-366

DR. B.R. SARANGI, J.

W.P.(C) NO. 25587 OF 2014

SANKAR PRASAD PADHY .....Petitioner

.Vrs.

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

PREVENTION OF CORRUPTION ACT, 1988 – S. 19 (1) (c)

Sanction – Petitioner is an employee under OPTCL – He was booked in a trap case while working on deputation as Executive officer Bhawanipatna Municipality – Being convicted U/s. 7 of the P.C. Act he preferred appeal before this Court – During pendency of the appeal OPTCL dismissed the petitioner from Service – Order challenged in writ petition on the ground that there being no sanction from the competent authority, the conviction in the criminal case is illegal and consequently the order dismissing him from service has no leg to stand – Held, the impugned order dismissing the petitioner from service is quashed – Direction issued to O.P. No. 2 to reinstate the petitioner in service with all consequential benefits as admissible to him under law. (Paras 14, 15,16)

Case Laws Referred to :-

1. AIR 2005 SC 4308 : State of Karnataka through C.B.I. v. C. Nagarajaswamy.
2. AIR 1966 SC 69 : Mohammad Safi v. The State of West Bengal
3. AIR 1957 SC 494 ;Baij Nath Prasad Tripathi v. The State of Bhopal and another.
4. 2010 (Supp.I) OLR 167 : Duryodhan Patra v. State of Orissa
5. AIR 1979 SC 677 : Mohd. Iqbal Ahmed v. State of Andhra Pradesh
6. AIR 2013 SC 1489 : State of Uttarakhand v. Yogendra Nath Arora

For petitioner : M/s. S.K.Dash, A.K.Otta, A.Dhalsamanta & S.Das

For opposite parties : Mr. S Mishra, Add. Govt. M/s. D.P.Nanda, R.K.Kanungo, B.P.Panda, S.B.Sahoo & P.K.Kar

---

Date of hearing : 11.12.2015
Date of judgment : 24.12.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner having been found guilty for the offence under Section 7 of the Prevention of Corruptions Act 1988 (in short hereinafter referred to as 'P.C. Act') and convicted under Section 248 (2) of the Cr.P.C. by the learned Special Judge, Vigilance, Bhawanipatna, Kalahandi in judgment dated 19.03.2014 passed in G.R. (Vigilance) case No.26 of 2009, has filed this writ petition to quash the show-cause notice dated 04.06.2014 issued under Clause 46(2)(b) of the GRIDCO Officer's Service Regulations indicating why he will not be dismissed from service vide Annexure-2 and consequential order dated 22.01.2015 passed by opposite party no.2 dismissing him from the services under Clause 44(1)(b) (iv) of the GRIDCO Officer's Service Regulations, adopted by OPTCL vide Annexure-4.

2. The factual matrix of the case is that the petitioner joined in service in the year 1984 as an Assistant Engineer in Orissa State Electricity Board at Mohana in the erstwhile district of Ganjam, presently in the district of Gajapati. After reorganization, the petitioner's service was placed under Orissa Power Transmission Corporation Limited (in short hereinafter referred to 'OPTCL') and he was posted as Assistant General Manager, Electrical at Berhampur in May, 2012. In the year 2005, the service of the petitioner was placed in the Urban Development Department of the Government of Odisha on deputation. During the period of deputation, the petitioner worked as Executive Officer of Balugaon, Barbil and Bhawanipatna Municipality. After 12.06.2009 i.e. the day on which the trap was laid by the Vigilance Department, the petitioner was sent back to GRIDCO/Odisha Power Transmission Corporation Limited in 2010 and was posted at Budhipadar in the district of Jharsuguda as Manager, Electrical. Again he was deputed to CESU, Angul and subsequently brought back to OPTCL and posted at Berhampur in May 2012. On transfer in August, 2014, the petitioner joined in the headquarters i.e. at OPTCL, Bhubaneswar as Assistant General Manager (Electrical), G.C.C., Bhubaneswar.

While working as Executive Officer at Bhawanipatna, a criminal case was initiated against him on the allegation that on 11.06.2009 the decoy paid a sum of Rs.1000/- to the co-accused Trilochan Rout, the Dealing Assistant, who demanded the same towards illegal gratification for processing the file for sanction of the building plan by the Bhawanipatna Municipality. The co-accused Trilochan Rout disclosed before the decoy that the petitioner has a share in the said bribe amount. Incidentally, a tainted currency note of Rs.500/- was found from the upper table drawer of the petitioner, following the trap. Consequently, the petitioner stood charged for the offences under

Section 13(2) read with Section 13(1) (d) and Section 7 of the P.C. Act 1988 read with Section 34 of IPC. Finally, he was convicted for the offence under Section 7 of the P.C. Act 1988 and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1000/- and in default of payment of the fine to undergo rigorous imprisonment for a further period of two months. Against the said order of conviction and sentence, the petitioner preferred Criminal Appeal No.1162/2014 under Section 374 (2) of Cr.P.C. and this Court vide order dated 31.03.2014 admitted the case, called for LCR and stayed realization of fine imposed by the learned Special Judge, Vigilance, Bhawanipatna till disposal of the criminal appeal in Misc. Case No.467/2014. Though this Court stayed the realization of fine, did not suspend the sentence imposed on the petitioner while admitting the appeal. However, in Misc. case No.466/2014 this Court released the petitioner on bail on such terms and conditions as deemed just and proper by the learned Special Judge, Vigilance, Bhawanipatna in the aforesaid case.

While the criminal appeal is subjudice before this Court, a show-cause notice was issued to the petitioner under Clause 46(2)(b) of the GRIDCO Officer's Service Regulations calling upon the petitioner to show-cause why he shall not be dismissed from service of the organization vide Annexure-2 dated 04.06.2014. At the show-cause stage, the petitioner approached this Court by filing this writ petition and this Court by order dated 13.01.2015 while issuing notice passed an interim order to the extent that no action shall be taken against the petitioner pursuant to show-cause notice dated 04.06.2014 in Annexure-2 till 10.02.2015. But, in the meantime, the order of dismissal having been passed on 22.01.2015 vide Annexure-4, the petitioner sought for amendment of the writ petition and the same was allowed permitting the petitioner to incorporate the subsequent document i.e. sanction order and file consolidated copy of writ petition.

3. Mr. S.K. Dash, learned counsel for the petitioner while challenging the notice of show-cause, urged that by issuing such notice under Clause 46(2)(b) of the GRIDCO Officer's Service Regulations, the authorities have prejudged the matter by dismissing the petitioner from service without following due procedure of law. It is stated that the quasi judicial authority while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show-cause notice is meant to give a person making his objection against the proposed charge in the notice. He has relied upon the judgment of Madras High Court in ***M.Perumal v. Tamil Nadu Generation***.., W.P. Nos.28133-28135 of 2011

disposed of on 27.01.2012 in which the decision of the apex Court in ***Oryx Fisheries Private Limited v. Union of India and others***, (2010) 13 SCC 427 has been referred to. Though this Court passed an interim order that no action shall be taken against the petitioner pursuant to show cause notice dated 04.06.2014 in Annexure-2 till 10.02.2015, the final order of dismissal was passed in Annexure-4 dated 22.01.2015 which is incorporated by way of amendment to the writ petition. Mr. Dash, learned counsel urged that the termination of petitioner from service on the backdrop of conviction under Annexure-1 is illegal and without jurisdiction as there is no absolute power under Section 19 (c) with regard to exercise of jurisdiction of any court to take cognizance under Section 7 of the P.C. Act 1988. There being no order of sanction from the authority competent to remove the accused from the service, being a regular employee under opposite party no.2, the petitioner could not have been dismissed from service on obtaining sanction from Government because he was on deputation. From the judgment under Annexure-1, it appears that the prosecution has obtained sanction order from the Government which is marked as Exhibit 41 and annexed as Annexure-5 to the writ petition but not from the employer i.e. opposite party no.2. In absence of valid sanction, the judgment of conviction becomes a nullity. Therefore, it is urged that unless the order of dismissal passed in Annexure-4 is set aside, it will lead to serious miscarriage of justice and judgment of conviction having been passed illegally and without jurisdiction is a nullity on the touchstone of law. To substantiate his contention he has relied upon ***State of Karnataka through C.B.I. v. C. Nagarajaswamy***, AIR 2005 SC 4308, ***Mohammad Safi v. The State of West Bengal***, AIR 1966 SC 69, ***Baij Nath Prasad Tripathi v. The State of Bhopal and another***, AIR 1957 SC 494, ***B.K. Kutty v. State***, 1984(I) OLR 597, ***B.A. Kameswar Rao v. State of Orissa***, 1988(II) 211, ***Duryodhan Patra v. State of Orissa***, 2010 (Supp.I) OLR 167, ***Mohd. Iqbal Ahmed v. State of Andhra Pradesh***, AIR 1979 SC 677 and ***State of Uttarakhand v. Yogendra Nath Arora***, AIR 2013 SC 1489.

4. Mr. D.P. Nanda, learned counsel for opposite party no.2 submits that the disciplinary authority has not prejudged the issue in any manner and the allegation made that no opportunity is given to the petitioner is not correct. Referring to Regulation 46(2)(B), it is urged that the action taken against the petitioner is justified because in the event of conviction of an officer in a criminal offence by any competent court of law, discretion has been given to the disciplinary authority under the regulations to discharge the said officer from employment without any notice or to impose any other punishment and

in the event any other punishment is sought to be or proposed to be imposed the same has to be preceded by giving an opportunity to said convicted officer to make a representation on the penalty sought to be imposed as might be mentioned in the show cause and no exception can be taken to such expression of intention and no motive can be attached to the same inasmuch as the relevant regulations require the disciplinary authority to categorically mention the specific punishment sought to be imposed if the same is not of discharge. Therefore, the authority having acted in consonance with the provisions of law, it cannot be construed that he has prejudged the matter and imposed punishment of dismissal from service vide Annexure-4.

5. On the basis of facts pleaded above, the only question that is to be considered is that the sanction as required under Section 19(1)(c) having not been taken from the employer of the petitioner, whether the order passed by the trial court convicting the petitioner is a nullity in the eye of law or not. If the order of conviction is a nullity, whether the consequential action taken can face the scrutiny of law or not.

6. The fact mentioned above being undisputed one, the only question that is to be considered whether the sanction order under Clause-19 (1) (c) of the P.C. Act 1988 has been obtained from opposite party no.2 by the prosecution while initiating criminal case against the petitioner. As it appears from the judgment Annexure-1, Exhibit-41 is the sanction order which is annexed as Annexure-5 to the writ petition. On perusal of the same, it appears that the same has been issued by the Additional Secretary, Government of Odisha, G.A. Department on 24.11.2010 by order of the Governor.

On query being made by this Court whether the petitioner is a Government employee or not, Mr. D.P. Nanda, learned counsel for opposite party no.2 fairly stated that the petitioner was not a Government servant rather he is the employee of OPTCL who was on deputation to Bhawanipatna Municipality to discharge the duty of the Executive Officer. It is admitted that the petitioner is an employee under opposite party no.2. Opposite party no.2 being the employer is competent to issue sanction order for initiating the proceeding against the officer working under it. It is also stated that no sanction order has been issued by opposite party no.2, who is the employer of the petitioner while he was discharging his duty as Executive Officer, Bhawanipatna Municipality for alleged commission of criminal misconduct in demanding the alleged gratification. The sanction order is marked as Exhibit-41 and on that basis the criminal case was

proceeded with and concluded in conviction. Therefore, in absence of any sanction order given by the employer, the judgment of conviction becomes nullity.

7. In ***state of Karnataka through C.B.I.*** (supra), the apex Court held that the judgment of conviction without valid sanction order even if it was recorded, it could be said to have been rendered illegality and without jurisdiction.

8. In ***Baij Nath Prasad Tripathi*** (supra) the Constitution Bench referring to the judgment of Federal court reported in AIR 1948 FC 16 held that the whole trial is null and void in absence of required sanction under the P.C. Act 1947.

9. In ***Md. Safi*** (supra), the apex Court held that a criminal court is precluded from determining the case before it in which charge has been framed otherwise than by making an order of acquittal or conviction only where the charge was framed by a Court competent to frame it and by a Court competent to try the case and make a valid order of acquittal or conviction. Therefore, the conditions requisite for initiation of proceedings before it includes prior sanction must be fulfilled. Otherwise the court does not obtain the jurisdiction to try the offence. The ultimate conclusion of trial court which lacks jurisdiction to take cognizance renders judgment of conviction or acquittal as a nullity.

10. In ***Mohammed Iqubal Ahmed*** (supra) the apex Court held as follows:

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

11. In ***B.K. Kutty*** (supra), this Court referring to the case of ***Mohd. Iqbal Ahmed*** (supra) of the apex Court held that grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government servants against frivolous prosecution and

must therefore be strictly complied with before any prosecution can be launched against the public servant concerned. While dealing with Section 5(2) read with Sections-5(1) (c) and 6 of the P.C. Act 1947 this Court held that prosecution must adduce proof of legal and valid sanction. Facts constituting the offence either should be referred to in the sanction itself or must be established alliunde by evidence that those were placed before sanctioning authority and authority applied his mind. Therefore, cognizance cannot be taken when legal and valid sanction is wanting. In absence of any valid sanction the court has no jurisdiction to try the principal offence.

12. In ***B.A. Kameswar Rao*** (supra), this Court held that in absence of any valid sanction under Section 6 of P.C. Act, the trial of offence under Section 5(2) of P.C. Act by Special Judge is no trial at all and the Special Judge lacks jurisdiction to try offence under Sections 409 and 477-A I.P.C.

13. The apex Court in State of ***Uttarakhand v. Yogendra Nath Arora*** held that even if the employee was on deputation sanction is to be obtained from the appointing authority.

14. Considering the ratio decided in the above judgments and applying the same to the present case, since the sanction order under Annexure-5 has been obtained from Additional Secretary to Government by order of Governor, the same cannot be drew as valid sanction as such the subject matter of criminal appeal to be adjudicated by this Court in accordance with law. Therefore, the action taken by the authority pursuant to Annexure-4 dismissing the petitioner from service hastily on the strength of so-called judgment of conviction under Annexure-1, which is subject matter of the criminal appeal pending before this Court, cannot sustain in the eye of law.

15. As it appears that petitioner had approached this Court against the notice of show cause in Annexure-2 dated 4.6.2014 by filing this application. While entertaining this application, this Court passed an interim order on 13.01.2015 in Misc. Case No. 22862 of 2014 directing that no action be taken against the petitioner pursuant to show cause notice dated 4.6.2014 in Annexure-2 till 10th February,2015. During pendency of this writ application when the petitioner is enjoying the interim order, the authority passed the impugned order dated 22.01.2015 in Annexure-4 which has been brought by way of amendment to the writ application. This clearly indicates that the authority has overreached the interim order dated 13.01.2015 passed by this Court by dismissing the petitioner from service. Therefore, the authority has violated the interim order with undue haste, consequently the order so passed in Annexure-4 cannot sustain.

16. In view of such position, this Court is of the considered view that when against the order of conviction passed by the learned Special Judge (Vigilance), Bhawanipatna the petitioner has preferred criminal appeal before this Court which has been admitted and pending for adjudication, the consequential action in removing the petitioner from service vide Annexure-4 cannot sustain in the eye of law. Accordingly, the office order dated 22.01.2015 issued by opposite party no.2 dismissing the petitioner from services under Clause-44(1)(b)(iv) of GRIDCO Officer's Service Regulations adopted by OPTCL vide Annexure-4 is hereby quashed. Opposite party no.2 is directed to reinstate the petitioner in service and grant all consequential benefits as due and admissible to him in accordance with law forthwith.

17. The writ petition is allowed. No order to cost.

Writ petition allowed.

2016 (I) ILR - CUT- 373

DR. B.R. SARANGI, J.

OJC. NO. 11148 OF 2005

DR.PRASANA KUMAR MISHRA .....Petitioners.

.Vrs.

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

SERVICE LAW – Regularisation – Petitioner was appointed as a lecturer in Mathematics on contractual basis pursuant to an advertisement – His appointment has been extended from time to time and in the process he has completed 20 years of service without the intervention of orders of Courts or of tribunals – So the employer is in need of service of the petitioner but he is not given regular appointment on the plea of financial crunch – Employer need to consider the length of service otherwise it will affect the livelihood of the petitioner and it will be violative of Article 21 of the constitution of India – Held, since the petitioner is not a back door entrant and has worked against a sanctioned vacant post for such a long period and has become overaged the opposite parties should absorb him on regular basis without insisting him to undergo the rigors of the

selection procedure laid down under the BPUT Act and Rules and should extend all consequential benefits as due and admissible under law. (Para 22)

For petitioner : M/s. A.K.Mishra (Sr.Adv.), J.Sengupta, D.K.Panda, G.Sinha & A.Mishra

For opposite parties : M/s. B.Sengupta, Add.Govt. Adv.
M/s. S.Palit A.K.Mahana,A.Mishra, A.Kajariwal & D.N.Pattnaik.

