# O.J.A. MONTHLY REVIEW OF CASES

# ON

# CIVIL, CRIMINAL & OTHER LAWS, 2017

# (*JULY*)


**Odisha Judicial Academy, Cuttack, Odisha**

# ODISHA JUDICIAL ACADEMY
# MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2017 ( JULY)
# I N D E X

********

***2. Order 6 rule 17 of CPC***

*Meera Patra versus Rekha Pradhan and others*

***Dr. A. K. Rath , J.***

***In the High Court Of Orissa: Cuttack***

*Date of Judgment:19.07.2017*

***Issue***

***In the matter of addition of necessary and proper parties in a suit for partition .***

***Relevant Extract***

This petition challenges the order dated 24.12.2014 passed by the learned Civil Judge (Sr. Divn.), Baripada in C.S. No.467 of 2013, whereby and whereunder learned trial court rejected the application of the plaintiff under Order 6 Rule 17 C.P.C. to delete the name of State Bank of India-defendant no.6 and delete few paragraphs with regard to mortgage of the property in favour of defendant no.6.

The petitioner as plaintiff instituted the suit for partition impleading the opposite parties as defendants. It is, inter alia, pleaded that the suit property is the joint family property of defendant nos.1 to 5. Defendant nos.2 and 3 in connivance with the defendant nos.1, 4 and 5 clandestinely mortgaged the property in favour of State Bank of India, defendant no.6. Defendant no.6 filed written statement. While the matter stood thus, plaintiff filed an application purportedly under Order 23 Rule 1 C.P.C. for withdrawal of the suit against defendant no.6. Defendant no.6 filed objection to the same stating therein that the suit property had been mortgaged in favour of the Bank. Since the loanee became a defaulter, the Bank had taken possession of the same under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as "SARFAESI Act"). By order dated 24.11.2014, learned trial court rejected the said application. The said order attained its finality. Again another application was filed by the plaintiff under Order 6 Rule 17 C.P.C. to amend the plaint. In the proposed amendment, the plaintiff sought to delete the name of defendant no.6 from the cause title of the plaint and delete certain paragraphs of the plaint with regard to mortgage of property in favour of the defendant no.6. Learned trial court rejected the same.

Heard Mr. P.K. Swain, learned counsel for the petitioner and Mr. P.V. Balakrishna, learned counsel for the opposite party no.6. None appeared for the opposite party nos.1 to 5. Mr. Swain, learned counsel for the petitioner submitted that Bank is neither necessary nor proper party in a suit for partition. In view of the same, the petition was filed to delete the name of defendant no.6. Learned trial court without considering the matter in its proper perspective rejected the same. He relied on the decision of the apex Court in the case of *Jagdish Singh v. Heeralal and others,* AIR 2014 SC 371.

Per contra, Mr. Balakrishna, learned counsel for the opposite party no.6 submitted that property had been mortgaged by the defendant nos.2 and 3 in

favour of defendant no.6-Bank. The loanee became chronic defaulter for which the Bank had taken possession of the same under the SARFAESI Act. Thus, the Bank is a proper party.

The distinction between a necessary party and a proper party is well known. In ***Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another*****, AIR 1963 SC 786,** the apex Court held that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

In ***Razia Begum v. Sahebzadi Anwar Begum and others,*** **AIR 1958 SC 886,** the apex Court held that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it raises questions relating to moveable or immoveable property.

The decision cited by the learned counsel for the petitioner is distinguishable on facts. In the said case, the appellant was an auction purchaser. In respect of the land in question, it was brought to sell for recovery of amount under the SARFAESI Act. The appellant was not put in possession of the property in question even though the auction was confirmed. The appellant came to know that respondent nos.1 to 5 have filed civil suit in the court of the District Judge, Barwani for a declaration of title, partition and permanent injunction against respondent nos.7 to 9 and others in which the appellant and the Bank were also made parties. On a survey of earlier decision, the apex Court held that Sec.34 of the SARFAESI Act clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and held that jurisdiction of the civil court is completely barred, so far as the measure taken by a secured creditor under subsec.( 4) of Sec.13 of the SARFAESI Act.

In the instant case, neither the Bank nor the borrower nor the guarantor approached the civil court against the measure taken by the Bank under the SARFAESI Act. Rather the plaintiff instituted the suit for partition pleading inter alia that clandestinely the defendant nos.2 and 3 mortgaged the suit property in favour of the Bank. The earlier order has attained its finality. Thus, the subsequent application is an abuse of the process of the court. In the event, the name of the defendant no.6 is deleted and preliminary decree is passed allotting the share in favour of the party, the same will give rise to multiplicity of proceeding. The defendant no.6 is proper party to the suit. In wake of aforesaid, the petition, sans merit, is dismissed. No costs.

**********

***3. Order VII rule II (d) of CPC***

*M/s. Saraf Trading Agency & others Versus M/s. Bharat Petroleum Corporation Limited*

***Dr. A. K. Rath, J***

***In the High Court of Orissa: Cuttack***

*Date of Judgment: 10.07.2017*

***Issue***

***In the matter of rejection of plaint as barred by the law of limitation .***

***Relevant Extract***

This petition challenges the order 26.12.2013 passed by the learned Civil Judge (Senior Division), Sambalpur in C.S No.118 of 2010 whereby and whereunder learned trial court rejected the application of the defendants under Order 7 Rule 11(d) CPC to reject the plaint.

Opposite party as plaintiff instituted C.S. No.118 of 2010 in the court of the learned Civil Judge (Senior Division), Sambalpur for recovery of Rs.4,49,823/- with pendente lite and future interest at the rate of 16.5% per annum. It is pleaded that the plaintiff is a company incorporated under the Companies Act. The plaintiff carries on business of distributing and marketing petroleum products. Defendant no.1 is a partnership firm represented by the partners defendant nos.2 and 3. A dealership agreement was executed by the plaintiff and the defendants on 27.11.2001. Defendants carried on business of sale of motor spirit, motor oil, greases and other motor accessories. The dealership was terminated on 28.11.2007. During subsistence of the dealership, the plaintiff-corporation and the defendants maintained a running account of transactions. Upon request of the defendants, the goods were supplied to them by the plaintiff as per the invoices. The last transaction was made on 31.7.2007. Since all persuasions made by the plaintiff ended in fiasco, notice was sent to the defendants on 11.11.2010 demanding payment of Rs.2,90,639.08 ps. Thereafter, the suit has been instituted with pendente lite and future interest at the rate of 16.5% per annum.

Defendants filed an application under Order 7 Rule 11 CPC for rejection of plaint stating therein that the suit is barred by limitation. It is stated that the last supply was made on 31.7.2007. The same is the starting point of limitation. Thus the suit is barred by limitation.

The plaintiff filed an objection to the same. It is stated that the allegations relating to disputed question of facts can only be decided in the suit. The plaint cannot be rejected upon the plea taken by the defendants in the written statement. Learned trial court assigned the following reasons and rejected the application.

"The plaint reveals that the cause of action for the suit first arose on 28.11.2007 when the dealership of the defendants was terminated and thereafter on different dates of demand for the outstanding amount made by the plaintiff Corporation through its Officers on the defendants from time to time and finally on 11.11.2010 when lawyer's notice was sent to the defendants to pay entire

outstanding amount along with interest. In the present suit whether the plaintiff filed the suit beyond the period of limitation is a mixed question of law and fact which should be decided in the suit after hearing. Further whether the cause of action arose on 31.7.2007 or on 11.11.2010 when lawyer's notice was sent to the defendants to pay entire outstanding amount along with interest will be decided after giving evidence by both parties. So at this stage the petition under Order 7 Rule 11(d) read with Sec.151 CPC premature and deserves no merit and hence rejected."

Mr. Ghosh, learned counsel for the petitioners, submitted that the last transaction was made on 31.7.2007. The same is the starting point of limitation. The suit was instituted on 25.11.2010. The limitation runs from the last date of supply of goods. The period of limitation for filing of the suit is three years under Article 14 of the Limitation Act. The suit is grossly barred by limitation and as such, the plaint is liable to be rejected. He relied on the decision of the apex Court in the case of Fatejhi & Company & another v. L.M. Nagpal & others, 2015 (II) OLR (SC) 128.

Per contra, Mr. Pattnaik, learned counsel for the opposite party, submitted that the limitation is a mixed question of law and fact. The instant suit is governed under Article 1 of the Limitation Act. The suit is filed within the stipulated time. Thus learned trial court has rightly rejected the application. He relied on the decision of the apex Court in the case of Popat and Kotecha Property v. State Bank of India Staff Association, (2005) 7 SCC 510.

The question does arise as to whether Article 1 or Article 14 of the Limitation Act will apply to the facts of this case ?

Article 1 of the Limitation Act applies to suits for the balance due on the mutual, open and current account, where there have been reciprocal demands between the parties. In such a case limitation is three years computed from the close of the year in which the last admitted or proved is entered in the account. Article 14 of the Limitation Act applies to suits for the price of goods sold and delivered where no fixed period of credit is agreed upon. Period of limitation in such a suit is three years from the date of the delivery of the goods.

This Court in the case of Attadi Venketi v. M/s. Bharatam Ramulu and sons, AIR 1984 Orissa 226 held that the distinctive features of a mutual account are that there should be two sets of independent transactions between the parties and in one transaction one of the parties should be debtor and the other creditor, whereas in the other transaction the parties should occupy reverse positions. The dealings should indicate independent obligation on both sides and not merely obligations on one side. The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other.

The plaintiff's suit is not based on mutual, open and current account and as such, Article 1 of the Limitation Act shall not come into play. There is no reciprocal dealing and independent obligation. The plaintiff used to supply

petroleum products whereafter the defendants used to remit the money. It was a case of supply of goods for a price to be paid. Payments were made in discharge of the obligations created by the delivery of goods made to the defendant and did not create any obligation on the plaintiff in favour of the defendants. Thus Article 14 of the Limitation Act is applicable to the facts of this case.

Defendant no.1 was a dealer of petroleum products. A dealership agreement was executed between the plaintiff and the defendants. The plaintiff used to supply petroleum products to the defendants. The dealership agreement was terminated on 28.11.2007. The plaintiff asserts that after adjusting the payment made by the defendants, an amount of Rs.2,90,639.08p was outstanding. The plaintiff sent several letters demanding payment and finally issued advocate notice on 11.11.2010. The last transaction was made on 31.7.2007. The same is a starting point of limitation. The period of limitation is three years for institution of thesuit. The suit was filed on 25.11.2010. Thus the suit is barred by limitation.

Order 7 Rule 11 (d) CPC provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

In Balasaria Construction (P) Ltd. V. Hanuman Seva Trust and others, (2006) 5 SCC 662, the apex Court in para-8 of the report held thus;

"8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure."

The case in the case of Balasaria Construction (P) Ltd. (supra) is distinguishable on facts. On a cursory perusal of the plaint, it is evident that the suit is barred by limitation.

In the wake of the aforesaid, the order dated 26.12.2013 passed by the learned Civil Judge (Senior Division), Sambalpur in C.S No.118 of 2010 is quashed. Consequently the plaint is rejected.

**********

***4. Order VIII Rule 6 A of CPC***

*Champi Das and others versus Sansai Das Ponka @ Sansai Ponka and another*

***Dr. A.K. Rath, J.***

*In the High Court of Orissa: Cuttack*

*Date of Judgment: 10.07.2017*

***Issue***

***In the matter of filing counter claim in respect of property which is beyond the subject matter of the suit.***

***Relevant Extract***

The seminal question that arises for consideration in the petition is as to whether the claim in respect of the property, which is not the subject matter of the suit, can be the subject matter of counter claim ?

Opposite party no.1 as plaintiff instituted C.S. No.62 of 2014 in the court of the learned Civil Judge (Sr. Divn.), Umerkote for declaration of right, title and interest and declaration that the two registered Willnama Nos.8/04 and 6/09 as null and void impleading the petitioners as well as opposite party no.2 as defendants. Pursuant to issuance of summons, the defendant nos.2 to 4, petitioners herein, entered appearance and filed written statement denying the assertions made in the plaint. While the matter stood thus, they filed an application under Order 6 Rule 17 C.P.C. to amend the written statement and introduce counter claim. The plaintiff filed objection to the same. Learned trial court came to hold that in the application for amendment, the defendants raised counter claim in respect of the properties which are not related to the subject matter of the suit and prayed inter alia for partition of the same. Learned trial court having rejected the same, the instant petition has been filed under Article 227 of the Constitution of India.

Heard Mr. Basudev Mishra, learned counsel for the petitioners and Mr. Debabrata Dash, learned counsel for the opposite parties.

Mr. Mishra, learned counsel for the petitioners submitted that the trial of the suit has not begun. The defendants filed application for amendment of the written statement to introduce counter claim. The cause of action for counter

claim arose before filing of the written statement. The proposed amendment is formal and the same will not change the nature and character of the suit. No prejudice shall be caused to the plaintiff in the event counter claim is adjudicated upon along with the main suit. He relied on the decision of this Court in the case of *Khetramohan Tripathy and another vs. Basudev Acharya,* 2016 (I) ILRCUT- 112.

Per contra, Mr. Dash, learned counsel for the opposite parties contended that by the counter claim the defendants sought to incorporate certain plots, which are not subject matter of dispute. Learned trial court has rightly rejected the application for amendment.

An identical matter came up before this Court in the case of *Purna Chandra Biswal vs. Kiran Kumari Brahma,* 2017 (I) OLR-1061. This Court held thus :

"8. Order 8 Rule 6-A(1) and 6-C, which are hub of the issue, are quoted below:-

"6-A(1). A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

xxx xxx xxx

6-C. Where any defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit."

9. The words "any right" appearing in Rule 6(A)(1) of Order 8 C.P.C. mean right over the suit land. The same must be in respect of cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit. Thus the defendant cannot file a counter claim in respect of the property, which is not the subject matter of suit."

**The ratio in the case of *Purna Chandra Biswal* (supra) proprio vigore applies to the facts of the case.**

The decision, in the case of *Khetramohan Tripathy and another* (supra), relied upon by Mr. Mishra, learned counsel for the petitioners, is distinguishable on facts. In the said case, question arose as to whether the counter claim can be filed after filing of the written statement ? This Court in paragraph 13 held thus:

"Thus, when a counter-claim is preferred by way of amendment incorporated subject to leave of the Court in a written statement or a counter-claim is filed by way of subsequent pleading, the same cannot be brought on record as of right, but shall be governed by the discretion vesting in the Court either under Order 6 Rule 17 C.P.C., if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order 8 Rule 9 C.P.C., if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counterclaims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim." Resultantly, the petition, sans merit, is dismissed. No costs.