Date of hearing : 19.11. 2015
Date of judgment : 01.12. 2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is presently working as Lecturer in Mathematics in the College of Engineering and Technology, Bhubaneswar has filed this application seeking for regularisation of his services and grant of consequential service and financial benefits retrospectively.

2. The factual matrix of the case in hand is that initially the petitioner was appointed as part time Lecturer on 06.11.1995 in the discipline of Mathematics in the College of Basic science and Humanities, OUAT, Bhubaneswar with a remuneration of Rs.75/- per theory class, Rs.25 per period for practical class and Rs.30/- per trip (to & fro) as conveyance allowance. Pursuant to advertisement issued by the Registrar, Orissa University of Agriculture and Technology (in short hereinafter referred to as "OUAT"), Bhubaneswar for engagement of part-time Teachers under the University in different faculties/colleges on prescribed remuneration for the academic year 1999-2000 in which it was advertised that there were four vacancies in the discipline of Mathematics. The petitioner applied for the same and having been selected against the post of Lecturer in Mathematics, he was issued appointment letter on 06.11.1995. Such engagement of the petitioner was extended from time to time. When the petitioner was continuing as such on contractual basis, an advertisement was issued by the Director of College of Basic Science and Humanities on 05.01.2002 fixing the date of interview on 17.01.2002 for recruitment to the post of Lecturer in Mathematics to which the petitioner applied for. He appeared and stood first in the interview and consequently, he was appointed on contractual basis with consolidated remuneration @ Rs.5,500/- per month from the date of joining till the end of April, 2002. Such engagement was extended from time

to time with the same terms and conditions. Again on 26.07.2002 another advertisement was issued by the Registrar, OUAT for engagement of contractual Teachers on a consolidated pay of Rs.8,000/-. The petitioner again appeared before the selection committee on 16.08.2002 and he was selected and appointed as Lecturer in Mathematics on consolidated amount of Rs.8000/- per month vide order dated 22.08.2002 under Annexure-9 issued by OUAT.

The establishment of Biju Pattnaik University of Technology (in short hereinafter referred to as 'BPUT') was notified w.e.f. 09.07.2002 as per the Government in Industries Department notification dated 01.07.2002. The College of Engineering and Technology in which the petitioner was continuing as Lecturer in Mathematics became a constituent College of BPUT as per Section 37(1) of BPUT Act and a request was made to Vice-Chancellor, BPUT to make necessary service conditions at par with the OUAT service conditions. Accordingly, the services of the petitioner, who was continuing on contractual basis in the College of Engineering and Technology were placed under the control of BPUT. Accordingly, the petitioner has been continuing as Lecturer in Mathematic from 23.08.2002 uninterruptedly without any break. In the meantime, he has completed 20 years of service. It is stated that since the petitioner is continuing in a sanctioned post of Lecturer in Mathematics, considering his length of service period, his services should be regularized. Hence, this application.

3. Mr. A.K. Mishra, learned Senior Counsel appearing for the petitioner submits that the petitioner having been selected and appointed by following due procedure of selection on contractual basis and the same has been extended from time to time and in the meantime he having completed 20 years of service, his services should be regularized against the sanctioned post of Lecturer in Mathematics in the College of Engineering and Technology, Bhubaneswar under the Biju Pattnaik University of Technology (in short hereinafter referred to 'BPUT'). In order to substantiate his contention he has relied upon the judgments in ***Binan Kumar Mohanty & others v. Water & Land Management Institute (WALMI) & others***, 2015 (1) OLR 347, ***Akhilanath Sahoo v. Joint General Manager, OSFC & others***, 2015 (Supp-1) OLR 111, ***Narendra Kumar Ratha and others v. State of Orissa and others***, 2015(1) OLR 197, ***Subash Chandra Nayak v. State of Orissa and others,*** 2015(1) OLR 108 and ***Suvendu Mohanty v. State of Orissa and another*** (W.P.(C) No.8350/2012 and batch of cases decided on 28.07.2015).

4. Per contra, Mr. S. Palit, learned counsel appearing for the BPUT urges that the petitioner having been engaged on contractual basis as a Lecturer in Mathematics pursuant to advertisement issued it shall not confer right for regular appointment nor for further continuance under this faculty in any of the Colleges of BPUT. He further urges that BPUT has been established under the BPUT Act notified on 09.07.2002 as per the Govt. in Industries Department notification dated 01.07.2002. As per Section 37(1) of BPUT Act, the College of Engineering and Technology became the constituent College of BPUT and the terms and conditions of the employees were the same as in Annexure-11. The contractual engagement of the petitioner has been extended from time to time with the same conditions. He urges that the contractual engagement does not confer any right for regular appointment nor for further continuance under the faculty or any of the colleges of BPUT and no claim for any service benefit for this contractual engagement shall be admissible. It is further urged that the petitioner though applied for regular appointment under the BPUT pursuant to which he was called for to appear in the interview by letter dated 07.10.2005, he did not appear. Pursuant to advertisement under Annexure-8, he attended the interview on 15.12.2008 and 16.12.2008 for the vacancy of a single post. The petitioner having secured 3rd position in the merit list and since the list was valid for a period of one year as per the provision of Section 24(8) of the BPUT Act, 2002, he could not have been considered for such regular appointment. It is further submitted that the First Statute of the BPUT 2006 has been notified on 29.12.2006. Section 31 of Chapter-IV of the said First Statute deals with the appointment of teachers and it is clearly mentioned regarding the selection procedure by the selection committee. The petitioner though had once appeared before the Selection Committee in the year 2008 and remained in 3rd position in the merit list against the vacancy of a single post, he cannot claim for regularization of his services. He has relied upon ***Secretary, State of Karnataka v. Umadevi***, (2006) 4 SCC 1, ***State of Orissa v. Chandrasekhar Mishra***, 2002 (10) SCC 583, ***Satish Chandra Anand v. Union of India***, AIR 1953 SC 250, ***Director, Institute of Management Development v. Pushpa Srivastava***, AIR 1992 SC 2070, ***Salkhan Murmu v. Union of India***, 2010 (Suppl.I) OLR 687 and ***University of Rajasthan v. Premalata Agrawal***, (2013) 3 SCC 705.

5. On the basis of the facts pleaded above, the admitted fact is that the petitioner has been engaged on contractual basis having been duly selected by following due procedure of selection pursuant to advertisement issued by OUAT and continuing in services by getting an extension from time to time.

Not only once, four times advertisement was issued by the OUAT and the petitioner appeared such interviews and having qualified he has been issued engagement order from time to time by the OUAT as a Lecturer in Mathematics. The petitioner has filed an additional affidavit on 14.10.2015 annexing the information received under R.T.I Act, 2005 in Annexure-49 wherein question no.7 and answer to the said question is stated as follows:

> "Question No.7- In the above dept. the contractual appointment against the clear vacant post sanction post or not at that time August, 2002.
>
> Answer-As there was restriction for filling up of the vacancies in regular manner by the Finance Department as indicated at Para-5, contractual appointment was made against the sanctioned vacant posts".

6. In Annexure-E to the said additional affidavit it is stated that as against two sanctioned posts of Lecturer in Mathematics, one post is vacant. Therefore, the petitioner is continuing in other sanctioned post. Since the petitioner is continuing as lecturer against the sanctioned post on contractual basis by following due procedure of selection, he could not have been denied regularization by the authority inasmuch as the reasons for allowing the petitioner to continue as contractual engagement is well founded from the answer given in question No.7 pursuant to Annexure-49 wherein it has been stated that due to restriction of filling up of the vacancies in regular manner by the Finance Department, contractual appointment was made by the OUAT against the sanctioned vacant posts. This clearly indicates that at no point of time the fault is with the petitioner for such contractual engagement made by the authority. If the reason given for such employment is financial crunch, in that case the petitioner could not have been denied the regularization of services. Admittedly, the petitioner is continuing in second post as Lecturer in Mathematics on contractual basis for a quite long time. This clearly indicates that there is need of his continuance of service against the vacancy as available and after exploiting for so many years and after the petitioner became age barred he cannot be said that he should come through the process of selection by following recruitment rules governing the field. After creation of BPUT, College of Engineering and Technology has been placed under the control of the said University and as such the service of the petitioner was also placed under the BPUT.

7. In ***Binan Kumar Mohanty & others*** (supra) referring to ***Kapila Hingorani v. State of Bihar***, (2003) 6 SCC 1 the apex Court held that the

Government companies/public sector undertakings being "States) would be constitutionally liable to respect life and liberty of all persons in terms of Article 21 of the Constitution of India. Therefore, if the petitioner has rendered service for around 20 years, keeping in view the ratio decided in ***Kapila Hingorani*** (supra), this Court issues direction to the opposite parties to mitigate the hardship of the employees. Financial stringency is no ground for not issuing requisite directions when there is violation of fundamental rights of the petitioner. Allowing a person to continue for a quite long period of 20 years of service and exploiting him on the pretext of financial crunch in violation of Article 21 of the Constitution of India is sheer arbitrariness of the authority which is highly condemnable.

8. In ***Narendra Kumar Ratha and others*** (supra), this Court has taken into consideration the object of Article 16 of the Constitution of India to create a constitutional right to equality of opportunity and employment in public offices. The word 'employment or appointment' cover not merely the initial appointment, but also other attributes like salary, increments, revision of pay, promotion, gratuity, leave pension and age of superannuation etc. Appointment to any post under the State can only be made in accordance with the provisions and procedure envisaged under the law and guidelines governing the field.

9. In ***Prabodh Verma and others v. State of U.P. and others***, (1984) 4 SCC 251, the apex Court held that Article 16 is an instance of the application of the general rule of equality laid down in Article 14, with special reference to the opportunity for appointment and employment under the Government.

10. Similar view has also been taken by the apex Court in ***Km. Neelima Mishra v. Harinder Kaur Paintal and others***, (1990) 2 SCC 746: AIR 1990 SC 1402 and ***E.P. Royappa v. State of Tamilnadu and another***, (1974) 4 SCC 3. Clause-1 of Article 16 guarantees equality of opportunity for all citizens in the matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preference in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens. This view has also been taken note of by the apex Court in the case of ***Indra Sawhney and others v. Union of India and others***, 1992 Supp. (3) SCC 217 : AIR 1993 SC 477.

11. In view of such position, if the petitioner has been allowed to continue for a quite long period on contractual basis due to financial crunch,

he cannot be thrown out stating that he has not been recruited as per the provisions of BPUT Act and Rules framed thereunder. Therefore, the petitioner's case should be taken into consideration for regularization of his services.

12. In ***Suvendu Mohanty*** (supra) this Court has taken into consideration the judgment of the apex Court in ***Secretary, State of Karnatak v. Umadevi***, 2006(4) SCC 1 : AIR 2006 SC 1806 wherein the apex Court held that the appointments made against temporary or ad-hoc basis are not to be regularized. In paragraph 53 of the said judgment, it is provided that irregular appointment of duly qualified persons against sanctioned posts, who have worked for 10 years or more can be considered on merits and steps to be taken as one time measure to regularize them. In Paragraph 53 of the said judgment, the apex Court has held as follows:

> "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S. V. Narayanappa, R. N. Nanjundappa and B. N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the state Governments and their instrumentalities should take steps to regularise as a non-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

13. The object behind the exception carved out in this case was to permit regularization of such appointments, which are irregular but not illegal, and to ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years. Similar question came up for consideration before the apex Court in Civil Appeal No. 2835 of 2015 (arising out of SLP (Civil) No. 20169 of 2013 disposed of on 13.3.2015. In paragraphs 12 and 13, the apex Court has held as follows:

> "12. Elaborating upon the principles laid down in Umadevi's case (supra) and explaining the difference between irregular and illegal

appointments in State of Karnataka & Ors. v. M.L. Kesari & Ors., (2010) 9 SCC 247, this Court held as under:

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3), if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

13. Applying the ratio of Umadevi's case, this Court in Nihal Singh & Ors. v. State of Punjab & Ors., (2013) 14 SCC 65 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is

> made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

14. The reference made to ***Akhilanath Sahoo*** (supra) and ***Subash Chandra Nayak*** (supra) has no application to the present context as the same have been decided on the factual matrix of the said cases.

15. Mr. S. Palit, learned counsel for BPUT referring to paragraph-47 of ***Secretary, State of Karnatak*** (supra) submits that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection.

The reference made in paragraph-47 in ***Secretary, State of Karnatak*** (supra) clearly specified that engagement if not based on selection as recognized by the rules in that case no regularization can be claimed and as such theory of legitimate expectation may not apply. Here the case is different than that of the law enunciated in paragraph-47 on the basis of the factual matrix available on record. The petitioner has been selected pursuant to advertisement issued by the authority and having been selected the engagement order has been issued in his favour and same has been extended from time to time allowing him to continue against the sanctioned post, he has not been given regular appointment on the plea of financial crunch. That itself cannot deprive him of regularization of his services if he is otherwise eligible in accordance with law.

16. Reliance placed on ***State of Orissa v. Chandrasekhar Mishra*** has no application in the present context in view of the fact that in that case the service of respondent-Chandrasekhar Mishra who was engaged on contractual basis had been terminated with effect from 31.01.1998 and he had not approached the Tribunal within a period of limitation. But the

Tribunal entertained his application after limitation period and subsequently directed his regular appointment after his services were terminated on expiry of the contract. In that context, the apex Court has held that when the respondent was only a contractual employee, there could be no question of his being granted the relief of being directed to be appointed as a regular employee. Therefore, the factual matrix of the said case is absolutely distinguishable from that of the present case and the said judgment is not applicable to the present case.

17. In ***Satish Chandra Anand*** (supra) the fact of the case is that the petitioner is a civil servant, who had been engaged on the basis of special contract for a certain term and on the expiry of the term, was re-appointed by a further contract on a temporary basis. In accordance with the Government rules, which formed part of the contract, he was discharged from service after notice. He filed a petition under Article-32(1) seeking redress for breach of his fundamental rights under Articles 14 and 16(1). Taking into account the factual matrix of this case and applying the law laid down therein to the present case, it cannot sustain in the eye of law.

18. In ***Director, Institute of Management Development*** (supra), the apex Court held that where the appointment is purely on ad hoc basis and is contractual and by efflux of time, the appointment comes to an end, the person holding such post can have no right to continue in the post. This is so even if the person is continued from time to time on 'ad hoc' basis for more than a year. He cannot claim regularization in service on the basis that he was appointed on ad hoc basis for more than a year. The factual matrix of this case is different from the case of the petitioner in the present case who has been appointed on contractual basis by following due procedure of selection on terms and conditions mentioned therein and such contractual employment has been given because of the financial crunch of the Government against the sanctioned vacancy. If the petitioner is continuing against the sanctioned vacancy by following due procedure of selection and due to financial difficulties if no regular appointment could have been made, in that case the petitioner's claim for regularization can be taken into consideration by the employer. Therefore, the fact of the case of ***Director, Institute of Management Development*** (supra) is totally different from that of the present case.

19. Reference is also made to ***Salkhan Murmu*** (supra) wherein the appointment to the tenure post has been extended from time to time. In that

case the Court has held that the petitioner cannot claim anything over and above the terms incorporated in the letter of appointment and has no right to continue in service after expiry of the tenure of the post. The said principle is not applicable to the present case as the post itself is a sanctioned vacant post against which the petitioner is continuing for years together in view of the fact of financial crunch of the Government to give regular appointment. In that case, the employer should take into consideration the length of service rendered by the petitioner otherwise it will affect the livelihood of the petitioner which violates Article 21 of the Constitution of India.

20. Similarly the reference made to ***University of Rajasthan*** (supra) has no application to the present context.

21. No doubt after establishment of BPUT, the institutions under control of BPUT have to fill up the vacancies in accordance with the provisions of BPUT Act and Rules framed thereunder. If the institution has been taken over along with its staffs, in that case BPUT has to take necessary steps for regularization of the services instead of terminating them though the employees have not been appointed under the provisions of BPUT Act and Rules.

22. In that view of the matter, this Court is of the considered view that the opposite parties should absorb the petitioner on regular basis against sanctioned vacant post taking into account the length of service rendered by him as a Lecturer in Mathematics in which he is continuing without insisting him to undergo the rigors of the selection procedure laid down under the BPUT Act and Rules framed thereunder reason being in the meantime the petitioner has become over aged and he has also been exploited for 20 years for no reasons though he has qualified in all the interviews conducted by the authority for his engagement on contractual basis. The petitioner being not a backdoor entrant to the service, the opposite party-University should extend all consequential benefits as due and admissible in accordance with law as expeditiously as possible preferably within a period of four months. The writ petition is allowed. No order to cost.

Writ petition allowed.

2016 (I) ILR - CUT- 384

D. DASH, J.

RSA NO. 119 OF 2014

SATYABHAMA BEHURA …….. Appellant

.Vrs.

RAJESH KUMAR AGARWAL & ANR. ……...Respondents

(A) SPECIFIC RELIEF ACT,1963 – S.34

Suit for declaration – No specific prayer for recovery of possession – Applicability of the provision to bar the suit – When there is prayer in the suit for other consequential relief i.e. for permanent injunction to restrain defendant No1 from making any construction and for mandatory injuction for removal of boundary wall from the suit land, it is permissible for the Court to grant the relief of recovery of possession – Held, the view taken by the lower appellate Court that the suit is barred under the provisions of Section 34 of the Act can not sustain. (Paras 16 to 19)

(B) CIVIL PROCEDURE CODE,1908 – O-7,R-7

Suit for declaration– Whether decree for recovery of possession can be passed in absence of prayer ? – Held, yes –Though plaintiff has not specifically prayed for recovery of possession, the plaint read as a whole leaves no doubt that the plaintiff desired that unauthorized construction be removed and the land be put back to her possession in the former condition – Held, in the present circumstances of the case the court can mould relief and direct for recovery of possession.

(Paras 16 to 19)

(C) SPECIFIC RELIEF ACT,1963 – S.34

Whether the relief of mandatory injunction, in the facts and circumstances of the case should have been treated as "further relief" within the meaning of the proviso to Section 34 of the specific Relief Act ? – Held, yes. – The word "further relief" referes to some relief to which the plaintiff will be necessarily entitled to on the basis of the title declared. (Paras 18,19)

For Appellant : M/s. S.K.Dash, A.K.Otta, Mrs. A.Dhalasamanta & Miss S.Das.

For Respondents: M/s. B.Baug, M.R.Baug ,R.R.Jethi, P.C.P.Das,& A.K.Mishra

---

Date of hearing : 8.12. 2015

Date of judgment: 18.12.2015

JUDGMENT

D. DASH, J.

1. This appeal has been filed calling in question the judgment passed by the learned 2nd Additional District Judge, Cuttack in RFA No. 83 of 2001.

The respondent no. 1 as the plaintiff had filed Civil Suit (I) No. 571 of 2006, a suit for declaration of her right, title and interest over the suit land with further declaration that the sale deed bearing No. 2086 dated 3.6.2000 executed by Chandra Sekhar Mohapatra and his daughter Smt. Suprama Mishra in her favour in respect of Ac.0.011 decimals as valid in law, with further declaration that registered sale deed No. 2878 dated 11.8.2000, executed by the respondent-defendant no. 2 in favour of respondent-defendant no. 1 to be void and to have clothed no title upon the respondent no. 1, with further prayer to restrain the respondent-defendant no. 1 from making any sort of construction over the suit land by permanent injunction as also for mandatory injunction directing him to remove the boundary wall constructed over the suit land. The suit having been decreed granting all the reliefs as prayed for, the respondent no. 1 as the unsuccessful defendant had carried the appeal. The appeal has been allowed and the plaintiff has been non-suited. Thus, the appellant being the unsuccessful plaintiff has filed this appeal under Section 100 of the Code of Civil Procedure.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. Plaintiff's case is that land under suit plot No. 440 measuring an area of Ac.0.034 decimals which includes suit land extending to Ac.0.011 decimals originally belonged to Kalyani Patra, the defendant no.2. The said land was sold by her to different purchasers including Chandra Sekhar Mohapatra son of Gopinath who being dead, his daughter Suprava was a party as defendant no. 3, now deleted. They had purchased Ac.0.017 decimals of land from defendant no. 2 who had delivered possession of the same to the purchaser Chandra Sekhar Mohapatra and his daughter who were thus in possession of the suit land and so also the other purchasers remained in possession of their respective purchased land. It is stated that Chandra Sekhar Mohapatra and his daughter sold Ac.0.011 decimals along with undisputed Ac.0.059 decimals from another plot to the plaintiff by virtue of registered sale deed No. 2056 dtd. 3.6.2000 in total measuring an area of Ac.0.070 decimals. The plaintiff had been delivered with the possession of

the same and she claims to be in possession since the date of her purchase i.e. 3.6.2000 having right, title and interest. In the year 2001, the record of right in respect of Ac.0.011 decimals was issued in favour of the plaintiff and she has been paying the rent to the State. When the matter stood thus in the month of June 2006, defendant no. 1 created disturbance in her possession. So, a demarcation case was initiated and when notice was issued to defendant no. 1 although he did not appear yet constructed a boundary wall. It is stated that in the year 2006, defendant no. 2 had again sold Ac.0.008 decimals of land to defendant no. 1 and that is from out of the suit land measuring Ac.0.011 decimals by registered sale deed dated 11.8.2000. So taking advantage of such void sale deed wherein he was clothed with no right, title and interest in respect of the so-called purchased land, he created disturbance in the peaceful possession of the plaintiff. The said sale deed is challenged to be void on the face of the earlier sale deed in favour of the plaintiff as holding the field and it is also stated that defendant no. 1 has acquired no right, title and interest by virtue of the same and behind the back of the plaintiff he has mutated the said land in his favour which is nonest in the eye of law. It is alleged that on 15.12.2006, as threat came from the side of the defendant no. 1 for construction of a building over the suit land, the suit had to be filed with the reliefs as claimed.

4. Defendant no. 1 appeared and contested the suit. In his written statement besides taking the technical pleas to non-suit the plaintiff such as the lack of cause of action; suit being barred by limitation; suit being bad for non-joinder and misjoinder of the parties; suit being undervalued and bad for vague and indefinite description of the suit land, it is also asserted that the suit is liable to be dismissed being barred by the provisions of Section 34 of the Specific Relief Act.

Coming to the facts, it is his case that he has boundary wall on all sides of the land and it was in existence at the time of the purchase with a gate on the northern side. He claims to have purchased the suit land by registered sale deed dated 11.8.2000 and that is land measuring Ac.0.085 decimals of land under five plots and again has purchased by registered sale deed dated 14.8.2000 measuring Ac.0.102 decimals from two plots. He claims to be in possession of all these properties since the date of his purchase having been given delivery of possession of the same. He specifically denied to have purchased Ac.0.008 decimals of land from out of the suit land which was earlier purchased by the plaintiff. It is his case that after purchase he having applied for mutation, the same has been duly

allowed and accordingly, the ROR has been prepared in his name and also he is paying the rent. According to him, the plaintiff by virtue of registered sale deed dated 3.6.2000 purchased Ac.0.011 decimals of land from plot No. 440 and Ac.0.059 decimals of land from plot no. 441 which comes in total to Ac.0.070 decimals and that she purchased from Suprama Mishra who had purchased it from defendant no. 2 who is also his vendor. Suprama Mishra is said to have purchased by registered sale deed dated 25.4.1995 and it was a vacant land which the plaintiff purchased having no boundary. It is also his case that it has been specifically stated in the sale deed that the land has been left by the vendor being used as road. It is stated that thereafter he purchased the house and land from defendant no. 2 under two registered sale deeds and his purchased land was surrounded by wall with all sides having a gate on the northern side. He admits that in the meantime the plaintiff constructed a residential house over her purchased land but that is without the approval from the local authorities.

5. The trial court in view of above pleadings framed in total 14 issues. In answering the pertinent issues regarding the entitlement of the plaintiff for declaration of her right, title and interest over the suit land, the sale deeds executed by Chandra Sekahar Mohapatra and his daughter to be invalid and also the tenability of the claim of declaration of the sale deed dated 11.8.2000 executed by defendant no.2 in favour of defendant no. 1 as void and consequently, the mutation entries together with the challenge to the suit being barred by limitation and vagueness in description of the suit land, upon consideration of evidence on record in the backdrop of pleadings, the trial court has answered all those in favour of the plaintiffs and against the defendants. The other issues being ancillary issues have followed the same path.

The unsuccessful defendant no. 1 having carried the appeal, the lower appellate court has affirmed the finding that the sale deed in favour of defendant no. 1 in respect of Ac. 0.008 decimals of land is void and it also held that the plaintiff has got right, title and interest over this land measuring Ac.0.008 decimals by virtue of the registered sale deed standing in her favour by virtue of registered sale deed Ext.2. thereafter, on careful examination of the plaint averments it has been found that the plaintiff has admitted possession of the defendant no.1 over that Ac.0.008 decimals of land which is also seen from the Amin Commissioners report, Ext.9 and the evidence of plaintiff examined as P.W.1. Accordingly, defendant no.1's possession over the suit land has been held.

Next coming to the contention raised before it as regards the maintainability of the suit being hit by the provision of Section 34 of the Specific Relief Act, the conclusion has been that the suit is barred under provision of Section 34 of the Act and accordingly the plaintiff has been non-suited on that sole ground in saying that inasmuch as by virtue of only declaration the plaintiff would not be able to recover possession from defendant no. 1. So the decree passed by the trial court in favour of the plaintiff has been set aside.

6. The appeal has been admitted on the following substantial questions of law:-

"i). Whether the relief of mandatory injunction, in the fact and circumstances of the case should have been treated as 'further relief' within the meaning of the proviso to Section 34 of the Specific Relief Act?

ii). Whether the suit was liable to be dismissed without any further opportunity to the plaintiff-appellant, to amend the plaint, so as to include a proper relief for recovery of possession?

iii). Whether the judgment passed by the lower appellate court can be sustained when it has failed to formulate the points for determination under Order XLI rule 31 of the Code of Civil Procedure, 1908?"

7. It may be mentioned here that the defendant no.1 has not come up with any cross objection/appeal questioning the current findings that his sale deed is void and that the plaintiff has the right, title and interest over the suit land on the strength of the purchase by registered sale deed Ext.2.

8. It may be stated here that the plaintiff has also filed a petition under Order 6 Rule 17 read with Section 108 of the Code of Civil Procedure for amendment of the plaint for grant of leave for amending the plaint by way of insertion of the relief for recovery of possession of the suit land in her favour and it has been numbered as Misc. Case No. 138 of 2015. The prayer has been resisted by the respondent no. 1 by filing objection mainly on the following grounds:-

"i) that the amendment as proposed would change the nature and character of the suit;

ii) that the prayer sought to be introduced by proposed amendment is now barred by limitation by efflux of time as the defendant no. 1 has by now already acquired title by adverse possession;

iii) that the second appeal having been admitted framing the substantial questions of law, for recording necessary answers to those; for disposal of the second appeal as a just decision, such amendment is unnecessary."

9. Another petition has also been filed by the defendant no.1 labelling it to be one under Section 151 of the Code of Civil Procedure numbered as Misc. Case No. 464 of 2015 with the prayer that the prayer of the plaintiff for amendment of the plaint registered as Misc. Case No. 138 of 2015 be heard at first and upon its disposal, the second appeal be taken up for hearing and disposal.

10. At this juncture, when we glance at the substantial questions of law framed for being answered in the appeal, in my considered view the first one in the facts and circumstances stands for answer at the outset as the lower appellate court has dismissed the suit in refusing to grant the relief of recovery of possession on the ground that provisions of Section 34 of the Specific Relief Act stand as a bar.

Now when the plaintiff has prayed also for grant of leave to amend the plaint inserting the prayer for recovery of possession, that is resisted by the defendant no.1 when he also prays for taking up that matter of amendment first.

In fact this defendant no. 1 in the objection has been resisting the prayer for amendment of the plaint on one of the grounds that in view of substantial question of law already framed, such prayer is not necessary to be considered. I accept the same to the extent that its consideration would stand for necessary decision accordingly only upon the answer that would be recorded on the first substantial question of law. In case the answer is given in affirmative, the need may not even arise for consideration of the prayer for amendment of plaint as advanced and its consideration would arise only after the answer to that question is recorded in the negative.

11. Learned counsel for the appellant submits that the view taken by the lower appellate court that the suit is barred under provision of Section 34 of the Specific Relief Act is erroneous and when there remains the prayer for permanent and mandatory injunction, the court was not without any power to modulate the relief instead of non-suiting the plaintiff on that ground. In support of his contention, he has placed reliance on two decisions of this Court in case of **Md. Aftabuddin Khan and others vs. Smt. Chandan Bilasini and another**: AIR 1977 Orissa 69 and **Bivas Chandra Samanta**

vs. Hira Alias Madan Mohan Biswal and others: AIR 2006 Orissa 1. Further he contends that for the suit the barred under Section 34 of the Specific Relief Act does not arrive. When the plaint there is an assertion that the possession is with the plaintiff though as a fact it is not, the court has all the power to direct the plaintiff to recover possession and the court had all the jurisdiction to do so and the lower appellate court has committed an error of jurisdiction in dismissing the suit of the plaintiff on that ground.

12. Learned counsel for the respondent no. 1 vehemently refutes the above said submission. According to him, when para-3 of the plaint, the plaintiff asserts to be in possession. In evidence, her husband clearly states that the defendant no. 1 who is in possession and that has been so found by the Survey Knowing Commissioner being deputed to inspect and measure the land. Therefore, he contends that in such a scenario the suit without the prayer for recovery of possession is only not maintainable and thus, the lower appellate court has rightly non-suited the plaintiff. In support of his submission, the following decisions have been cited:-

"i. **Mehar Chand Das vs. Lal Babu Siddique and Ors.** :AIR 2007 SC 1499;
ii) **Ramji Rai and Anr. Vs. Jagdish Mallah (Dead) through L.Rs. and Anr.** : AIR 2007 SC 900;
iii) **Dr.Shehla Burvey and Ors vs. Syed Ali Mossa Raza and Ors.**: 2011 AIR SCW 2694;
iv) **Om Prakash and others vs. Ram Kumar and others:** (1991) 1 SCC 441;
v) **Union of India vs. Ibrahim Uddin and another**: (2012) 8 SCC 148;
vi) **Bachhaj Nahar vs. Nilima Mandal and another**: (2008) 17 SCC 491;
vii) **Nandkishore Lalbhai Mehta vs. New Era Fabrics Private Limited and others**: (2015) 9 SCC 755."
viii) **Vinay Krishna vs. Keshav Chandra and another**: AIR 1993 SC 957;
ix) **Venkataraja and Ors. Vs. Vidyane Doureradjaperumal (D) Thr. Lrs. and Ors.** : 2013 AIR SCW 3063; and
x) **Anathula Sudhakar vs. P.Buchi Reddy (Dead) By LRs. and others**: (2008) 4 SCC 594;

13 . In order to appreciate the rival contentions, and further consider as regards the applicability of the ratios emerging from the decisions cited by the learned counsel for the parties, it is first felt the need to reproduce the provision of section 34 of the Specific Relief Act. The same reads as under:-

> "34. **Discretion of court as to declaration of status or right**.- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court

may in its discretion made therein a declaration that he is so entitle, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

The proviso reads that when there is no dispute as to the plaintiffs' legal character or right to the property, and the parties are properly arrayed, yet the court shall refuse to make any declaration in favour of the plaintiff, where being able to seek further relief than a mere declaration, the plaintiff omits to do so. The object of the proviso is to avoid multiplicity of suits and to prevent a person getting a declaration in one suit and immediately after, seeking the remedy, already available, in another. The proviso to section 34 is imperative and makes its obligatory not to make any declaration in cases where the plaintiff being able to seek further relief omits to do so. But the objection into the maintainability of the suit on that ground that he does not seek consequential relief must be taken with promptitude. The word "further relief", in section 34 of the Act refers to some relief to which the plaintiff will be necessarily entitled to on the basis of the title declared. This 'further relief' is distinguishable from 'other relief'. Then further relief is one which would complete the claim of the plaintiff and not lead to multiplicity of suits.

14. (i) In ***Meher Chand Das*** (supra), the Hon'ble Apex Court held that suit for mere declaration without claim of relief of possession to be untenable. In that case, it stood admitted that the appellant was treated to be a tenant by the respondents and the suit property according to the respondents was a tenanted one. The possession of the appellant, therefore was denied and disputed when also a prior suit for eviction filed him, was dismissed by the civil court.