**********

***5. Order 41 Rule 17 Sub Rule 1 & 2 of CPC***

*Budhiman Biswal Versus State of Orissa & Another*

***D. Dash , J***

*In the High Court of Orissa: Cuttack.*

*Date of Judgment : 17.07.2017*

***Issue***

***In the matter of validity or otherwise of the adjudication of the first appeal (RFA) on merit in absence of parties and their respective counsels***.

This second appeal has been filed challenging the judgment and decree passed by the learned Additional District Judge, Kamakhyanagar in R.F.A. No.49 of 2012 (28/2014). By the said judgment and decree, the lower appellate court has set aside the judgment and decree passed by the learned Civil Judge (Sr. Division), Kamakhyanagar in Civil Suit No.11 of 2008 decreeing the suit filed by the appellant as the plaintiff. The above noted first appeal had been filed by the defendants as the appellants, being aggrieved by the judgment and decree passed by the trial court in the said suit declaring the right, title and interest of the appellant plaintiff over the suit land with confirmation of his possession. The lower appellate court by the impugned judgment and decree has dismissed the suit filed by the appellant-plaintiff.

The appeal has been admitted on the following substantial question of law: "Whether in the absence of appellant (plaintiff) as also the respondents (defendants) and the learned counsel representing them in the first appeal under section 96 of the Code, the course adopted by the first appellate court in proceeding to dispose of the appeal, on merit in finally allowing the same by setting aside the judgment and decree passed in the suit filed by the present appellant standing in his favour is permissible in the eye of law so as to have the legal sanction?"

Learned counsel for the appellant submits that the appeal was posted to 22.01.2016 for hearing and on that day the parties were not present and the learned counsel appearing on their behalf were also absent as the members of the local Bar Association were abstaining from the court work. In such situation, the lower appellate court without giving any further opportunity for hearing of the appeal has gone to peruse the case record and then has finally delivered judgment on 05.02.2016 by allowing the appeal, in setting aside the findings of the trial court and dismissing the suit filed by the present appellant-plaintiff. According to him, the course adopted by the lower appellate court is not permissible under the provisions of Order-41 of the Code of Civil Procedure (in short, hereinafter called as 'the Code'). It is his submission that the lower

appellate court in that situation even when was not inclined to adjourn the hearing of the appeal ought to have dismissed the said appeal in view of the absence of the parties. Thus, he submits that the substantial question of law as above has to receive its answer in the negative that the course adopted by the lower appellate court does not have the sanction of law.

Learned Additional Government Advocate does not dispute the factual position that on that date fixed for hearing of the appeal, the counsel for the respondent, i.e., State Counsel was not present in view of the call given by the members of the local Bar.

Sub-Rule-1 of, Rule-17 of Order-41 of the Code provides that where on the day fixed, or on any other day to which the hearing of the appeal may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Sub-Rule-2 of the said Rule provides that where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.

Here in the instant case neither the appellants nor the respondent were present on the date fixed for hearing. The counsel appearing on their behalf were also not present to represent them. The first appeal had been filed questioning the judgment and decree passed by the trial court in decreeing the suit of the respondent granting the relief of declaration of right, title, interest and confirmation of possession. The last portion of paragraph-7.1 of the judgment of the lower appellate court which is relevant for the present reads as under:-

"The findings of the learned lower Court are challenged in this Regular First Appeal. But when the appeal was posted for hearing the learned Advocate for the parties did not appear in Court for argument as the members of the local Bar Association abstained from Court work, hence this judgment on perusal of the materials on record."

The lower appellate court then has gone to render the judgment viewing the grounds taken in the memorandum of appeal and on going through the pleadings of the parties as well as the evidence that they had placed. Having differed with the findings recorded by the trial court, those have been set aside and the appeal has been allowed which has led to the dismissal of the suit. That is how the present appellant has been adversely visited with by way of denial of the reliefs as prayed for which had been so granted by the trial court.

The lower appellate court was in seisin of the first appeal under section 96 of the Code. The procedures for such appeals from the original decrees have been provided in the Rules under Order-41 of the Code. The provisions of law do not empower the first appellate court that either in the absence of appellant, it can go to the merit in judging the substainability of the findings as well as the impugned judgment and decree and dismiss the appeal or in the absence of appellant, it can allow the appeal on merit or that in the absence of the parties it can dispose of the appeal either way on merit. When on the date fixed for hearing of the appeal, the appellant was absent, the course permissible is to dismiss the appeal for default of the appellant and where of course, the appellant is present and the respondent is absent, it is permissible to take up ex parte hearing of the appeal for its disposal accordingly. In the absence of the parties to the appeal, the first appellate court is not empowered to decide the appeal on merit either way which has been done in the instant case that the lower appellate court in that eventuality without hearing the parties, on its own by going through the materials available on record has judged the sustainability of the findings of the trial court and has finally allowed the appeal by setting aside the findings as well as the judgment and decree passed by the trial court in favour of the appellant granting the reliefs as prayed for.

In the wake of aforesaid, this Court is led to answer the above substantial question of law in the negative that the course adopted by the first appellate court has no legal sanction and as such the judgment and decree passed by it which are impugned in this appeal are held unsustainable.

Accordingly, this Court unhesitatingly sets aside the judgment and decree passed in R.F.A. No.49 of 2012( 28/2014).

In the result, the second appeal is allowed and in the facts and circumstances without cost. The judgment and decree passed in R.F.A. No.49 of 2012( 28/2014) being set aside, the said appeal is now remitted to the Court of the learned Additional District Judge, Kamakhyanagar for its disposal afresh in accordance with law after providing opportunity of hearing to the parties. In order to save delay, in the process, the parties are directed to appear before the said court on 04.08.2017 to receive further instruction and to cooperate with the hearing of the appeal for its disposal as expeditiously as possible preferably within a period of three months.

**********

***6. Order 47 rule 1 read with section 114 of CPC***
*Ritanjali Puhan and another Versus State of Odisha and others*
***Kumari Sanju Panda & S. N. Prasad, JJ.***
***In the High Court of Orissa: Cuttack.***
***Date of hearing and Judgment : 06.7.2017***
***Issue***
***In the natter of application for review of final order on the ground of obtaining fresh information under Right to Information Act.***

This instant review petition has been filed for review of the order dated 22.3.2017 passed in W.P.(C) Nos.20894 and 5375 of 2016.

The ground for review, as has been made by the review petition in the instant review petition, is that after disposal of the writ petitions they have got information under Right to Information Act whereby and where under it is evident that 33 vacancies of Junior Clerk for the year 2013 have not been included in the subsequent vacancies advertised in the year 2015 and as such appropriate direction may be passed to the authority by reviewing the order passed by this Court dated 22.3.2017 to publish result of the 33 vacancies advertised by way of advertisement in the year 2013.