The court relied upon the ratio decided in the case of ***Vinay Krishna*** (supra) which was rendered on the premises that if the plaintiff had been in possession of the suit property then a suit for mere declaration is maintainable: the logical corollary whereof would be that if the plaintiff is not in possession, a suit for mere declaration would not be maintainable. The High Court was thus held to have committed manifest error in not relying on that decision.

(ii) In the case of ***Ramji Rai and another*** (supra), it was a suit for permanent injunction where plaintiffs failed to prove that they are in possession. So the suit was dismissed only on that ground the case of

Venkataraja and others (supra), it was declaratory suit without consequential relief. The declaration sought for was that the plaintiff is the owner of the suit property and the sale made by the defendant was null and void. However, the possession of the suit property remained with the tenant who were parties to the suit. The plaintiff could have claimed possession from the tenant. Instead of doing so he had filed the simple suit for declaration. So the suit was held to be not maintainable as it defeats the provisions of section 34 of the Specific Relief Act and the provision of order 2, rule 2 of the Code of Civil Procedure.

(iii) In the case of ***Dr. Shehla Burney and others*** (supra), the suit being for possession against the illegal occupants of suit property, however, no relief was claimed against the transferee of suit property, from the illegal occupants of the suit property. In view of said deficiency, the suit was dismissed.

(iv) The Hon'ble Apex Court in case of ***Om Prakash and others*** (supra) has held that the relief not claimed cannot be granted especially if it affects the right of the interested party and the plaintiff could not base a new cause of action on plea of defendant unless he amends the plaint or files separate proceedings. In that case, it has been held that a party cannot be granted a relief which is not claimed. If the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute. So, in the action by the landlord, the tenant is expected to defend only the claim made against him and if a cause of action arises to the landlord on the basis of the plea set up by the tenant, in such action, it is necessary that the landlord seeks to enforce that cause of action in the same proceeding by suit at the amendment or by separate proceedings to entitle the landlord to the relief on the basis of such cause of action.

(v) In case of **Union of India** (supra), the Court was considering the maintainability of the suit wherein no consequential relief was sought for. The relief sought for was declaration of title of ownership of property simpliciter when the plaintiff was not in possession. Though admittedly the plaintiff was not in possession on the date of the suit, he did not ask for restoration of possession or any other consequential relief. The Hon'ble Court held that Section 34 of the Act provides that Courts have the discretion as to declaration of status or right. However, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title,

omits to do so. Therefore, in the facts and circumstances of said case in the absence of either claim of any relief of restoration of possession or any other consequential relief, the suit was held to be barred by the provisions of Section 34 of the Act.

(vi) In case of **Bachhaj Nahar** (surpa), it has been held that when there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. So in doing justice to one party causing injustice to other and he being the casualty has been depcricated.

(viii) In case of **Nandkishore Lalbhai Mehta** (supra), the question was whether any relief can be granted, when the defendant had no opportunity to show that the proposed relief by the court could not be granted. So it has been held that when there is no prayer or pleading to support such a relief, and as the defendant had no opportunity to resist or oppose such a relief, the court should not grant such a relief as it would lead to miscarriage of justice.

15. In case of **Md. Aftabuddin Khan and others** (supra), this Court found the defect and also held that amendment of the plaint would have been more appropriate but then it was held that the court had the jurisdiction to do what has been done in allowing the relief of recovery of possession.

Similarly, in case of **Bivas Chandra Samanta** (supra) in the absence of prayer for recovery of possession in that suit where the prayer for permanent injunction was very much there along with the prayer for declaration of title, the court granted that relief.

16. Adverting to the fact situation of the present case, it is seen that here the plaintiff has sought for the relief of declaration of right, title and interest over the suit schedule property, the relief of declaration that the sale deed executed by Chandra Sekhar Mohapatra and his daughter Smt. Suprama Mishra in her favour as valid; with further declaration that the sale deed executed by the defendant no. 2 in favour of defendant no. 1 to be void and consequential declaration is that the mutation carried out in the name of defendant no. 1 to be invalid. More importantly, the plaintiff had prayed for permanent injunction restraining the defendant no. 1 from making any construction and as also for mandatory injunction for removal of boundary wall from the suit land. No doubt in the instant case specifically no prayer has been sought for recovery of possession.

At this stage, it will not be out of place to also discuss two more decisions of this Court in case of **Chennaru Naghbhusan Rao vs. M. Rama Rao and others**: AIR 1992 Orissa 76 and in case of **Chandra Sekhar Sahoo and others vs. Chandrasekhar Das and others** :2000 (II) OLR 128. In the former one it has been finally held that though the plaintiff has not asked for recovery of possession in the prayer when the plaint read as a whole goes to show the desire of removal of the unauthorized construction and the land put back to the plaintiff possession, it is permissible for the court to grant the relief of recovery possession which would have been made as a prayer in the suit yet not having been made in view of the evidence led before the court in the suit as there remains no doubt that the defendant had known clearly the plaintiff's desire to have recovery of the land in question. So it was held that the question of defendant to be suffering in any way if such relief is granted does not arise and he does not get it as a surprise since both parties have led evidence on the score of their respective possession and title. So saying it has been held that such recovery of possession can be brought within the expression of the other relief as contained under Order 7 Rule 7 of the Code of Civil Procedure and thus there remains the competency on the part of the court to grant such a relief even though there is no specific prayer for such a relief. In the latter case, this Court has taken the prayer for confirmation of possession to be a prayer of recovery of possession when it was found that the plaintiff was not in possession and it has been held that the court can mould the relief keeping in view the facts and circumstances of the case and merely because there is no specific prayer for recovery of possession, the court would not be helpless to direct for recovery of possession where the facts and circumstances of the particular case so warranted. At this moment, let us also turn the attention to the decision in case of **Vinay Krishna** (supra). That was a suit of declaration of share in the property. The plaintiff was not in exclusive possession of the property because two other persons and also tenants were in occupation. So failure of the plaintiff to claim the relief of possession was held in support of legitimate exercise of discretion of the Court in refusing to grant relief of declaration. In that very case, the decision of this Court in case of **Md. Aftabuddin Khan and others** (supra) has taken into consideration and has been distinguished. In paras 13 and 15 of the judgment, for the above reason of distinguishing facts the decision of this court was not followed. It has been held to have no application to the facts and circumstances of the said case for the simple reason that therein it was found that no injustice has been caused to the defendants by not requiring the plaintiff to make a formal application

for amendment of the plaint. However, in the case in hand before the Apex Court, it was found that two defendants as well as other tenants were in possession and one of those two defendants was in possession of part of the property on his own right and the other one had no right or title but in possession. So in order to pass a decree for possession in respect of the portion of suit property in possession of that defendant without right, title, determination felt necessary whether both the defendants were entitled to remain in possession. Thereafter, it was held that it can only be done after suitable amendment of the plaint and thus it has been held that the suit as laid to be barred.

In case of ***Venkataraja and others*** (supra), the suit was a declaratory one without consequential relief. Suit property was in possession of tenants but the plaintiff had not claimed possession from tenants though he could have. Therefore, in such factual settings, the suit has been held as not maintainable.

In case of **Anathula Sudhakar** (supra), the Apex Court, the suit was permanent injunction simpliciter. It was considering a number of decisions of the Apex Court, the position has been summarized as under:-

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint

> and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.
>
> (d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

The case in hand is not a suit for injunction simpliciter. Here the question is as to whether when the prayer for mandatory and permanent injunction are there along with the declaration, can the court treat the prayer for mandatory and permanent injunction as further reliefs.

17. Keeping in view the authoritative pronouncements as referred to above let us have a look at the plaint.

In para-5 of the plaint, the averments are as follows:-

> "5. That when the position was as such, in June 2006, the defendant no.1 disturbed the peaceful possession of the plaintiff over the suit Ac.0.011 decimals. So the plaintiff filed the demarcation case No. 173-2006 before the Tahasildar, Cuttack. Though notice was issued to the defendant no. 1 several times he did not appear. But constructed a boundary wall."

Para-10 of the plaint stating about the cause of action for the suit reads as under:-

"10. That the cause of action for the suit arose on 11.08.2000 when the defendant no.2 executed the illegal sale deed, again in Mutation Case No. 335/2001 when the Defendant No. 1 managed to get mutation R.O.R. again in June 2006 when the Defendant No.1 made forcible construction and on 15.12.2006 when he gave out in the locality to make further construction over the suit land."

The reliefs as prayed for by the plaintiff in the plaint read as under:-

"(i) Let a decree be passed declaring the plaintiff's right, title and interest over the suit land.

(ii) Let it be further declared that sale deed No. 2086 dated 3.6.2000 executed by Chandra Sekhar Mohapatra and her daughter Defendant No. 3 in favour of the plaintiff in respect of Ac.0.011 decimals is valid in law.

(iii) Let the R.S.D. No. 2878 dated 11.8.2000 executed by the defendant No.2 in favour of the defendant No.1 be set-aside being void in law as Defendant No.2 has no salable right to execute such sale deed.

(iv) Let it be further declared that the Mutation R.O.R. and rent receipt created by the Defendant No. 1 in connection with the suit land are not binding on the plaintiff.

(v) Let a decree of permanent injunction be passed against the defendant No. 1 restraining him from making any construction whatsoever on the suit land.

(vi) Let an ad interim injunction be passed against the defendant No. 1 restraining him from making any construction over the suit land during the suit period.

(vii) Let mandatory injunction be passed against the defendant No.1 for removal of boundary wall from the suit land failing which the same should be demolished in the process of law.

(viii) In case the defendant No. 1 makes any forcible construction over the suit land during the pendency of the suit a decree of mandatory injunction be passed against him for removal of construction from the suit land failing which the same may be demolished in the process of law.

(ix) Let any other decree/decrees as this Hon'ble court deems fit and proper under the circumstances be passed in favour of the plaintiff.

(x) Let the cost of the suit be awarded in favour of the plaintiff."

The findings of the learned Civil Judge (Sr.Divn.) in para-10 of the judgment run as under:-

" xxx xx xxx. Therefore, by no stretch of imagination, it can be said that the claim of the plaintiff is barred by limitation as prescribed period of 12 years was not over from the date of dispossession.

xx xx xx Ext. 5 which has also been marked as Ext. A clearly proves that defendant no.1 has purchased Ac.0.008 decimals of land from plot No. 440 which was earlier purchased by the plaintiff. Therefore, the sale deed of defendant no. 1 vide Ext. 5 and Ext. A and the mutation done in favour of defendant no. 1 Ext. D so far as the suit plot No. 440 measuring Ac.0.008 decimals is concerned is liable to be declared as illegal void and no valid title had passed under it and the plaintiff which is prior in time (sic) is better in law and therefore all the issues are answered in favour of the plaintiff and against the defendants.

Next in para-11 of the judgment it has been held that the plaintiff has the cause of action to file the suit and therefore, the defendant no. 1 has been directed to remove the boundary wall construction made by him over the suit land given liberty to the plaintiff in case of disobedience to take recourse through court.

The lower appellate court has taken a view that when the plaintiff has admitted the possession of defendant no.1 and for that reason has sought for mandatory injunction in the absence of prayer for recovery of possession, the suit for all the reliefs as prayed for as led is barred by provisions of Section 34 of the Specific Relief Act.

18. In the present case, though the plaintiff has not specifically asked for the recovery of possession in the prayer, the plaint read as a whole particularly the pleadings referred to above leaves no room to doubt that the plaintiff desired that unauthorized construction be removed and the land be put back to her possession in the former condition and the parties were quite aware of their respective cases. Therefore, such a prayer for recovery of possession which could have been made in the suit, but having not been made in view of evidence led before this Court, in the suit, there is no iota of doubt that the defendant no. 1 had known clearly that the plaintiff desired to have the recovery of land and the defendant would not in any way suffer if such a relief is granted nor he will in any way be prejudicially affected. Moreover, in the facts and circumstances of the case such relief of recovery of possession cannot be held for a moment that such relief is a larger relief

then those claimed by the plaintiff. The relief of recovery of possession is thus found to be founded on pleadings made by the parties. The parties knew that the matter in question was involved in the trial and they led evidence about it.

In the instance case it can never be said that the parties did not know that the matter was in issue in the trial and defendant no. 1 is seen to have in particular led evidence in respect of it. When he has very much claimed to have been in possession on the basis of his sale deed, the same has been held to be invalid by concurrent finding of the courts below. Thus, here in the case the recovery of possession squarely falls well within the expression of other relief as contained under Order 7 Rule 7 of the Code of Civil Procedure and the court is competent to grant such relief to the plaintiff even though there is no specific prayer for such relief in the prayer portion of the plaint.

19. For the aforesaid discussions and reasons, this Court is constraint to hold that the view taken by the lower appellate court is unsustainable and as such is liable to be set aside. It was well within its competence while concurring with the findings of the trial court on all other issues to pass a decree for recovery of possession with the aid of the provision of Order 7 Rule 7 of the Code of Civil Procedure. The substantial questions of law as framed at para-6 (i) is accordingly answered and in that view of the matter, the other substantial questions of law do not survive for further consideration and so as to be answered.

20. For the aforesaid, the prayer for amendment of the plaint vide Misc. Case No. 138 of 2015 filed by the appellant becomes redundant and consequentially Misc. Case No. 438 of 2015 filed by respondent no. 1 does no more survive.

21. In the result, the second appeal stands allowed. The judgment and decree passed by the lower appellate court are set aside. The suit is decreed as under:-

(i) the sale deed dated 3.6.2000 executed by Chandra Sekhar Mohapatra in favour of the plaintiff in respect of Ac.0.011 decimals of land from plot No. 440 in mouza Dakhin Tulasipur under marked Ext. 2 is declared as legal and valid and as such the right, title and interest of the plaintiff over the said suit land is hereby declared and she is held to be entitled to get the recovery of possession of the said land from defendant no.1;

(ii) The sale deed dated 11.8.2000 executed by defendant no. 2 in favour of defendant no. 1 in respect of land under plot No. 440 measuring Ac.0.008

decimals under marked as Ext.5 equal to Ext. A is declared as illegal and void and consequently the mutation in the name of respondent no. 1 in respect of that land vide Ext.D is declared illegal; and

(iii) Mandatory injunction is issued against defendant no. 1 for removal of the boundary wall situated over the above plot of land and to deliver vacant possession of the said land within three months hence and in case of failure, the plaintiff is at liberty to get the removal of the said boundary wall or any other construction done at the cost to be paid by defendant no. 1 and recover vacant possession of the said land through the process of the court by initiating appropriate proceeding. The defendant no. 1 is further permanently restrained from creating any disturbance in the peaceful possession of the plaintiff. In the facts and circumstances of the case, there would however be no order as to cost.

Appeal allowed.

2016 (I) ILR - CUT- 400

BISWANATH RATH, J.

W.P.(C) NO. 22869 OF 2012

GITANJALI PRADHAN & ORS. ……..Petitioners

.Vrs.

HAZARI PRADHAN ……..Opp. Party

CIVIL PROCEDURE CODE, 1908 – S.151

Partition Suit by widow against her father-in-law – In the suit, she filed a petition U/s. 151 C.P.C. for grant of monthly maintenance pending disposal of the Suit – Maintainability of the petition questioned in view of the provisions of the Family Courts Act, 1984 – Application rejected by the trial Court – Hence the writ petition – Personal disputes not involving the disputes between the husband and wife can not be brought under the adjudication process of the Family Court – Held, the present proceeding arising out of the Suit can only be resolved by the Civil Court in the pending proceeding – Impugned order is quashed – Direction issued to the trial Court to hear the application for maintenance and pass orders as appropriate.

(Paras 7, 8)

Case Laws Referred to :-

1. AIR 2007 Kerala 38 : Devaki Antharjanam v. Narayanan Namboodiri

& Anr.,
2. AIR 2008 Gujurat 167: Darshanaben & Ors. V. Shantibai Ratilal Parmar & Ors.,
3. AIR 2001 A. P. 169 P: Srihari v. Kum.P.Sukunda and another
4. AIR.2010 A.P. 224 : G.Pentamma & Ors. V. G.Anjali, w/o G.Raghurameswar Rao & Anr.

For Petitioners : M/s. S.K.Dash, A.K.Otta, A.Dhalasamanta & B.P.Dhal
For Opp. Party : M/s. M.K.Mishra, S.K.Pattanaik & N.B.Dora

Date of Hearing :16.11. 2015
Date of Judgment: 24.11. 2015

JUDGMENT

BISWANATH RATH, J.