Learned counsel for the State has vehemently opposed the ground made by the review petitioners in the review petition. Learned Additional Government advocate representing the State has submitted that the petitioners are seeking review of the order by virtue of the information got under Right to Information Act. He has further submitted that the W.P.(C) No.20894 of 2016 has been filed on 25.11.2016 which has been dismissed on 22.3.2017 and after its disposal an application under the Right to Information Act has been filed on 31.3.2017 but in pursuance thereof information has been supplied on 13.4.2017, as such it cannot be said to be a ground for review. It is not a case that in spite of due diligence the document could not have been produced before the court which is paramount condition for seeking review of the order passed by the court of law. 4. Heard learned counsel for the parties and perused the documents available on record. 5. The petitioners have filed Original Application Nos.744(C) and 374(C) of 2014 before the Odisha Administrative Tribunal,Cuttack Bench, Cuttack seeking direction to publish result of the selection process initiated by virtue of the advertisement No.2145 dated 7.7.2013. The Tribunal has declined to interfere to fill up the rest 33 posts of the year 2013 after fresh advertisement having been made in the year 2014-15 with observation that if no advertisement has been published in the meanwhile in the year 2014 or in 2015, then it is up to the recruitment Committee to exercise its discretion to fill up the vacancies. 6. We,

after hearing the learned counsel for the parties, disposed of the writ petitions with specific observation in the order that fresh advertisement has been published by the Staff Selection Commission for the year 2015 for Keonjhar district and recruitment process has been completed, considering this aspect of the matter, we have declined to interfere with the order impugned. 7. Learned counsel for the review petitioners has tried to impress upon the Court that 33 vacancies of the Junior Clerk posts of the year 2013 was not the subject matter of the recruitment process which was initiated in the year 2015 and as such the order needs fresh consideration by reviewing it with direction to publish result of 33 vacancies which pertains to the advertisement published in the year 2013.
It is settled that jurisdiction of review is very limited and it can only be entertained if there is error apparent on the face of the record or the fact could not have been brought on record in spite of due diligence. It is evident in the instant case that the writ petition been filed in the month of November,2016, the same has been disposed of on 22.3.2017 and thereafter certain documents have been demanded under the Right to Information Act vide application dated 31.3.2017 i.e. after disposal of the writ petitions, in pursuance thereof, some information has been furnished regarding vacancies by the Deputy Collector, Establishment, Collectorate, Keonjhar to the Public Information Officer, Collectorate, Keonjhar. 8. We have not been impressed upon the argument advanced on behalf of learned counsel for the petitioners for the reason that this is the information under the Right to Information Act without supporting valid document. Further it is not a case where the petitioners have made out a case in spite of due diligence the document could not have been produced before the court which could be said to be ground for review and as such this Court is of the view that the review petition is not fit to be entertained. 9. In view of the limited jurisdiction of the review as stated above, we are not inclined to exercise power conferred upon it to review the order. Accordingly, the review petition is dismissed.

**********

***7. Sections 31,427(1) of Criminal Procedure Code***

*P.N. Mohanan Nair Vs. State of Kerala*

***Ranjan Gogoi & Navin Sinha ,JJ.***

*In the Supreme Court of India.*

*Date of Order - 11.07.2017*

***Issue***

***In the matter of running of sentences against the appellant in three different conviction cases concurrently or consecutively***.

***Relevant Extract***

Leave granted.

The substantive appeals against convictions were dismissed as withdrawn on 09.12.2016. Liberty was however granted, to approach this court again if required. On the application made, the special leave petition was resurrected.

The short question of law for consideration is, if the offences essentially constitute a single transaction, but have been split up by the prosecution into three separate cases, will the sentences imposed individually, run concurrently or consecutively?

The appellant was a Peon in the office of Sub Registrar, Vazhoor. He was alleged to have misappropriated Rs.92,225/- from public funds during 1995-1996, without making remittance in the Sub Treasury, creating false challans showing remittance. The Prosecution initiated under Sections 13(2) read with 13(1)(c) and 13(1)(d) of the Prevention of Corruption Act (hereinafter referred to as "the Act") and under Sections 409, 465 and 471, I.P.C. was split up in three different cases, for the period 07.07.1992 to 29.12.1992 2 registered as C.C. No.21/2002, for the period 21.10.1994 to 31.07.1995 registered as C.C. No.22/2002 and for the period 12.12.1995 to 30.08.1996 C.C. No.23/2002 was registered. The three cases were tried jointly and common evidence was recorded.

The Enquiry Commissioner and Special Judge, Thrissur, by a common judgment convicted the appellant to one year rigorous imprisonment under Sections 13(2) read with 13(1)(c) and 13(1)(d) of the Act in each one of them, along with fine of Rs.15,000/-, Rs.30,000/- and Rs.50,000/- respectively. The conviction was further under Section 409 I.P.C to one year rigorous imprisonment in each, as also three months rigorous imprisonment each, under Sections 465 and 471 I.P.C. The substantive sentences in each case were directed to run concurrently.

Learned counsel for the appellant submits that the allegations for misappropriation were for one transaction, in a 3 block period, for a quantified sum. The appellant will have to undergo the sentences consecutively for each conviction, after the earlier sentence in a case exhausted itself. The appellant is 68 years old. Reference was made to Section 427(1) Cr.P.C. and Shyam Pal (supra) to contend that the sentences awarded individually ought to be directed to run concurrently.

Learned counsel for the respondent, referring to Section 31 Cr.P.C. submits that each case was a separate prosecution, relating to a different time period, and for a different sum. It is only in a case where a person is tried in respect of two or more offences in a single transaction, that the sentence can be directed to run concurrently.

We have considered the respective submissions, and are of the opinion, that essentially the allegations constituted a single transaction, between the same parties for a block period, split up by the prosecution, presumably for its convenience, into three different cases. The evidence also was 4 common, and so is the conviction. Section 427(1), Cr.P.C. stipulates that where a person undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, it shall commence at the expiration of the imprisonment previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. The jurisdiction being discretionary must be exercised on fair and just principles in the facts of a case.

Suffice it to observe that in the facts of the case, the exercise of discretion under Section 427(1) Code of Criminal Procedure, mandates that the substantive sentences imposed upon the appellant in the three separate prosecutions, are directed to run concurrently, except the default sentence, if the fine by way of compensation as imposed has not been paid by him. 5 The appellant would naturally be entitled to all consequential reliefs for release from custody as available in law based on the present discussion. The appeals stand disposed.

********

***8. Sections 482 of Cr.P.C.***

*Saroj Kumar Mohapatra Versus Satyendra Prasad Sinha and another*

***S. K. Sahoo, J.***

***In the High Court of Orissa: Cuttack***

*Date of Hearing and Judgment: 03.07.2017*

***Issue***

***In the matter of taking cognizance of offence under Sections 294 of IPC –Challenged.***

***Relevant Extract***

Heard Mr. Pramod Kumar Mishra, learned counsel for the petitioner and Mr. U.C. Panda, learned counsel for the opposite party no.1-complainant. The petitioner Saroj Kumar Mohapatra who was the Sub-Inspector of Police, GRPS, Rourkela Railway Station has filed this application under section 482 of Cr.P.C. challenging the impugned order dated 10.12.2003 passed by the learned S.D.J.M., Panposh, Rourkela in 1.C.C. Case No.52 of 2002 in taking cognizance of the offence under section 294 of the Indian Penal Code and issuance of process against him.

The prosecution case, as per the complaint petition filed by the complainant-opposite party no.1 is that on 27.12.2001 he was going to Marena in connection with some work carrying cash of Rs.1,80,000/- (rupees one lakh eighty thousand only) and other documents in a briefcase and while he was standing in a queue to book a ticket in the railway booking counter, somebody took away his briefcase. After collecting the ticket, when he searched for the briefcase, it was not found for which he rushed to the GRP Police Station to submit a report regarding theft of his briefcase and verbally reported the matter to the police personnel on duty who asked him to give it in writing and accordingly, the complainant-opposite party no.1 presented the written report before the GRP Police Station regarding theft of cash of Rs.1,80,000/- (rupees one lakh eighty thousand only) and other documents. It is the further case of the complainant that after receipt of the first information report, the petitioner as well as co-accused G.N. Siri who was the Sub- Inspector of Police of GRP, Rourkela Railway Station, misbehaved with him and abused him in filthy language, such as “Sala Magiha Eie Paisa Chori Kari Anithilugibe, Salaku Thunki Debije Bapa Naa Asibani, Sala Kantractor Chodei Hauchhi”. It is stated that the complainant felt ashamed due to such abusive words and the accused persons did not allow the complainant to go outside the police station from 27.12.2001 to 31.12.2001 and finally on 31.12.2001, he was produced before the Executive Magistrate, Panposh in a case under section 109 of the Cr.P.C. who released him after execution of P.R. bond. It is stated in the complaint petition that without any

reason, the complainant was arrested which caused damage to his reputation. It is further stated in the complaint petition that thereafter, the complainant opposite party no.1 sent messages to different authorities including Superintendent of Police, G.R.P., South-Eastern Railway, Rourkela to look into his grievances but no fruitful result came out.