This matter arises out of an order dated 21.9.2012 passed by the learned Civil Judge (Senior Division), Khurda rejecting an application under Section 151 of the Code of Civil Procedure at the instance of the plaintiff-petitioners in C.M.A.No.82 of 2012 arising out of C.S.No.26 of 2011 for awarding interim maintenance on the premises of maintainability of the same.

2. Fact involved in the case is that after the death of predecessor-in-interest of the petitioners, defendant nos.1 to 3, the father-in-law of the petitioner no.2 and his two other sons created disturbance and deprived the petitioners from the usufructs compelling the petitioners for instituting a suit for partition of the properties by filing C.S.No.26 of 2011. The defendant nos.2 and 3 on their appearance filed a joint written statement refuting the plaint averments and raising thereby the question of maintainability of the suit. During pendency of the suit the petitioners being a distress family, filed an application under Section 125 of the Code of Criminal Procedure before the Learned Judge, Family Court, Khurda and the said application was dismissed as not maintainable. The order was challenged in this Court. This Court even though did not interfere in the impugned order directed for early disposal of the suit with an observation to see that the widow survives and gets at least her share on usufructs by appointing her father-in-law, present opposite party, as the receiver. As admitted by the opposite party, the attempt for appointment of receiver has gone frustrated as there is nothing available to be filed as return. Having no other source of income, the petitioners remain constrained to file an application under

Section 151 of the Code of Civil Procedure for grant of monthly maintenance pending disposal of the suit, which application being rejected, the same is under challenge in the present writ petition.

3. Sri Dash, learned counsel appearing for the petitioners in substantiating his claim repeated his stand as quoted herein above and further taking resort to the provisions under Sections 7 and 8 of the Family Courts Act, 1984 submitted that in view of the specific purpose of the Family Courts Act, the dispute between the parties before the Family Court confines to marriage and proceedings arising out of such marriage and there cannot be any restriction for filing such application without getting involved into the question of marriage. Further, relying on catena of decisions in the cases of ***Devaki Antharjanam v. Narayanan Namboodiri & Anr***., *AIR 2007 Kerala 38,* ***Darshanaben & Ors. V. Shantibai Ratilal Parmar & Ors****., AIR 2008* ***Gujurat 167, P. Srihari v. Kum.P.Sukunda and another****, AIR 2001 Andhra Pradesh 169,* ***G.Pentamma & Ors. V. G.Anjali, w/o G.Raghurameswar Rao & Anr.,*** *AIR.2010 Andhra Pradesh 224* contended that in view of the position settled by different Courts, the application at the instance of the petitioners was very much maintainable and it is in this view of the matter, the impugned order should be set aside.

4. Shri Misra, learned counsel for the opposite party on the other hand apart from filing a counter in seriously objecting to the challenge of the petitioners taking resort to the provisions contained in Sections 7 and 8 of the Family Courts Act, 1984 contended that under the specific provisions of the Family Court Act, 1984, such application is a clear bar and consideration of such application remain only within the domain of the Family Courts created under the Act, 1984. Further relying on a decision in the case of ***Srimati Nishamoni Kalita & Anr, v. Srimati Sarada Kalita & Ors***, *AIR 2009 Gauhati 62* **contended** that **as** per the decision, the application for maintenance is wholly not maintainable before a Civil Court. Relying a decision in the case of ***Sri Mayadhar Mallik v. Smt.Laxmi Mallik and others***, *1999(I) OLR 37* on interpretation of ward 'proceeding' submitted that proceeding for maintenance in Civil & Criminal Court is not maintainable after the establishment of the Family Court. Similarly, relying on a decision involving ***Abdul Rahim Atar & others v. Atul Ambalal*** barot*, AIR 2005 Bombay 120* and ***Padma Sen and another v. State of Uttar Pradesh,*** *AIR 1961 SC 218* submitted that inherent power cannot be exercised to nullify the effect of the statutory provision. Learned counsel, Sri Mishra also relying on a decision in the case of ***Ramji Gir and others v.***

Elaichi Devi, *AIR (1974) Patna 280* and in the case of ***Mulimani Sanna Basavarajappa v. Basavannappa***, *AIR 1959 Maysore 152* submitted that filing of petition under Section 151 of the Code of Civil Procedure is not in consonance of provisions contained Section 19 of Hindu Adoption of Maintenance Act and as such, such application in the pending suit for partition is not at all maintainable.

5. It is admitted that the main proceeding for partition in between the parties is pending before the Civil Court. It also remains undisputed that petitioner no.1 has lost her husband and she has filed the suit claiming for partition of the property in her and her children's favour on the allegation of non-maintenance of the petitioners' family after the sad demise of her husband. Before proceeding to decide on the main point involved in the matter, it is necessary to take into account the legal provisions of Sections 7 and 8 of the Family Courts Act, 1948, which are reflected as herein below:

> ***7. Jurisdiction***-(1) Subject to the other provisions of this Act, a Family Court shall-
>
> (a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation, and
>
> (b) be deemed for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.
>
> ***Explanation***- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely-
>
> (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
>
> (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
>
> (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
>
> (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor;

2. Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter-IX (relating to other for maintenance of wife, children and parents) of the Code of Criminal Procedure,1973 (2 of 2974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

8. Exclusion of jurisdiction and pending proceedings: Where a Family Court has been established for any area,-

(a) no district Court or any subordinate civil Court referred to in Sub-Section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to Sub-section (1) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district Court or subordinate Court referred to in the sub-section or, as the case may be, before any Magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established."

6. The statement of object and reasons for bringing the family Courts Act, 1984 make it clear that the Act has been brought considering the need as a public interest to establish Family Courts for speedy settlement of family

disputes and the Family Courts Act are established to exclusively provide within the jurisdiction of the Family Courts. The matters relating to (i) matrimonial relief including nullity, marriage judicial separation, divorce, restitution of conjugal rights or declaration to the nullity of marriage or as to the matrimonial status of any person; (ii) The property of spouses or of either of them. So keeping in view the statement of objection and reasons behind the Family Courts Act, 1984, the provisions contained under Section 7 as well as Section 8 of the Family Courts Act, 1984 are to be applied remaining within the close compass of the statement of objects and reasons behind the Act. The question of bar of applications under such contingency to Civil Court has been the point of consideration of various courts. In deciding a similar contingency in a proceeding for partition on their father's property, at the instance of the deceased against the brother, a Division Bench of Andhra Pradesh in the case of *P. Srihari (supra)* taking into account the provisions contained under Section 7 of the Act came to held as follows:

> "In view of the above, the essential ingredient should be a dispute between the husband and the wife and the said dispute can be with regard to their marital status, divorce, restitution of conjugal rights, judicial separation, child custody, maintenance, as also properly sharing. But, in no event, the Family Court can have jurisdiction if the above dispute is absent. By no stretch of imagination, can the Family Court assume jurisdiction, if there is a dispute between the brothers, sisters, mothers, fathers etc. concerning property and the case on hand being one such, the Family Court had clearly no jurisdiction."

In another instance, in the case of *Devaki Antharjanam (supra),* the Kerala High Court taking into account several other decisions of various Courts in paragraph-19 came to held as follows:

> "The next question to be considered is what is the meaning of the expression "with respect to the property of the parties' occurring in Explanation (c) to Section 7(1). Does it mean property of the parties to the proceedings or property of the parties to a marriage? The words "or of either of them" following the expression "with respect to the property of the parties" would unmistakably lead to the conclusion that the expression refers to parties to a marriage and not parties to the proceedings. In order to attract Clause (c), the litigation must be with respect to the property of either the husband or wife or both of

> them. It excludes any other person who has independent rights in respect of the property. Could it be said that the co-ownership property of the husband, wife and son is the property of "the parties' to a marriage or either of them"? Evidently not. Therefore, I am of the view that the ingredients of Clause (c) of the Explanation are not attracted in the present case. It cannot even be contended that the present case is covered by Clause (d) to the Explanation to Section 7(1). Therefore, I am of the view that the Civil Court had jurisdiction to decide the suit and that the decree is not a nullity. I respectfully follow the decisions in Krishnan Nomboodiri v. Thankamani, 1994 (1) KLT 607 :1996 AIHC 1351 and Kamalasanan v. Valsala, 1994 (I) KLT 737 and Shyni v. Georgeand others, 1997 (1) KLJ 573: AIR 1997 Ker 231. Point No.1 is accordingly held against the appellant.

Similarly, in another decision rendered by Andhra Pradesh High Court in the case of *G.Pentamma & Ors. (supra),* taking note of a decision rendered by a Division Bench of Karnataka High Court in the matter of Genu @ Ganu v. Jalabai,LLR 2009 Kar 612 came to hold that it is clear that the Family Court has no jurisdiction to entertain and try a suit or proceeding claiming a property by persons other than the parties to the marriage. Further, the property in dispute should belong exclusively to the parties. If the persons other than the parties to the marriage have an interest in the said dispute, the Family Court has no jurisdiction to adjudicate the dispute and ultimately in paragraph 17, the Andhar Pradesh High Court has held as follows:

> "Viewed thus, it cannot be denied that the petitioners would be placed at a disadvantage if they have to face the subject suit proceeding before the Family Court. It is thus not for this Court to distort the express language of the provision in the name of purposive construction and thereby bring within its ambit matters which do not naturally fall thereunder."

In another situation, specifically considering an application for maintenance during pendency of a suit, the Gujarat High Court in the case of *Darshanaben (supra) has* come to held as follows*:*

> "It is not in dispute that the appellants-original plaintiffs have filed Civil Suit No.1038 of 2004 in the City Civil Court at Ahmedabad seeking various reliefs inter alia for partition of the properties of Hindu Undivided Family of the defendants and for accounts. In the

said suit, the plaintiffs have taken out notice of motion seeking temporary injunction restraining the defendants from transferring, alienating and/or assigning the movable and immovable suit properties and also seeking Rs.10,000 per month towards interim maintenance during the pendency of the suit. Thus, the main relief sought in the suit is for partition of the properties of the Hindu Undivided Family of the defendants and for accounts. Incidentally and by way of interim relief, by taking out notice of motion, the plaintiffs have prayed for Rs.10,000 per month towards their maintenance during the pendency of the suit. Thus, this Court fails to appropriate that how the suit for partition of the properties of the Hindu Undivided Family and for accounts, would fall within the purview of Secs.7 and 8 of the Family Courts Act. Sections 7 and 8 of the Family Courts Act would not be applicable at all with respect to the dispute and the relief sought in the suit for partition of the properties and accounts. It appears that what is weighed with the learned Chamber Judge is the maintenance amount sought by the plaintiffs during the pendency of the suit. The learned Chamber Judge has lost sight of the fact that the main reliefs in the suit is for partition of the properties of the Hindu Undivided Family and for accounts. Thus, the learned Chamber Judge has misread and misinterpreted the provisions of the Family Courts Act and has not properly appreciated and considered the main reliefs sought in the suit. The learned Chamber Judge has dismissed the notice of motion only on the aforesaid ground considering Secs.7 and 8 of the Family Courts Act, by observing that the suit for aforesaid relief is not maintainable in the City Civil Court at Ahmedabad and has not decided the notice of motion on merits. Under the circumstances and for the reasons stated above, the impugned orders passed by the learned Chamber Judge, City Civil Court at Ahmedabad below notice of motion requires to be quashed and set aside and the matter is to be remanded to the Chamber Judge for deciding the notice of motion on merits."

7. Now coming to the citation shown by the opposite party. This Court is of the view that in view of catena of decisions settling the position taking into varieties of account, the view taken by the Gauhati High Court in the case of *Srimati Nishamoni Kalita & Anr. (supra*) is not a correct view. Other citations shown at the instance of the opposite party are simply ignored as

same are not relevant for discussion in the present case particularly in the present circumstance. Thus, while accepting the views of the other High Courts, such as Andhra Pradesh, Kerala, Gujarat and in keeping in mind the statement of objects and reasons behind the Act, this Court is of the view that personal disputes not involving the disputes between the husband and wife cannot be brought under the adjudication process of the Family Court and as such , dispute, as raised in the present proceeding arising out of the suit can only be resolved by the Civil Court in the pending proceeding.

8. In view of the legal provisions as indicated hereinabove, in view of the settled position of law and under the observations made by this Court hereinabove, this Court while declaring the impugned order dated 21.9.2012 passed in C.M.A.No.82 of 2012 as bad, directs the Civil Judge (Senior Division), Khurda to hear the application for maintenance at the instance of the petitioners afresh and pass order, as appropriate.

9. In view of long pendency of the particular proceeding in the trial court, this Court further directs the trial court to also conclude the proceeding for maintenance within a period of two moths from the date of communication of this order.

10. In the result, the writ petition stands allowed but with no order as to cost.

Writ petition allowed.

2016 (I) ILR - CUT- 408

S.K.SAHOO, J.

CRLA NO. 507 OF 2011

SANTOSH KUMAR SAHU .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A) **S.C. AND S.T. (P.A.) ACT, 1989 – S. 3 (1) (xv)**

Merely because the victim belonged to SC/ST and the appellant belonged to general caste, it would not automatically attract the ingredients of the offence U/s 3 (1) (xv) of the Act – In order to attract the provision some force must have applied and some overtact must have caused on the victim, a member of SC/ST to leave his/her house, village or place of residence.

In this case prosecution has failed to establish any kind of force or overtact or deceitful means utilized by the appellant on the victim which caused the victim to leave her house – Held, impugned conviction and sentence U/s 3(1) (xv) of the Act is setaside. (paras 10,12)

(B) CRIMINAL PROCEDURE CODE, 1973 – S. 154.

Delay in lodging F.I.R – Offence U/s 366 I.P.C. and Section 3 (1) (xv) of SC & ST(P.A) Act. – Occurrence took place on 19.11.2009 but F.I.R. lodged on 5.5.2010 – Neither the informant nor any other witness has stated anything in the Court regarding such delay – Held, delay in lodging F.I.R. has not been properly explained. (Para 11)

(C) PENAL CODE, 1860 – S.366

"Abduction" – Inorder to attract the provision, any force, compulsion or any deceitful means is to be applied to the victim by the accused/appellant for inducing her to leave her village – In this case the father of the victim deposed that the age of the victim was 22 years at the time of occurrence – Evidence is clear that victim on her own sweet will and volition left her house without intimating her lawful guardianship being fully aware that the accused is a married person and she has also moved with the appellant from place to place without any complain before anybody although she had ample scope and opportunity – Held, the impugned conviction and sentence U/s 366 IPC is setaside. (Paras 10,12)

For the Appellants : Mr. Bijaya Kumar Behera (1)
For the Respondent : Mr. Sangram Keshari Nayak, Addl.Govt.Adv.

Date of Argument: 23.12.2015
Date of Judgment : 23.12.2015

JUDGMENT

S.K.SAHOO, J.

It is rightly said that love is blind. Love can be foolish also. Sometimes the selection goes wrong and the consequence is endless suffering. This case is the story of a young girl who falls in love with a married man. Leaves her house, leaves her parents. Elopes with her paramour holding fast to dreams. Dreams crumble to dust. Realization comes very soon to her. Her lover's love was not true love. She repents and yells in pain, "I will never have an affair with a married man again."

The appellant Santosh Kumar Sahu was initially charged for offence punishable under section 363 of Indian Penal Code in the Court of learned Additional Sessions Judge -cum- Special Judge, Nuapada in S.A. Case No.11 of 2010 for kidnapping S.S. (hereafter 'the victim'), a minor girl aged about 17 years on 9.11.2009 night at village Moharadihi from the lawful guardianship of her mother Soneibai Bewa. He was further charged under section 3(1)(xv) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter "SC and ST (PA) Act") on the ground that not being a member of Scheduled Caste and Scheduled Tribe, he forced/ caused the victim, a member of Scheduled Tribe to leave her house.

During course of trial, on a petition filed by the public prosecutor, the charge was altered from section 363 IPC to section 366 IPC and accordingly the charges were reframed against the appellant under section 366 of IPC and section 3(1)(xv) of the SC and ST (PA) Act.

The learned trial court vide impugned judgment and order dated 08.08.2011 found the appellant guilty under section 366 of IPC as well as under section 3(1)(xv) of the SC and ST (PA) Act. The appellant was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 20,000/- (Rupees Twenty Thousands), in default of payment of fine, to undergo rigorous imprisonment for one year for the offence under section 366 of IPC. He was also sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5000/- (Rupees five thousands), in default of payment of fine, to undergo rigorous imprisonment for three months for the offence under section 3(1)(xv) of the SC and ST (PA) Act. Both the substantive sentences were directed to run concurrently.