Basing on such complaint petition, 1.C.C. Case No.52 of 2002 was registered. The initial statement of the complainant was recorded under section 200 of Cr.P.C. and thereafter, the complainant examined three witnesses during inquiry under section 202 of Cr.P.C. The learned S.D.J.M., Panposh, Rourkela after going through the complaint petition, initial statement of the complainant as well as the statements of the witnesses recorded under section 202 of Cr.P.C., found prima facie case under section 294 of the Indian Penal Code against the petitioner and observing that protection under section 197 of Cr.P.C. is not available to him in the facts scenario of the case, took cognizance of the offence under section 294 of the Indian Penal Code and issued process against him which is impugned in this case.

Mr. Pramod Kumar Mishra, learned counsel for the petitioner while challenging the impugned order contended that as because the petitioner produced the complainant before the Executive Magistrate, Panposh, he has filed the complaint petition on 19.04.2002 which is more than four months of the alleged occurrence. It is further contended that the complaint case proceeding is attended with malafide and the witnesses examined by the complainant during inquiry under section 202 Cr.P.C. have not supported the case of the complainant and therefore, the order of cognizance is vitiated in the eye of law and the same should be quashed.

Mr. U.C. Panda, learned counsel appearing for the complainant-opposite party no.1 placed the certified copy of the initial statement as well as statements of the witnesses recorded under section 202 of Cr.P.C. He also placed the decision of this Court in case of Abani Ch. Biswal -Vrs.- State of Orissa reported in Vol. 64 (1987) Cuttack Law Times 659, wherein it has been held that there must be a reasonable connection between the act and the discharge of official duty and the act must bear such relation to the duty that the accused could lay a reasonable but not a pretended or fanciful claim that he did it in the course of performance of the duty.

Learned counsel for the complainant-opposite party no.1 further placed reliance in case of Manohar Nath Kaul - Vrs.- State of Jammu and Kashmir reported in AIR 1983 Supreme Court 610, wherein it was held that when the offence committed by the public servant is not connected with discharge of official duty, the sanction for prosecution is not necessary.

In the present case, the materials available on record indicate that though in the complaint petition, the abusive words used have been mentioned in a detailed manner but in the initial statement, the complainant has stated he was abused by the petitioner in filthy language such as "Sala Maghia, Contractor Chodouchhu". Most peculiarly, none of the three witnesses examined by the opposite party no.1-complainant has whispered anything regarding hurling of any abusive words by the petitioner against the complainant. Therefore, there is no consistency between the types of abusive words hurled at the complainant allegedly by the petitioner. In the complaint petition, it is mentioned that the petitioner and the co-accused abused him but in the initial statement, the complainant has alleged only against the petitioner which gets no corroboration from the statements of the witnesses examined by the complainant during inquiry under section 202 Cr.P.C. The complaint petition has been filed more than four months of the alleged occurrence and that to after the opposite party no.1 was forwarded to Court by the petitioner in connection with Criminal Misc. Case No.961 of 2002 under section 109 of Cr.P.C. and he was released after execution of P.R. bond. In view of the available materials, I am of the view that there are no clinching materials against the petitioner for prosecuting him for the offence under section 294 of the Indian Penal Code.

Accordingly, I am inclined to invoke my inherent power under section 482 of Cr.P.C. and quash the impugned order dated 10.12.2003 passed by the S.D.J.M., Panposh in I.C.C. Case No. 52 of 2002 in taking cognizance of offence under section 294 of the Indian Penal Code.

In the result, the CRLMC application is allowed.

**********

## *9. Section 2(d) of POCSO Act*

*Ms. Eera Through Dr. Manjula Krippendorf Versus State (Govt. of NCT of Delhi) & Anr.*

***Dipak Misra & R.F. Nariman, JJ.***

*In the Supreme Court of India.*

*Date of Judgment -21.07.2017*

***Issue***

***In the matter of consideration of mental age (functional age) of a mentally retarded child to determine his /her age as required under Section 2(d) of POCSO Act 2012.***

***Relevant Extract***

Leave granted.

The pivotal issue that emanates for consideration in these appeals, by special leave, pertains to interpretation of Section 2(d) of the Protection of Children from Sexual Offences Act, 2012 (for short, "the POCSO Act"), and the primary argument of the learned counsel for the appellant is that the definition in Section 2(d) that defines "child" to mean any person below the age of 18 years, should engulf and embrace, in its connotative expanse, the "mental age" of a person or the age determined by the prevalent science pertaining to psychiatry so that a mentally retarded person or an extremely intellectually challenged person who even has crossed the biological age of 18 years can be included within the holistic conception of the term "child".

Before I note the submissions of Ms. Aishwarya Bhati, learned counsel for the appellant, the supporting submissions by the respondent State and the proponements in oppugnation by the learned senior counsel who was engaged on behalf of the accusedrespondent No. 2 by the Court as the said respondent chose not to enter appearance, few facts are essential to be noted. The appellant is represented by her mother on the foundation that she is suffering from Cerebral Palasy (R. Hemiparesis) and, therefore, though she is biologically 38 years of age, yet her mental age is approximately 6 to 8 years. In this backdrop, it is contended that the trial has to be held by the Special Court established under the POCSO Act. As the facts would unroll, the mother of the appellant had lodged FIR No. 197 of 2014 at Police Station Defence Colony, New Delhi against the respondent No. 2 alleging that he had committed rape on her mentally retarded daughter and on the basis of the FIR, investigation was carried on and eventually charge sheet was laid for the offence punishable under Section 376(2)(l) of the Indian Penal Code (IPC) before the concerned Judicial Magistrate, who, in turn, committed the case to the Court of the learned Assistant Special Judge/Special

Fast Track Court, Saket, New Delhi for trial. Many a fact has been enumerated which need not be stated in detail. Suffice it to mention that the trial commenced and when the question of examination of the appellant came up, various aspects such as camera trial, videography of the trial, absence of congenial atmosphere and many other issues emerged. As the mother of the appellant felt that the trial court was not able to address the same, the victim through her mother, filed a petition under Section 482 of the Code of Criminal Procedure (CrPC) before the High Court of Delhi praying, *inter alia*, that the matter should be transferred to the Special Court under the POCSO Act as the functional age of the prosecutrix is hardly around 6 to 8 years and there is necessity for trial to be conducted in a most congenial, friendly and comfortable atmosphere and the proceeding should be videographed. The High Court vide order dated 15.06.2015 issued directions for making necessary arrangements for videography of the proceeding as the prosecutrix mainly communicates through gestures.

The order passed in that regard read as follows: "Vide order dated 15th September, 2014, the learned ASJ, Special Fast Track Court, Saket had directed that the prosecutrix who is a physically and mentally challenged girl suffering from cerebral palsy will be provided a special educator/interpreter and necessary arrangements be made for videographing the in camera trial at the time of recording of the statement of the prosecutrix. When the evidence of the prosecutrix was sought to be recorded on 15th May, 2015 the learned Judge noted that the concerned officer of the vulnerable witness Court complex submitted that the videographing of the proceedings is not permissible. The learned Additional Sessions Judge has sought necessary directions regarding videography from the learned Sessions Judge (South) in this regard and has listed the matter for 27th May, 2015. It is also informed by the learned APP on instructions from the investigating officer that two doctors of AIIMS have been contacted who will be present on the date when the evidence of the prosecutrix has to be recorded.

Learned counsel for the petitioner states that the prosecutrix is terrified by the presence of males and it would be thus appropriate if female doctors/interpreters are available at the time of the evidence of the prosecutrix. Learned APP will file a status report in this regard before the next date.

In the meanwhile the learned Sessions Judge (South District) will make necessary arrangements for videography of the proceedings as the prosecutrix mostly communicates through gestures."

The matter was finally disposed of vide order dated 29.06.2015 and the appellant felt aggrieved as the two main prayers, namely, (i) transfer of the case to the Special Court established under the POCSO Act as the functional age of the

prosecutrix is 6 to 8 years and (ii) the transfer of the case from P.S. Defence Colony to the Crime Branch for proper supervisional investigation were not allowed. As the impugned order would show, the High Court directed that the case should be assigned to a trial court presided over by a lady Judge in Saket Court.

When the matter was listed on 01.04.2016, it was contended by Ms. Bhati, learned counsel for the appellant that the prosecutrix has been suffering from a devastating mental and physical disorder since her birth and though she is biologically aged about 38 years, she has not mentally grown beyond six years. In support of her stand, a certificate of the neuro physician and the psychologist of AIIMS, New Delhi was filed. She had referred to Section 28 of the POCSO Act which deals with Special Courts. She had also drawn attention of the Court to Sections 24 to 27 of the POCSO Act to highlight that there is a special procedure for recording statement of the child and, therefore, when medical evidence had established the mental age, the victim's biological age should not be the governing yardstick but she should be considered as a child because she is intellectually challenged and mentally retarded under the POCSO Act.

As the respondent No. 2 did not appear, the Court appointed Mr. Sanjay R. Hegde, learned senior counsel, as Amicus Curiae to argue and put forth the points on behalf of respondent No. 2. On behalf of respondent No.1, that is, State (Government of NCT of Delhi), Mr. P.K. Dey and Mr. Siddharth Dave, learned counsel assisted the Court.

After the matter was heard, the judgment was reserved and after some time, an office note was circulated that the sole accused, the respondent No. 2, had died during the pendency of the proceeding. When the matter was listed again because of the subsequent event, it was contended by Ms. Bhati appearing for the appellant that under the POCSO Act and the Rules framed thereunder, the victim would be entitled to get compensation and the procedure would be different. That apart, she also submitted that after the death of the accused, the grievance still remains and as the procedure for grant of compensation is different, this Court may deal with the principal issue. And, I have thought it appropriate to address the same.

Learned counsel for the appellant submits that Section 2(d) that defines "child" to mean any person below the age of eighteen years should not be conferred a restricted meaning to convey that the words "eighteen years" are singularly and exclusively associated with the biological or chronological age and has nothing to do with the real concept or conception of "age". Elaborating the argument, she would contend that "child", as defined under Article 1 of the United Nations Convention on the Rights of Children, is to mean "every human

being below the age of 18 years unless under the law applicable, majority is attained earlier".

It is urged by her that the principle of purposive construction is required to be adopted keeping in view the intrinsic perspective of POCSO Act and construction should be placed on the word "age" to compositely include biological and mental age so that the protective umbrella meant and recognized for the child under the law to avoid abuse and exploitation is achieved. It is contended by her that likes of the appellant who suffer from mental disabilities or are mentally challenged are unable to keep pace with biological age and their mental growth and understanding is arrested and unless they get the protection of law that the legislature has conceived, it would be an anathema that the law that has been brought in to protect the class, that is, child, leaves out a part of it though they are worse than the children of the age that is defined under the POCSO Act. Elaborating further, she would submit that a mentally retarded person may have the body mass, weight and height which will be matching the chronological age or biological age of 30 years, but in reality behaves like a child of 8 to 10 years, for the mental age, as it is called, stops progressing. She has drawn a comparison between various provisions of the IPC where the legislature has recognized a person of unsound mind to be on the same pedestal as child which indicates that IPC prescribes protection on the basis of maturity of understanding, to the persons suffering from unsoundness of mind. Emphasis is on departure from the chronological age by the legislature by laying stress on capacity to understand the nature and consequence of the act. She has also referred to Chapter XXV of the CrPC that enumerates the provisions as to the accused persons of unsound mind.

Learned counsel would contend that dignity of a child is of extreme significance and this Court has eloquently accentuated on the sustenance of such dignity. To buttress her submission, she has relied upon ***Reena Banerjee & another v. Govt. (NCT of Delhi) and others,*** (2015) 11 SCC 725, ***Mofil Khan & another v. State of Jharkhand*** , (2015) 1 SCC 67, ***Suchita Srivastava & another v. Chandigarh Administration*** , (2009) 9 SCC 1, and ***Tulshidas Kanolkar v. State of Goa*** ,(2003) 8 SCC 590.

It is propounded by her that to read mental age with biological age will not cause any violence to Section 2(d) of POCSO Act but on the contrary, it would be in accord with the context of the scheme of the POCSO Act and also inject life to the words which constitute the fulcrum of the spirit of the legislation that is meant to protect the victims. The legislature has used the word "child" and restricted it to age of 18 years, but when a mentally retarded child is incapable of protest and suffers from inadequacy to understand, chronological age should not

be the guiding factor or laser beam but the real mental age, for the cherished purpose of the POCSO Act is to give protection to the child and check sexual abuse of a child. A literal construction, according to the learned counsel, would defeat the intendment of the legislature. For the aforesaid purpose, she has commended us to the authorities in ***Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi and others*** , (1986) 2 SCC 614 , ***Githa Hariharan (Ms.) and another v. Reserve Bank of India and another*** , (1999) 2 SCC 228 , ***Union of India v. Prabhakaran Vijaya Kumar and others*** , (2008) 9 SCC 527, ***Regional Provident Fund Commissioner v. Hooghly Mills Company Limited and others*** , (2012) 2 SCC 489, ***Bangalore Turf Club Limited v. Regional Director, Employees' State Insurance Corporation*** , (2014) 9 SCC 657.

Mr. Dey, learned counsel appearing for the first respondent – State, submits that POCSO Act has been introduced with a view to provide protection of the children from the offences of sexual assault, sexual harassment and abuse with due regard to safeguard the interest and well being of the children at every stage of judicial proceeding including children friendly procedure, recording of evidence and establishment of Special Courts for the speedy trial and, therefore, a person who is mentally challenged/retarded is required to be brought within the definition of a child so that the life is ignited to the piece of legislation. Learned counsel would submit that when such a person is incapable of understanding what is happening to her, she is equal to a child and when such an interpretation is placed, it serves the basic purpose of behind the Act that the legislature has intended to achieve. It is his further submission that there is a distinction between two terms, namely, "age" and "years", for "age" signifies mental or biological/physical age whereas "years" refer to chronology and hence, it is possible to interpret the word "age" in a particular provision to mean mental age without offending the term of the word "year" which means year and "year" has been defined in the General Clauses Act, 1897 as period of 365 days. He has referred to the Juvenile Justice (Care and Protection of Children) Act, 2015 to highlight that the legislative intention there is explicit with regard to mental capacity of a person which would have a relevant factor to determine the forum of trial. It is further contended by him that if the trial is held in case of mental retarded person whose biological age is more than 18 years by the Special Court as provided under the POCSO Act, the accused is no way affected because the punishment for the offence remains the same even if the trial is held by the Court of Session under the CrPC. Learned counsel in his written note of submissions has placed reliance upon ***Sheikh Gulfan & others v. Sanat Kumar Ganguli*** ,AIR 1965 SC 1839, ***Yudhishter v. Ashok Kumar*** , (1987) 1 SCC 204, ***Pratap Singh v.***

***State of Jharkhand and another*** ,(2005) 3 SCC 551, ***Directorate of Enforcement v. Deepak Mahajan and another*** ,(1994) 3 SCC 440 .