2. The prosecution case, as per FIR lodged by one Chinilal Sabar (P.W.9) on 05.05.2010 before the Inspector-In- Charge, Nuapada Police Station is that he belonged to Scheduled Tribe and the victim who is his daughter was aged about 17 to 18 years. On 18.11.2009 while the victim was staying in the house of her elder mother in village Jhilmila, the appellant called her over telephone and informed her about her mother's illness. The appellant further intimated her that her father had been to Bargarh and brother had been to Gujurat and nobody was present in the house to look after her ailing mother and asked her to come back to her house. The victim with her elder mother returned back to her house. It is further stated in the FIR that on 19.11.2009 night the appellant kidnapped the victim and on 21.11.2009 at about 7.00 a.m. the paternal uncle of the appellant namely Jagadish Sahu

intimated the elder brother of the informant namely Mandhar Sabar that the appellant had kidnapped the victim and they would search for both of them and thereafter the victim would be handed over to her parents. With such assurance being given by the paternal uncle of the appellant, the informant waited but since the victim did not return back even after a considerable period, the FIR was lodged on 05.05.2010.

On the basis of such FIR, Inspector-in-Charge of Nuapada Police Station registered Nuapada P.S. Case No.37 dated 05.05.2010 under section 363 of IPC and section 3(1)(xv) of the SC and ST (PA) Act and the charge of investigation was handed over to Shri Prafulla Kumar Patra (P.W.11), S.D.P.O., Nuapada. During course of investigation, P.W.11 examined the informant and other witnesses. He visited the spot and prepared spot map Ext.2. On 31.05.2010 he arrested the appellant and forwarded him to Court. He sent requisition to Tahasildar, Nuapada to ascertain the caste of the informant and the accused as well as the victim. The Tahasildar, Nuapada vide the letter no. 2107 dated 19.07.2010 intimated that the informant and the victim belong to 'Sabar' Caste which is 'ST' and the appellant belongs to 'Teli' Caste which is 'OBC'. In spite of the best efforts, the I.O. could not be able to trace out the victim girl and accordingly on completion of investigation, charge sheet was submitted against the appellant under section 363 of IPC and section 3(1)(xv) of the SC and ST (PA) Act.

3. After observing due committal formalities, the case of the appellant was committed to the Court of Session for trial where the learned trial court first framed charge against the appellant under section 363 of IPC and section 3(1)(xv) of SC and ST (PA) Act on 19.08.2010 and since the appellant denied the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt. Subsequently in the midst of trial, on a petition filed by the Special Public Prosecutor, the charge was altered to one under section 366 of IPC and on 21.07.2011 the learned trial Court reframed the charge under section 366 of IPC and section 3(1)(xv) of SC and ST (PA) Act to which also the appellant pleaded not guilty.

4. In order to prove its case, the prosecution examined eleven witnesses.

P.W.1 Dinabandhu Sabar is a co-villager of the informant and he stated that he received a phone call from one Ahalya Rout, a co-villager who was staying at Nagpur who intimated him that she had received phone call from the victim that she was at Nagpur railway station alone and the victim was requesting her to take her. P.W.1 further stated that Ahalya Rout was not

inclined to take the victim with her unless she was requested in that behalf by the parents of the victim. P.W.1 further stated that at about 9.00 p.m. in the night on the same day when he talked with Ahalya Rout over phone, she informed him that she had been to Nagpur railway station but could not locate the victim.

P.W.2 Shankarlal Rout is a co-villager of the informant who stated that he along with Suklala Rout had been to Nagpur to trace out the victim and they contacted Ahalya Rout and Debaki Rout who told them that the victim had not come to their house.

P.W.3 Mandhar Sabar is the elder brother of the informant who stated that the paternal uncle of the appellant told him about the kidnapping and further told him that they would search for the appellant as well as the victim and thereafter the victim would be handed over to her parents. He has further stated about the caste of the informant to be Sabar and that of the appellant as general category.

P.W.4 Manihar Sabar is a co-villager of the appellant who stated that the informant called a village meeting and he attended the said meeting wherein he was intimated about the kidnapping of the victim by the appellant but neither the appellant nor his parents attended the meeting.

P.W. 5 Soneibai Bewa is the mother's sister of the victim and she has stated that on receipt of the information regarding the illness of the mother of the victim, she along with the victim came to the house of victim situated at village Maharadihi.

P.W.6 is the victim lady.

P.W.7 Dileswari Ahir stated that the accused used to purchase mobile re-charge vouchers from his grocery shop and two to three days prior to the occurrence, the appellant had purchased one of such vouchers.

P.W.8 Anjali Sabar has stated that the victim had come to her house and in the night, she slept with her and on the next day morning, she left her house.

P.W.9 Chinilal Sabar is the informant in the case and he is the father of the victim.

P.W.10 Dhanmati Sabar is the mother of the victim and she has stated about the missing of the victim from her house after arrival from village Jhilimila.

P.W.11 Prafulla Kumar Patra is the Investigating Officer

The prosecution exhibited three documents. Ext.1 is the FIR, Ext.2 is the Spot Map and Ext.3 is the letter of the Tahasildar, Nuapada. No witness was examined on behalf of the defence.

5. The defence plea is one of denial and it was specifically pleaded by the appellant that neither he had called the victim over phone nor he had taken her away to Raipur nor he had handed her over to any lady and since he is an affluent person, he has been falsely roped in the case.

6. The learned trial Court had been pleased to held that since the I.O. has not collected any material relating to the age of the victim and the victim during her deposition in Court has stated her age to be 18 years and the father of the victim in his evidence has stated that at the time of occurrence, the age of the victim was 22 years, no conviction can be warranted against the appellant for kidnapping of the victim.

The learned trial Court, however held that the prosecution has proved its case that the appellant had abducted the victim in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she may be forced or seduced to illicit intercourse and as such held the appellant liable under section 366 of IPC. Learned trial Court further held that the appellant not being a member of Scheduled Caste or Scheduled Tribe caused the victim, a member of Scheduled Tribe to leave her house and as such the appellant was held liable under section 3(1)(xv) of the SC and ST (PA) Act.

7. Mr. Bijaya Kumar Behera, learned counsel appearing for the appellant contended that the impugned judgment and order of conviction is not sustainable in the eye of law. He further contended that when the learned trial Court has acquitted the appellant of the charge of kidnapping holding that, in view of the age of the victim as on the date of occurrence, the ingredients of such offence are not made out and when there is no clinching material that any force or any deceitful means was applied by the appellant for inducing the victim to leave her village, the basic ingredients of 'abduction' are not attracted and as such the conviction of the appellant under section 366 of IPC is wholly unwarranted.

The learned counsel for the appellant further urged that merely because the victim belonged to Scheduled Tribe and the appellant belonged to general caste, that itself would not attract the ingredients of offence under section 3(1)(xv) of the SC and ST (PA) Act, 1989 unless there are materials on record that the appellant had used any force or had caused the victim to leave her house. The learned counsel further urged that the statement of the

victim clearly indicates that she on her own volition left her lawful guardianship being fully aware that the accused is a married person and moved with the appellant from place to place and did not complain before anybody while she was in the company of the appellant even though she had ample opportunity and scope to complain against the appellant and therefore in absence of the basic ingredients of offences, the impugned judgment and order of conviction is liable to be set aside. Leaned counsel for the appellant further urged that there is inordinate delay in lodging the FIR and there is no clinching material on record that the appellant received any money from the lady to whom the victim is stated to have been handed over.

Mr. Sangram Keshari Nayak, learned Addl. Government Advocate on the contrary, contended that since the victim was not rescued till the submission of charge sheet, she could not be sent for medical examination and as the appellant being himself a married person had made false promises of marriage to the victim for which the victim left her lawful guardianship and the victim being admittedly a member of Scheduled Tribe, the ingredients of both the offences are squarely attracted.

8. Considering the submissions raised by the learned counsels for the respective parties, there is no dispute that the prosecution has miserably failed in all respect to prove that the victim was minor as on the date of occurrence. Since the victim had not gone to any school for her studies, no educational certificate regarding her age proof was available. No birth certificate or horoscope was proved. No medical evidence is also available in support of her age at the time of occurrence. Though the victim stated her age to be 18 years at the time of deposition which was given a year after occurrence but the father of the victim has stated that the victim was aged about 22 years at the time of occurrence. In view of such materials, I am of the humble view that the victim was major as on the date of occurrence.

9. Section 362 I.P.C. defines ‘abduction’. It requires movement of any person from one place to other either by force or by deceitful means. The provision envisages two types of abduction i.e. (i) by force or by compulsion; and/or (ii)inducement by deceitful means. The object of such compulsion or inducement must be going of the victim from any place. The word ‘force’ is defined in section 349 I.P.C. as implying a contact between the person on whom force is used and some other person or object in order to compel the former to move or to cease to move from a certain place. The word ‘force’ in this section meant actual force and not merely a show or threat of force. It hardly needs to be observed that merely taking away of a woman without use

of force or deceitful means and without the intention specified in the section would not amount to abduction. Deception can be established only when accused either dishonestly or fraudulently conceal certain facts or made a false statement to the victim knowing it to be false.

In order to bring home an offence under section 366 of I.P.C., the prosecution is required to establish first that the accused kidnapped as understood in sections 360 and 361 of I.P.C. or abducted the victim as understood in section 362 of IPC. 'Kidnapping' and 'abduction' are two distinct offences. The ingredients of the two offences are entirely different. The prosecution is further required to establish that the victim was a woman and that the accused during the kidnapping or abduction had the intention or knew it to be likely that such woman might or would be forced to marry a person against her will or that she might or would be forced or seduced to illicit intercourse or by means of criminal intimidation or otherwise, by inducing the woman to go from any place with intent that she may be or knowing that she will be forced or seduced to illicit intercourse.

Kidnapping from lawful guardianship prescribes separate age limit for a male victim as well as a female victim. For any victim of unsound mind, no age limit has been prescribed. In abduction, the person abducted may be a minor or a major. Abduction is not punishable per se but is punishable only when accompanied by a particular purpose as contemplated in the latter sections i.e. sections 364 to 369 of I.P.C.

10. Analyzing the evidence on record to find out whether a case of abduction is made out or not and whether it is further established that the purposes which are required to be proved under section 366 of IPC are proved or not, it appears that the victim was a fully grown up girl. She had attended the age of discretion and moreover she was sensible and aware of the intention of the appellant. It was not unknown to her with whom and for what purpose she was going.

The victim (P.W.6) has stated that the accused was a married person by the time of occurrence and since the accused told her that he would marry her, she agreed and then she went with the accused to Khariar road in a cycle and from Khariar Road to Raipur by train. She had not attempted to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect her. She further stated that she left her house with the accused without informing anybody and on her own will. Thus she was a willing party to go with the appellant on her own. She had further stated that at Khariar Road, the appellant asked her to sit for some time and went with the cycle and after

sometime returned to railway station leaving the cycle elsewhere. The victim has not tried to escape from the Railway Station while she was alone nor complained either before railway police or before anybody. She further stated that both of them got up in the train at Khariar Road at about 4.00 a.m. and reached at Raipur railway station at 6.00 a.m. and they remained at Raipur Railway Station for about half an hour. Though the victim has stated in the chief examination that the appellant asked her to sit near a lady and left the train compartment and then that lady told her that she had purchased her from the appellant for Rs.1,000,00/- and took her to Nagpur and from Nagpur to Pune in a bus but that lady is neither a witness in this case nor an accused. There is also no material on record that any money was handed over by that lady to the appellant. The victim on the other hand has stated in her crossexamination that when the appellant got up into the train compartment at Raipur, that lady had already occupied a seat and the appellant requested the lady to give a space on the seat near her for her sitting and accordingly the lady provided her space and she sat down and thereafter the appellant had no talk with that lady. In view of such evidence, there is no material on record that the appellant had handed over the victim to that lady or any money was given by the lady to the appellant. The statement of the victim as to what the lady told her being hearsay in nature is not admissible in the eye of law. The conduct of the victim in further accompanying the lady even after the later disclosed before her that she had purchased her from the appellant for cash of Rs. 1,000,00/- and her further conduct in not complaining before anybody either in the train compartment or elsewhere is another factor which goes against the truthfulness of the statement of the victim. There is absolutely no material on record that either any force or compulsion or any deceitful means was applied to the victim by the appellant for leaving her lawful guardianship rather it appears that the victim on her own sweet will, left the house without intimating anybody in the house and accompanied the appellant knowing fully well that he is a married person and therefore the ingredients of offence under section 366 of IPC are not attracted.

Coming to the offence under section 3(1)(xv) of the SC and ST (PA) Act, it is very clear that force must be applied or some overt act must be caused on the member of a Scheduled Caste or Scheduled Tribe to leave his house, village or place of residence. If a member of Scheduled Caste or Scheduled Tribe on his/her own volition accompanies the accused leaving his/her house or village or his place of resident, merely because the accused is not a member of Scheduled Caste or Scheduled Tribe, the ingredients of

offence under section 3(1)(xv) of the SC and ST (PA) Act would not be automatically attracted. As I have already held that the prosecution has failed to establish that any kind of force or deceitful means was utilized by the appellant on the victim which caused the victim to leave her house, I am of the view that the ingredients of the offence under section 3(1)(xv) of the SC and ST (PA) Act is also not attracted.

11. Coming to the next contention raised by the learned counsel for the appellant that there is inordinate delay in the lodging of the FIR, it appears that the occurrence has taken place on 19.11.2009 and the FIR was lodged on 05.05.2010. Though some flimsy explanation regarding delay is given in the F.I.R. but neither the informant nor any other witness has stated anything in Court regarding the cause of delay in presenting the F.I.R. Therefore, I am of the view that the delay in lodging F.I.R. has not been properly explained by the prosecution.

12. In view of what has been discussed above, since the prosecution has failed to prove the ingredients of offences either under section 366 of IPC or under section 3(1)(xv) of the SC and ST (PA) Act, the impugned judgment and the order of conviction cannot be sustained in the eye of law and accordingly the same is hereby set aside.

The appeal is allowed.

The appellant who is in jail custody shall be released forthwith if his detention is not required in any other crime.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

Appeal allowed.

2016 (I) ILR - CUT- 417

S.N.PRASAD, J.

W.P.(C). NO.14692 OF 2011

SEBATI PATRA ..... Petitioner

.Vrs.

STATE OF ODISHA & ORS. .....Opp. Parties

Anganwadi Helper – Appointment – Petitioner got appointment having secured highest marks – O.P.No.5 filed complaint saying that she being an widow she ought to have been given preference as per

the guidelines – Sub-Collector set aside the appointment of the petitioner – Hence the writ petition – Preference can neither override merit nor claimed as a matter of right – Rather it is required to be considered whether a candidate actually in need of any preference – As a matter of fact preference can only be considered if two candidates found in the same footing – In this case committee members put related questions to the candidates wherein the petitioner secured ten marks and O.P. No. 5 secured only four marks so it cannot be said that both the candidates are on similar footing and O.P.No 5 can claim any benefit on the basis of preference – Sub-collector while entertaining the complaint of O.P.No. 5 has not taken all these aspects in to consideration – Held, impugned order being not sustainable is quashed. (Para 12 to 15)

Case Laws Referred to :-

1. 1992 Supp.(3) SCC 217 : Indra Sawhney & Ors -v- Union Of India & Ors.
2. (2003)5 SCC 341 : Secretary, A.P.Public Service Commission -v- Y.V.V.R. Srinivasulu & Ors.
3. (2011)1 SCC 150 : Vijendra Kumar Verma -v- Public Service Commission Uttarakhand & Ors.
4. (2007)11 SCC 522 : Marripati Nagaraja & Ors. -v- Government of A.P. & Ors.

For petitioner : M/s. N.K.Sahoo & B.Swain

For opp. Parties : Mr Amit Pattnaik (Addl.Govt. Advocate)
M/s. P.K.Rath, P.K.Satpathy, R.N. Parija & D.P.Patnaik

Date of hearing : 23.09.2015
Date of judgment: 23.09.2015

JUDGMENT

S.N.PRASAD,J.

This writ petition has been filed assailing the order dated 15.4.2011 passed in AW Misc.Case No.4 of 2011(Annexure-5) by which engagement of the petitioner has been held to be in contravention of the guideline and as such it was set aside and accordingly the authorities have been directed to take necessary steps for selection of Anganwadi Helper of the centre from amongst the applicants.