Mr. Dave, while supporting the stand of Mr. Dey has commended us to the decision in ***Deepak Mahajan*** (supra).

Mr. Hegde, learned senior counsel, who has been engaged by the Court to assist on behalf of respondent No. 2, has referred to Article 1 of the United Nations Convention on the Rights of the Child which has been acceded to by India on 11.12.1992. Relying on the definition in the Black's Law Dictionary and the Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. 2005 p. 175, learned senior counsel would submit that there is distinction between mental age and chronological age. Had it been the intention of the Parliament not to make such a distinction, it would have included within the protective ambit of the definition pertaining to adults whose mental age is less than 18 years. It is urged by him that when the language of the dictionary clause is clear and unambiguous, it should be given its ordinary literal meaning. It is further argued by him that wherever the legislature has intended to refer to other definition of "age" including mental age, it has specifically made like the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and, therefore, in the absence of a specific provision in the POCSO Act, the Court ought to adopt the actual grammatical meaning and for the said purpose, he has drawn inspiration from Bennion on ***Statutory Interpretation***, 5th Edn. p.825. He would put forth the stand that if the term "age" is interpreted to mean "mental age", it would lead to ambiguity, chaos and unwarranted delay in the proceedings and also it would have the effect potentiality to derail the trial and defeat the purpose of the Act, for the informant will have the option to venture on the correctness of the mental age. Learned senior counsel would further urge that various Courts in other parts of the world have treated the child keeping in view the chronological age unless the mental age has been specifically considered for inclusion by the legislature. Mr. Hegde, in his written notes of submission, has reproduced passages from ***R. v. Sharpe*** , BCCA 1999 416 [British Columbia Court of Appeal], ***R v. Cockerton*** , [1901] 1 KB 726, [Kings Bench] and ***OggMoss v. R*** ,[1984] 2 SCR 173 [Supreme Court of Canada]. According to him, when the definition of "child" in Section 2(d) is plain and intelligible, the Court ought not add or read words into the same regard being had to the pronouncements in ***P.K. Unni v. Nirmala Industries and others*** ,(1990) 2 SCC 378 and ***Lt. Col. Prithi Pal Singh Bedi etc. v. Union of India and others*** ,(1982) 3 SCC 140 : [1983] 1 SCR 393 .

Learned senior counsel would submit that if mental age is read into the definition of the "child", it will be against the manifest intention of the legislature. As an instance, he has referred to Section 5(k) of the POCSO Act which alludes to

child's mental or physical disability in the context of aggravated penetrated sexual assault. He has submitted that if the term "age" is interpreted to engulf mental and biological age, the scheme of the POCSO Act shall be defeated and it will lead to inconsistencies. For the said purpose, he has referred to the concept of "mental age" in respect of which the scientific views and methods vary. The eventual stand of the learned senior counsel is that mental age with a proximate figure can never be constant and is likely to vary with time and surrounding circumstances and, therefore, interpreting the word "age" falling under the definition of "child" to include mental age also would breach the settled principles of criminal jurisprudence and usher in uncertainty.

Chapter II of the POCSO Act deals with sexual offences against children. Part A of the said Chapter provides for penetrative sexual assault and punishment therefor. Section 3 stipulates what is the penetrative sexual assault and Section 4 provides punishment for such offence. Part B of the said Chapter deals with aggravated penetrative sexual assault and punishment therefor. Section 5 copiously deals with what can constitute aggravated penetration sexual assault. It is extremely significant to note that Section 5(a) enumerates number of circumstances where the offence becomes aggravated one. It includes in its ambit various situations and also certain categories of persons. The provision is quite elaborate.

Section 5(k) to which my attention has been drawn reads thus: "(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child;" The aforesaid provision, as is evident, lays stress on the mental disability of the child.

Part C of Chapter II deals with sexual assault and punishment therefor. Section 7 lays down about the sexual assault. Part D deals with aggravated sexual assault and punishment therefor. Section 9 deals with aggravated sexual assault which is akin to Section 5. Part E deals with sexual harassment and punishment therefor. The said harassment lays down various acts which will amount to sexual harassment.

On a reading of the aforesaid Chapters, it is quite manifest and limpid that the legislature has intended to protect the child from any kind of sexual assault and harassment. It has also laid stress upon the mental and physical disability of the child. The child, as per the definition, is the principal protagonist and the POCSO Act protects the child from any sexual act and also takes into consideration his mental disability. Thus, the legislature was alive to the condition of mental disability. Chapter III of the POCSO Act deals with using child

for pornographic purposes and punishment therefor. Chapter IV deals with abetment of and attempt to commit an offence. Chapter V deals with the procedure for reporting of cases and Chapter VI provides for procedure for recording statement of the child. Sections 24 to 27, which have been pressed into service by Ms. Bhati, relate to recording of statement of a child; recording of statement of a child by Magistrate; additional provisions regarding statement to be recorded and medical examination of a child.

Presently, I shall refer to certain authorities as regards the purposive interpretations and its contours, for learned counsel for the appellant would like us to perceive the provision through the said magnified glass using different lens. In ***Cabell v. Markhan*** , 148 F 2d 737 (2d Cir 1945) .Learned Hand, J. articulated the merits of purposive interpretation:

**"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."**

On a proper analysis of the aforesaid authority, it is clear as crystal that when two constructions are reasonably possible, preference should go to one which helps to carry out the beneficent purpose of the Act; and that apart, the said interpretation should not unduly expand the scope of a provision. Thus, the Court has to be careful and cautious while adopting an alternative reasonable interpretation. The acceptability of the alternative reasonable construction should be within the permissible ambit of the Act. To elaborate, introduction of theory of balance cannot be on thin air and in any case, the Courts, bent with the idea to engulf a concept within the statutory parameters, should not pave the path of expansion that the provision by so stretch of examination envisages.

The Court also referred to various other decisions and finally ruled that it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

As the aforesaid statement would show that the Court has been inclined to adopt a functional approach to arrive at the legislative intention. Needless to emphasise, there has to be a necessity to do so.