2. Brief facts of the case is that one advertisement was issued for engagement of Anganwadi Helper in respect of Gohirapadi Anganwadi Centre and accordingly eight candidates including the petitioner as well as the opposite party no.5 had submitted applications for consideration and selection as Anganwadi Helper for the said Centre. The candidature of the petitioner and others have been considered in the light of the guideline of the Government of Orissa, issued by the Women and Child Development Depart vide letter No.9994 dated 24.11.1997. Petitioner found fit to be eligible was subjected to suitability test along with other participants and accordingly petitioner since secured 10 marks has been selected and engaged.

Selection and engagement of the petitioner has been objected by the opposite party no.5 on the ground that she being widow, ought to have been given preference and thereby was to be selected but giving go by to the preferential guideline dated 24.11.1997, the petitioner has been selected and engaged. Sub-Collector after accepting the appeal, after hearing the parties has passed order declaring the selection and engagement of the petitioner to be in contravention of the guideline and as such same was set aside with a direction to take necessary steps for selection of Anganwadi Helper of the centre from amongst the applicants giving due preference to the opposite party no.5 for her being widow.

3. Petitioner has challenged the order passed by the Sub-Collector, Bhadrak on the following grounds:

(1) Guideline dated 24.11.1997 issued by the Women & Child Development Department provides eligibility conditions under Clause (i), (ii)(iii), (iv), (v) and Clause (v) being preference clause should be given to Orphan, Widow, Separated Divorced or Deserted Woman.

(2) A Helper will be selected by a Committee consisting of following members:

(i) C.D.P.O. of the Project being Chairperson;

(ii) Supervisor in-charge of the area and

(iii) A.N.M. in-charge of the area being other members.

The above committee will select the Helper in consultation with the Women Groups of the village. In case, for any reasons, to be recorded in writing, it is not possible to make the selection in a particular village the selection may be made in the Project Headquarters by the above mentioned

committee. However, the candidate selected should fulfill all the eligibility criteria as mentioned at para-1 above.

4. Learned counsel for the petitioner has submitted

(i) Petitioner being found suitable on the basis of the decision taken by the Committee to go for written and viva voce tests secured highest marks in the selection process, she has rightly been engaged.

(ii) Petitioner is eligible as per clause-1 and it is only after her eligibility she was directed to go for suitability test in which she has found to be highest securer of marks.

(iii) Preference cannot override the merit position rather preference can only be given if two candidates are found to be on same footing. Meaning of preference cannot be misconstrued to give undue weightage over and above meritorious candidates.

(iv) Clause-1(v) stipulates that preference should be given to an Orphan, Widow, Separated Divorced or Deserted Woman,

purpose is to support these categories of the candidates but for getting the support it is incumbent upon these categories of candidates to prove that they are really in need of any support and they are not financially capable for sustaining life.

(v) Widow or separated or divorced woman, if if so facto, cannot be given benefit of preference if they are not in penury i.e. without any means of livelihood, there may be situation that widow, separated, divorced and deserted woman is capable after being inherited property from the deceased-husband or give financial help by the court of law to the divorcee or deserted woman and as such for getting benefit of preference clause a candidate is suppose to make out her case regarding need of financial help which can be given to them in the shape of engaging them as Anganwadi Helper.

All these are lacking and has not been raised before the appellate authority, without considering these aspect of the matter and only on the preference clause, selection made on the basis of the merit is held to be illegal.

5. Opposite party-State has filed counter affidavit stating, inter alia, therein that for deciding the suitability written test and viva voce was conducted for selection of Anganwadi Helper in which petitioner has secured

highest marks, i.e. 10 marks while opposite party no.5 has secured only 4 marks, hence in order not to compromise with the merit, selection committee has taken decision by engaging the petitioner.

It has been submitted that preference does not mean that suitability will be ignored rather implied meaning of preference is that if two candidates are on same footing then only preference clause is to be applied.

6. Opposite party no.5 has put her appearance through learned Advocate who has argued the case at length and submitted that engagement relates to Anganwadi Helper. The procedure for engagement of Helper has been given in the guideline dated 24.11.1997, Clauses provides that for being a candidate, should be lady of the locality and acceptable to the Anganwadi Worker, should not be less than 18 years of age, preference should be given to Orphan, Widow, Separated Divorced or Deserted Woman, opposite party no.5 being widow ought to have been given benefit of preference clause as provided in the guideline but not given.

In order to emphasize these argument, learned counsel for the opposite party no.5 has submitted that Anganwadi Helper is not a civil post rather Anganwadi Helper is suppose to help Anganwadi Worker in the matter of cooking and other needs, hence for cooking there is no need to go for written as well as Viva voce test which is not prescribed in the guideline dated 24.11.1997 which provides that selection is to be made through a committee consisting of three members of which C.D.P.O. of the Project would be Chairperson and Supervisor In-charge and A.N.M. in-charge would be two other members which itself suggest that selection is to be made on the basis of selection with consultation with the Women Group of village, there is no reference to go for written test or Viva voce test. Since the State authorities have gone for written or viva voce test and on that test petitioner has secured 10 marks while opposite party no.5 has secured 4 marks, since there is no procedure for selection test, engagement of the petitioner cannot be said to be selection in consonance with the guideline dated 24.11.1997. If there would not have been any written or viva voce test then opposite party no.5 on the basis of preference clause, since she was widow, would have been selected but it is only in order to deprive the opposite party no.5 legitimate claim for giving the benefit of preference, the authorities have gone for written and viva voce tests even the same was not provided in the guideline dated 24.11.1997.

7. Heard learned counsel for the parties and perused the documents on record.

8. Fact which is not in dispute in this case is that an advertisement was issued in which eight candidates have participated. The authorities have issued advertisement on the basis of the guideline dated 24.11.1997 for engaging Anganwadi Helper. Guideline provides the following eligibility criteria:

(i) She must be a lady of the locality and acceptable to the Anganwadi Worker,

(ii) She should not be of less than 18 years of age.

(iii) She can continue in the job till she discharges her duty efficiently.

(iv) The C.D.P.O. is competent to appoint and discharge the Helper.

(v) Preferences should be given to an Orphan, Widow, Separated Divorced or Deserted Woman.

The guideline further provides for selection:

(i) C.D.P.O. of the Project … Chair-person

(ii) Supervisor in-charge of the area … Member
(iii) A.N.M. in-charge of the area … Member

From perusal of clause-1 regarding eligibility conditions although five conditions have been given, only two conditions can be said to be eligibility condition i.e. (i) She must be a lady of the locality and acceptable to the Anganwadi Worker and (ii) She should not be of less than 18 years of age. Condition no.(iii) which provides continuation of Helper in the job. Condition no.(iv) prescribes for competent authority for appointment and discharge of the Helper. Condition no.(v) prescribes preferences to be given to an Orphan, Widow, Separated, Divorced or Deserted Woman. Preference cannot be said to be an eligibility condition.

Under Clause-2 procedure for selection has been given, according to which an Helper is supposed to be engaged by a committee consisting of three members, C.D.P.O. of the project will be Chairperson while Supervisor in-charge and A.N.M. in-charge of the area will be two other members. The

above committee should select Helper in consultation with the Women Group of the village. In case, for any reasons, to be recorded in writing, it is not possible to make the selection in a particular village the selection may be made in the Project headquarters by the above mentioned Committee. However, the candidate selected should fulfill all the eligibility criteria as mentioned at para-1 above.

Thus power for engagement has been vested upon the committee who will select in consultation with the Women Group of the village. It is right that modes of selection process has not been given in the guideline dated 24.11.1997. It is settled that if there is no selection method prescribed in the guideline or Rule, the appointing authority or the competent authority is competent to evolve policy for making appointment in order to adopt fair play and transparent recruitment process.

In this case, although engagement of Helper is to be made, prime work of Helper is to cook which is to be provided to small children. Cooking also needs some expertise, if a candidate whose prime duty is to cook it is expected from the said helper to cook properly, feed in proper manner so that food which is to be provided to small children be taken with all interest. Keeping this fact in mind authorities have decided to go for selection test of course with consultation of the Women Group. In the selection, as has been stated by the learned counsel for the opposite party-State, question related to cooking was asked for from the candidates in which all the members have awarded marks in written and viva voce test. The petitioner has secured 6 marks out of 10 highest marks in the written test and 4 marks out of 10 in viva voce test total comes to 10 marks while the opposite party no.5 has secured only one mark out of 10 in written test and 3 marks out of 10 in the viva voce test total comes to 4 marks. Allotting of marks also suggests that no unfair play has been played because the petitioner in the written test has secured 6 marks while opposite party no.5 has secured only one mark and in the interview petitioner has secured 4 marks while opposite party no.5 has secured 3 marks.

9. On the basis of the highest marks petitioner was directed to be selected and accordingly engaged. After engagement opposite partyno.5 has challenged the decision of the selection committee on the ground that she has not been given benefit of preference clause since she was widow and as such she ought to have been engaged irrespective of the marks obtained by her and the authorities should not have been gone for written or viva voce tests since not provided in the guideline dated 24.11.1997.

10. As has already been indicated hereinabove regarding second ground that decision of the authority going for written and viva voce test was wrong, it is settled that authorities is competent enough to go for any procedure of selection in order to test the suitability of a candidate, the same cannot be questioned by a candidate after her participation in the selection process. Here, opposite party no.5 without any objection at any corner has participated in the selection process, but when became unsuccessful she is questioning the decision of going for written as well as viva voce test which is not permissible in view of the settled proposition of law that once a candidate has participated in the selection process she cannot challenge the same. Reference may be to the judgment rendered by the Hon'ble Supreme Court in the case of **Marripati Nagaraja and others –v- Government of A.P. and others**, reported in (2007)11 SCC 522 wherein their Lordships held at paragraph-19 which is being quoted below.

> "The other contention of Mr. Rao that the candidates had given only seven days↕ time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."

And in the case of **Vijendra Kumar Verma –v- Public Service Commission Uttarakhand and others** reported in (2011)1 SCC 150 wherein their Lordships held at paragraph-27 which is being quoted below.

> "In Union of India v. S.Vinodh Kumar, (2007)8 SCC 100 in para 18 it was held that:

> "18. ….. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."

In view of the settled position of law learned counsel for the opposite party no.5 is not accepted. It is also not accepted due to the reason that this point has not been raised before the appellate authority.

11. So far as main thrust of argument by learned counsel for the opposite party no.5 regarding preference clause as contained in Clause-1(v) and as per the argument opposite party no.5 ought to have been selected being a widow irrespective of marks or irrespective of any suitably condition.

In order to deal with the circumstance of preference it is necessary to see the judgment of the Apex Court in the case of **Secretary, A.P.Public Service Commission –v- Y.V.V.R. Srinivasulu and others,** reported in (2003)5 SCC 341 wherein at paragraph-10 it has been held that preference envisaged has to be given only when claims of all candidates who are eligible are taken for consideration and when any one or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-à-vis others in the matter of actual selection.

Another judgment of the Hon'ble Supreme Court rendered in the case of **State of U.P. and another –v-Om Prakash and others**, reported in **(2006)6 SCC 174** wherein at paragraph-19 which is being quoted hereinbelow:

> "The word "preference" would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-à-vis others in the merit list prepared by the Commission. <u>But preference does not mean en bloc preference irrespective of inter se merit and suitability.</u>

12. It is settled that preference cannot be equated with the benefit of reservation. Even in the matter of extending benefit of reservation to the members of backward communities, candidates belonging to other backward community, the candidates have to show that he is not in the creamy layer. In this context, judgment of the Hon'ble Supreme Court in the case of **Indra**

Sawhney & Ors vs Union Of India & Ors reported in 1992 Supp.(3) SCC 217 may be referred to.

Applying the same principle, preference cannot be given as a matter of right and the guideline suggests to give preference to Orphan, Widow, divorced or deserted woman for extending monetary help for the purpose of making them independent so that these categories of candidate may survive on their own leg but for getting this benefit this category of candidate has to substantiate that they are actually in need of preference otherwise there will be no meaning to give preference if it will be given to these categories of candidate who are financially sound. For example, there may be of situation in this category that if a candidate is widow, there may be circumstances that husband might have left substantial means for her survival, in case of divorcee or deserted women after decree of divorce has been passed by the competent court of law she must have got some alimony for maintenance, meaning thereby merely being in the category of widow, separated divorced or deserted woman, benefit of preference cannot be given and if candidate wants to take benefit of preference they have to come out with specific case that they are in actual need of help, but even then there would not be any compromise with the quality efficiency and merit, due to the settled principle of law that benefit of preference can only be given if two candidates are on same footing otherwise not.

Applying the same principle merely because opposite party no.5 is widow cannot claim as a matter of right the benefit of preference being a widow by engaging her unless and until she will prove that she is actually in need of engagement.

13. Thus the settled position of law that preference can only be given when candidates are on similar footing. If a candidate although is not on same footing with respect to suitability and if on the basis of preference engagement has been made then it will certainly lead to inefficiency in discharge of duty and will be compromising with the efficiency.

In this regard, submission of the learned counsel for the opposite partyno.5 that engagement relates to Anganwadi Helper and work of Anganwadi Helper is not so important or serious that requires assessment on merit. This argument cannot be accepted because of the reason that a candidate cannot be engaged without testing suitability and merit may be the post is of contractual nature or any of the work like cooking etc. Everywhere merit/suitability is necessary to be seen before induction of a candidate in a job.

In this case consideration of engagement of Anganwadi Helper is involved who is supposed to cook food, nourish small children, all these requires expertise and without any expertise in the matter of cooking and nourishing, maximum utilization of work cannot be taken out from the said candidate. Here the guideline dated 24.11.1997 does not provide any process of selection and in such situation the selection committee was competent enough to adopt selection process to test the suitability, as such the authority has taken decision to go for selection test by written and viva voce tests and in the said test question related to cooking had been asked and accordingly the Committee has assessed that the petitioner is more meritorious than the opposite party no.5.

Petitioner has secured 10 marks while opposite party no.5 secured four marks. So in between these two candidates there is no comparison of merit due to long gap in marks obtained by these two candidates. Thus, both of the candidates are not on similar footing, hence opposite partyno.5 cannot claim any benefit on the basis of preference.

14. Sub-Collector while entertaining the complaint of opposite party no.5 has not taken into all these aspect of the matter and came to conclusion that selection of the petitioner is contrary to the guideline, but how it is contrary to the guideline has not been discussed in the order.

15. In view of the foregoing reasons I am of the considered view that the order of the Sub-Collector dated 15.4.2011 suffers from infirmity, order aving been passed without taking into consideration all these aspects of the matter as discussed hereinabove, hence same is not sustainable, accordingly quashed.

16. In the result, writ petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT- 428

K.R. MOHAPATRA , J.

RFA NO. 245 OF 2004

JADUMANI PENTHEI (DEAD) AND HIS WIFE GOMATI PENTHEI ……...Appellants

.Vrs.

MANAGING DIRECTOR,NESCO & ANR. ……...Respondents

LIMITATION ACT, 1963 – Arts 72, 113

Electrocution death – Suit for compensation – Limitation – Whether Art. 72 or Art. 113 applies ? – The suit is not filed alleging any act done or omitted to have been done pursuant to any enactment – No enactment has yet been made for providing compensation due to electrocution death – Held, since the compensation is claimed under the general law, Art. 113 of the Act. is very much applicable to this case – The impugned judgment and decree passed by the Court below on the ground of limitation is setaside. (Para 11)

For Appellants : Mr. R.K.Mohanty, M/s. D.K.Mohanty, P.K.Samantray, A.P.Bose, S.N.Biswal, S.Mohanty & J.K.Mohanty

For Respondents : M/s. P.K.Mohanty, D.N.Mohapatra, Smt. J.Mohanty,P.K.Nayak & G.S.Satapathy

Date of hearing : 05.01.2016
Date of judgment: 05.01.2016

JUDGMENT

K.R. MOHAPATRA, J.

Judgment and decree dated 17.09.2004 and 30.09.2004 respectively passed by the learned Civil Judge (Senior Division), Keonjhar in dismissing the Money Suit No.30 of 2002 is under challenge in this appeal.

2. The suit was filed by the parents of the deceased-Ranjit Penthei claiming damages of Rs.3,00,000/- for the death of said Ranjit (for short, 'deceased') due to electrocution. In the meantime, appellant No.1-Jadumani Penthei (father of the deceased) has died and appellant No.2-Gomati Penthei, the mother of the deceased is only prosecuting the appeal.

3. Case of the plaintiffs in short is that due to heavy rain and storm in the night of 4/5.10.2000, the live electricity wire in their village Kalima was snapped and was hanging from the pole. The same was not attended to by the

distribution Company, namely, North Eastern Electricity Supply Company Orissa Limited (NESCO) personnel, who were in-charge of maintenance in that area in spite of information. As a result, Ranjit Penthei (the deceased), a young man of 19/20 years old came in contact with the live wire at 9/10 AM, while escorting the cattle near the electric pole and died instantaneously. The FIR was lodged at Telkoi Police Station, and on requisition, postmortem examination was conducted over the corpus. The postmortem report disclosed that the death was caused due to electrocution. Such an unfortunate incident occurred due to the negligent act of officials of NESCO. At the time of death, the deceased was earning about Rs.4,000/- per month. Due to death of the only earning member of the family, the plaintiffs are starving and thus the suit was filed for the aforesaid relief.

The defendant No.2 only appeared pursuant to the notice issued and filed his written statement denying the plaint allegations. He further contended that in absence of the Company, which is in charge of distribution of electricity and maintenance, the suit is liable to be dismissed for non-joinder of necessary parties; Principles of *Res Ipsa Loquitur* is not applicable to the case of the plaintiffs. Defendant No.2 disputed the status of the plaintiffs as parents and dependants of deceased Ranjit Penthei. They also disputed the alleged occurrence. Amongst other, defendant No.2 took a stand that the suit is barred by limitation and is bad for non-joinder of necessary party. At para-6 of the written statement, it is categorically stated by defendant No.2 that the plaintiffs are estopped to allege that they (the defendants) can ever be held liable to pay the damages in their individual capacity in any manner, particularly, in absence of the Company, i.e., NESCO, which should have been impleaded as party to the suit. Further, defendant No.2 contended that the plaintiffs have no cause of action to file the suit. Hence, they prayed for dismissal of the suit.

4. Taking into consideration the rival contentions of the parties, learned Civil Judge (Senior Division) framed as many as seven issues out of which issue Nos. 2, 3 and 4 are relevant for adjudication of this appeal, which reads as follows:-

> "2. Was there cause of action to bring the suit?
>
> 3. Is the suit bad for non-joinder of necessary parties?
>
> 4. Is the suit barred by law of limitation?"

5. While answering issue No.3, learned Civil Judge (SeniorDivision) though held that the plaintiffs have intimated the Lineman of Junior Engineer

regarding alleged occurrence, but they are not pleaded as parties to the suit. The plaintiffs have impleaded the Managing Director, NESCO and Executive Engineer, NESCO only as defendants 1 and 2 respectively. In view of the nature of allegation, NESCO is a necessary party, but it has not been impleaded as such and the Managing Director has been impleaded in his individual capacity as party to the suit. Hence, the suit is bad for non-joinder of necessary parties.

6. While answering issue No.4, learned Civil Judge held that Article 72 of the Limitation Act is applicable for filing the suit which provides limitation of one year for filing the suit of the present nature.

7. In view of the answers to issue Nos. 3 and 4, learned Civil Judge held that the plaintiffs have no cause of action to file the suit. Issue Nos. 5 and 6 were answered in favour of the plaintiffs. Thus, the learned counsel for the plaintiffs assails the findings on issue Nos. 2, 3 and 4 in this appeal.

8. It is the contention of the learned counsel for the appellant that NESCO is being represented by its Managing Director and the Managing Director has been impleaded as a party in his official capacity. The suit is not filed for suing the Managing Director in his individual capacity. He is sued in his representative capacity, namely, the representative of NESCO. He during course of argument, fairly concedes that defendant No.1 has not been properly described. Due to such mis-description of defendant No.1, learned counsel for appellant No.2 has filed an application for amendment of the cause title in Misc. Case No.350 of 2015. To substantiate his case, he relied upon a decision in the case of Union of India Vs. Ashok Kumar Rasiklal, reported in AIR 1987 (Ori) 264 in which the suit was filed against the General Manager, S.E. Railway. But after filing of the written statement, the plaint was amended impleading defendant No.2 and also amending the description of defendant No.1 by adding "Union of India through" before the description of the original defendant. The question of such amendment was under challenge before this Court in the case of Ashok Kumar Rasiklal (supra). This Court relying upon the decision of the Hon'ble Supreme Court in the case of ***Purushottam Umedbhai and Co. Vs. Manilal and Sons*****, reported in AIR 1961 SC 325,** held as under:-

> "10. Misdescription of parties and correction of the misdescription are not unknown to law. Where it is clear from the facts as to who is the person who intends to sue or is intended to be sued but is described wrongly, it is a case of misdescription of parties which can be

> corrected by the court any time. The Supreme Court in the case of Purushottam Umedbhai & Co. v. Manilal & Sons, AIR 1961 SC 325 dealt with a somewhat, similar question where the suit was instituted in the name of the firm and the partners were substituted later in its place."

He also relied upon decisions of the Hon'ble Supreme Court in the case of ***Murari Mohan Dev Vs. Secretary to the Government of India and others*****, reported in AIR 1985 SC 931** (para-10) and ***Bal Niketan Nursery School Vs. Kesari Prasad*****,** reported in **AIR 1987 SC 1970** (para-12 and 13). Thus, it is contended by learned counsel for the appellant that defendant No.1 has not been described properly in the plaint but the real intention of the plaintiff was to sue the NESCO for compensation.

9. Refuting allegations made, learned counsel for the respondent No.2 submits that the decisions cited by learned counsel for the appellant are not applicable to the case at hand. The decision in the case of *Bal Niketan Nursery School (supra)* relates to a petition under Order 1 Rule 10, CPC. In the said case, the plaintiff was capable of instituting a suit under the Bye law of the Society. In the instant case, though a specific stand was taken by the defendant No.2 (respondent No.2 herein) that NESCO being a Company has not yet been impleaded as party to the suit. On the other hand, they (plaintiffs) preferred to pursue the suit till the impugned judgment was passed against them. Thus, they have not shown due diligence during pendency of the suit. Relying upon a decision of this Court in the case of ***L.P. Electronics (Orissa) Pvt. Ltd. others Vs. Tirupati Electro Marketing Pvt. Ltd.,*** reported in 2013 (II) OLR 318, he submits that after conclusion of hearing of the suit the parties have no further right or privilege in the matter and it is only for the convenience of the Court that the suit is adjourned under Order 20 Rule 1, CPC to pronounce the judgment as a subsequent date. He also relies upon another decision of the Hon'ble Supreme Court in the case of ***Ram Nath Sao @ Ram Nath Sahu vs. Gobardhan Sao And Others*** **AIR 2002 SC 1201** in which it is held that after a lapse of considerable period, the Court has to strike balance between the two taking into facts and circumstances of the case into consideration. The same reads as follows:-

> "11. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular

> case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."

Thus, he submits that the petition under Order 6 Rule 17, CPC at the appellate stage is not maintainable, more particularly when a right has been accrued to the defendants by virtue of said judgment. Moreover, the conduct of the plaintiffs does not entitle them the relief sought for amendment of the plaint. He further submits that the amendment sought for is hit under Article 21 of the Limitation Act. Hence, he vehemently objects to amendment of the plaint at this stage.

10. There is no stand taken in the written statement by defendant No.2 to the effect that the Managing Director is not competent to represent NESCO. No other material is available on record to show that the Managing Director cannot be sued or sued on behalf of NESCO. In addition to the above, on a close scrutiny of the pleadings in the plaint, it appears that the intention of the plaintiffs was to recover the damages from NESCO for untimely death of Ranjit Penthei due to electrocution. Thus, I have no hesitation to hold that the defendant No.1 has not been properly described in the plaint though it was the intent of the plaintiffs to sue the Company for damages. Again, Junior

Engineer and Lineman cannot be held to be necessary parties to the suit while deciding a suit of this nature, which is based on the principles of *Res Ipsa Loquitur* and they are neither necessary nor proper parties to the suit.

11. The next question that arises whether Article 72 of the Limitation Act is applicable to the suit at hand. Article 72 of the Limitation Act reads as follows:-

> "72 For compensation <u>for doing or for omitting to do an act alleged to be in pursuance of any enactment in force</u> for the time being in the territories to which this Act extends."
>
> (*emphasis supplied*)

12 Learned counsel for the appellant strenuously urged that Article 113 of the Limitation Act is applicable to the case at hand, which is strongly refuted by respondent No.2. Learned counsel for respondent No.2, on the other hand, submits that since the suit is for compensation, learned Civil Judge has rightly made Article-72 of the Limitation Act applicable to the case at hand. Article 113 relates to the suit for which no limitation is provided. According to him, the said Article is not applicable to the case at hand as the Article 72 specifically provides the period of limitation for suit for compensation. Section-3 of the Limitation Act casts a duty on the Court to decide the question of limitation in filing the suit, even if the same is not taken as a defence in the written statement. Thus, this Court proceeds to decide the question of limitation. Article 72 as quoted above, clearly indicates the period of limitation for the suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment enforced for the time being. The limitation period for the same is provided as one year from the date when the act or omission has taken place. The suit is certainly not filed alleging any act done or omitted to have been done pursuant to any enactment. It is a suit for compensation and no enactment has yet been made for providing compensation in the case of death due to electrocution. The compensation is claimed under general law. Thus, Article 113 of the Limitation Act is very much applicable to the case at hand.

13. In view of the above, the impugned judgment and decree dated 17.09.2004 and 30.09.2004 respectively passed by the learned Civil Judge (Senior Division), Keonjhar in Money Suit No.30 of 2002 are set aside. The matter is remitted back for *de nove* trial by permitting the plaintiff No.2 (appellant No.2) to amend the plaint by impleading "North-Eastern Electricity Supply Company of Orissa Limited (NESCO)' represented

through its Managing Director, Corporate Office at Januganj, PO/Dist: Balasore" as defendant No.1. The suit shall proceed *de nove* from the stage of issuance of summons for settlements of the dispute. Learned Civil Judge shall act upon production of certified copy of this order. LCR be sent back immediately.

14. The appeal is allowed accordingly.

Appeal allowed.

2016 (I) ILR - CUT- 434

J. P. DAS, J.

CRLA NO. 73 OF 1992

HRUSHIKESH PANDA & ORS. ……..Appellants

.Vrs.

STATE OF ORISSA …….. Respondent

CRIMINAL TRIAL – Conviction under Sections 148,323 I.P.C. read with Section 149 I.P.C. is challenged – Admittedly there was a counter case and the accused persons sustained injuries in course of the same occurrence – No explanation by the prosecution as to how the accused persons sustained injuries – Unexplained injuries sustained by the accused persons create a doubt in the prosecution case – prosecution failed to prove the charges beyond all reasonable doubt – Held, impugned judgment of conviction and sentence is setaside. (Para 10 to 12)

For the Appellants : M/s. B.C. Patry, L. Mohapatra & S.C. Mohanty.
For the Respondent : Addl. Standing Counsel

Date of hearing : 11.12.2015
Date of judgment: 24.12.2015

JUDGMENT

J.P. DAS, J.

The appeal is directed against the order dated 31.01.1992 passed by the learned Addl. Sessions Judge, Bhadrak in Sessions Case no.16/79 of 1991 convicting the appellants under Sections 148 and 323 of the Indian Penal Code (IPC in short) read with Section 149 of the I.P.C. sentencing each of them to undergo R.I. for one year on each count with concurrent running of sentences.

2. The prosecution case is that on 06.07.1990 at about 10 a.m. the informant one Panchanan Panda heard that the accused persons being armed with different weapons had been to one hamlet of the village to assault one Bijay. The informant rushed to the spot and found the accused persons standing in front of his house being armed with different weapons and hurling abuses were calling the said Bijay to come out of the house. Since Bijay was not there, the informant went near the accused persons and tried to pacify them but the accused persons started assaulting him. Seeing the occurrence other persons nearby including the family members of the informant came running and they were also assaulted by the accused persons sustaining injuries. On the same day immediately after the occurrence, the F.I.R. was lodged at Dhusuri Police Station pursuant to which concerned P.S. Case No.46 of 1990 was registered under Sections 147/148/149/323/324/325/326/294 of the I.P.C. and investigation was taken up. In course of investigation, the injured persons were medically examined, the accused persons were arrested and were also medically examined since there was a counter case registered for the same occurrence wherein the present accused persons also sustained serious injuries. Some of the accused persons were arrested and forwarded to court. After completion of investigation, charge sheet was placed against the five appellants under Sections 147/148/149/323/324/294, I.P.C.

3. Since the counter case was committed to the Court of Sessions having offences triable by the said court, the present case was also committed to the Court of Sessions for analogous trial.

4. The learned trial court framed charges only under Sections 148/323/324/294, I.P.C. read with Section 149 of the I.P.C. against all the five accused persons. The accused persons pleaded not guilty to the charge with a further plea that they were assaulted by the informant group.

5. The prosecution examined 11 witnesses as against non-preferred on behalf of the defence. Considering the materials placed before the court, the learned trial court reached the impugned findings of conviction and awarded consequential sentences.

6. It has been submitted in the appeal that the learned trial court casually put aside serious discrepancies and deficiencies in the prosecution case and also ignored the material contradictions and improbabilities in the evidence of the prosecution witnesses. In course of hearing, it was also submitted on behalf of the appellants that the learned trial court closed its eyes to the injuries including grievous injuries sustained by the accused group which

have gone totally un-explained on behalf of the prosecution. It was further submitted that although there has been a mention regarding the counter case, nothing has been discussed while considering the probabilities of the prosecution case by the learned trial court.

7. As against this, the learned counsel for the State supported the impugned judgment and conviction.

8. In course of hearing, learned counsel appearing for the appellants painstakingly took me through the oral evidence led on behalf of the prosecution. It was further submitted that the observations made by the learned trial court in paragraph-11 of the impugned judgment are itself sufficient to set aside the prosecution case as unbelievable and concocted.

9. It has been observed by the learned trial judge that all the prosecution witnesses described the occurrence in a parrot like manner with a lot of exaggerations and have also tried to justify the injury sustained by the accused appellant Mahendra Panda telling that the blow fell on him dealt by another accused while it was aimed at one of the informant group. It has also been observed that such a situation was not stated by the witnesses before the Police in course of their examination during investigation. It has also further been mentioned that the statement of the witnesses regarding the injuries sustained by them did not tally with regard to the gravity of the injuries, since as per the medical reports the injured persons sustained some simple injuries. The learned Addl. Sessions Judge has also observed that there was inefficiency on the part of the Investigating Officer showing his interestedness which was apparent from the materials placed before the court. After observing so many deficiencies and discrepancies in the prosecution case, the learned trial court concluded that those do not go to the root of the case of the prosecution and held that the accused persons were responsible for the injuries on the prosecuting parties. Therefore, the accused persons were found guilty under Sections 148 and 323 of the I.P.C. read with Section 149 of the I.P.C. only.

10. Suffice it to say that when admittedly there was a counter case and the accused persons also sustained injuries in course of the same occurrence it cannot be said that the accused persons voluntarily caused hurt to the prosecuting parties so as to be liable under Section 323 of the I.P.C. Although admittedly there was a counter case triable by Court of Sessions and this case was committed to the Court of Sessions for analogous trial, still nothing has been discussed regarding the counter case in the impugned judgment so as to

hold that the present appellants were aggressors or exceeded the limit of exercising their right to self defence in course of the alleged occurrence. It was more so required since the allegations were more serious against the informant group in the counter case.

11. The details of the injuries sustained by the accused persons have been narrated in paragraph-10 of the impugned judgment. There was absolutely no explanation on behalf of the prosecution as to how the accused persons sustained injuries and on the other hand as mentioned in the judgment it was tried to be stated that one of the accused sustained injuries when one blow aimed at one of the prosecuting witness fell on him. It needs no citation that un-explained injuries sustained by the accused persons create doubt in the prosecution case, especially when allegation of offence is only under Section 323 of the I.P.C. It has also been observed in the impugned judgment that the investigation was not proper and the prosecution witnesses tried to exaggerate the occurrence.

12. Considering all these facts and circumstances, I am unable to concur with the findings of the learned trial court that the prosecution was able to prove the charges beyond all reasonable doubts to hold that the accused persons were guilty of the offences punishable under Sections 148 and 323 of the I.P.C. read with Section 149 of the I.P.C. Accordingly, the impugned judgment passed in Sessions Case No.16/79 of 1991 is set aside and the accused appellants are set at liberty being discharged of their bail bonds furnished at the time of admission of the appeal. Accordingly, the criminal appeal stands disposed of.

Appeal disposed of.