I have referred to the aforesaid authorities to highlight that legislative intention and the purpose of the legislation regard being had to the fact that context has to be appositely appreciated. It is the foremost duty of the Court while construing a provision to ascertain the intention of the legislature, for it is an accepted principle that the legislature expresses itself with use of correct words and in the absence of any ambiguity or the resultant consequence does not lead to any absurdity, there is no room to look for any other aid in the name of creativity. There is no quarrel over the proposition that the method of purposive construction has been adopted keeping in view the text and the context of the legislation, the mischief it intends to obliterate and the fundamental intention of the legislature when it comes to social welfare legislations. If the purpose is defeated, absurd result is arrived at. The Court need not be miserly and should have the broad attitude to take recourse to in supplying a word wherever necessary. Authorities referred to hereinabove encompass various legislations wherein the legislature intended to cover various fields and address the issues. While interpreting a social welfare or beneficent legislation one has to be guided by the 'colour', 'content' and the 'context of statutes' and if it involves human rights, the conceptions of Procrustean justice and Lilliputtian hollowness approach should be abandoned. The Judge has to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention and in that event, he becomes a real creative constructionist Judge. I have perceived the approach in ***Hindustan Lever Ltd.*** (supra) and ***Deepak Mahajan*** (supra), ***Pratap Singh*** (supra) and many others. I have also analysed where the Court has declined to follow the said approach as in ***R.M.D. Chamarbaugwalla*** (supra) and other decisions. The Court has evolved the principle that the legislative intention must be gatherable from the text, content and context of the statute and the purposive approach should help and enhance the functional principle of the enactment. That apart, if an interpretation is likely to cause inconvenience, it should be avoided, and further personal notion or belief of the Judge as regards the intention of the makers of the statute should not be thought of. And, needless to say, for adopting the purposive approach there must exist the necessity. The Judge, assuming the role of creatively constructionist personality, should not wear any hat of any colour to suit his thought and idea and drive his thinking process to wrestle with words stretching beyond a permissible or acceptable limit. That has the potentiality to cause violence to the language used by the legislature. Quite apart from, the Court can

take aid of *causus omissus,* only in a case of clear necessity and further it should be discerned from the four corner of the statute. If the meaning is intelligible, the said principle has no entry. It cannot be a ready tool in the hands of a Judge to introduce as and what he desires.

Keeping in view the aforesaid parameters, I am required to scrutinize whether the content and the context of the POCSO Act would allow space for the interpretation that has been canvassed by the learned counsel for the appellant, which has also got support from the State, before us. The POCSO Act, as I have indicated earlier, comprehensively deals with various facets that are likely to offend the physical identity and mental condition of a child. The legislature has dealt with sexual assault, sexual harassment and abuse with due regard to safeguard the interest and well being of the children at every stage of judicial proceeding in an extremely detailed manner. The procedure is child friendly and the atmosphere as commanded by the provisions of the POSCO Act has to be congenial. The protection of the dignity of the child is the spine of the legislation. It also lays stress on mental physical disadvantage of a child. It takes note of the mental disability. The legislature in its wisdom has stipulated a definition of the "child" which I have noted hereinbefore. The submission is that the term "age" should not be perceived through the restricted prism but must be viewed with the telescope and thereby should include the mental age.

The learned counsel for the appellant has emphasized on the same to bolster the proposition that the POCSO Act being child friendly and meant for protecting the dignity of the child regard being had to her physical and mental or body and mind integrity interpretation of the term "age" should include mental age so that statute becomes purposively child sensitive.

In this context, a passage from ***Tulshidas Kanolkar*** (supra) will be appropriate to refer. In the said case, the victim of rape was an adult who was a mentally challenged person and her IQ was not even 1/3rd of what a normal person has. She had become pregnant, and on being asked by her parents, as to who was responsible for her pregnancy, she on her own way pointed out finger at the appellant therein. During the trial, the accused indirectly took the stand of consent apart from other pleas. The trial court repelled the plea of consent and found the appellant guilty. In appeal, the High Court negatived the contention raised by the accusedappellant by upholding the conviction but reduced the sentence to seven years. Before this Court, it was contended that in the absence of any other person being examined, the testimony of the prosecutrix could not be placed reliance upon. The Court analysed the evidence and placed reliance on the version of the victim and rejected the plea of consent stating it as absolutely shallow. The Court held that a mentally challenged person cannot give legal

consent which would involve understanding of the effect of such consent and it has to be a conscious and voluntary act. A distinction was drawn between "consent" and "submission" and ruled that every consent involves a submission but the converse does not follow and an act of helpless resignation could not be treated as a consent. Proceeding further, the Court said for constituting consent there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the Act. While parting with the case, the Court added one aspect which requires to be noted:

"8. … a few words are necessary to be said about prescription of sentence in a case where a mentally challenged or deficient woman is the victim. In subsection (2) of Section 376, clause (*f*) relates to physical age of a woman under 12 years of age. In such a case sentence higher than that prescribed for one under subsection (1) is provided for. But what happens in a case when the mental age of the victim is not even 12 years? Such a woman is definitely in a more vulnerable situation. A rapist in such a case in addition to physical ravishment exploits her mental non development and helplessness. The legislature would do well in prescribing higher minimum sentence in a case of this nature. The gravity of offence in such case is more serious than the enumerated categories indicated in subsection (2) of Section 376."

As it seems, the Court left it to the legislature for prescribing a higher minimum sentence. The said passage, as I perceive, does not help the proposition canvassed in the instant case.

The learned counsel for the appellant has drawn my attention to various Sections of IPC, namely, Sections 89, 90, 98, 228A, 305, 361 and 491. Section 89 IPC deals with an act done in good faith for benefit of child or insane person by or by consent of guardian. It stipulates that nothing would be done in good faith for the benefit of a person under twelve years of age or of unsound mind by or by consent either express or implied of the guardian or other person having lawful charge of that person would be an offence by reason of any harm which it may cause or be intended by the doer to cause or be known by the doer to be likely to cause to that person. Section 90 deals with consent known to be given under fear or misconception. It also encapsulates of insane person and consent of child which is a person who is under twelve years of age. Section 98 covers right of private defence against the act of a person of unsound mind and when an act which would otherwise be an offence is not offence by reason of want of maturity of understanding, the unsoundness of mind. Section 305 deals with abetment of suicide of child or insane person and provides punishment with death or imprisonment for life, or imprisonment for a term not exceeding ten years. Section 361 deals with kidnapping of minor under the age of 16 years of age from

lawful guardianship. The learned counsel for the appellant relying upon the said provisions would contend that IPC prescribes protection on the basis of maturity of understanding to a child, and the same protection has been extended to persons suffering from unsoundness of mind and, therefore, it is limpid that a penal law sometimes makes departure from the chronological age by placing more emphasis on capacity to understand the nature and consequences of an act. On that basis, an argument has been structured to treat the mental age of an adult within the ambit and sweep of the term "age" that pertains to age under the POCSO Act. In this regard, I am obligated to say what has been provided in the IPC is on a different base and foundation. Such a provision does treat the child differently and carves out the nature of offence in respect of an insane person or person of unsound mind. There is a prescription by the statute. Learned counsel would impress upon us that I can adopt the said prescription and apply it to dictionary clause of POCSO Act so that mental age is considered within the definition of the term "age". I am not inclined to accept the said submission.

In this regard, it is worthy to note that the legislature despite having the intent in its Statement of Objects and Reasons and the long Preamble to the POCSO Act, has thought it wise to define the term "age" which does not only mention a child but adds the words "below the age of 18 years". Had the word "child" alone been mentioned in the Act, the scope of interpretation by the Courts could have been in a different realm and the Court might have deliberated on a larger canvass. It is not so.

There is distinction between mental retardation and mentally ill person. In this regard, it would be fruitful to analyse the concept. In ***Suchita Srivastava*** (supra), the assail was to the orders passed by the Division Bench of the High Court which had ruled that it was in the best interests of a mentally retarded women to undergo an abortion. The said woman was an inmate at a government run welfare institution and after discovery of her pregnancy, the administration of the Union Territory of Chandigarh had approached the High Court for the termination of her pregnancy keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court had appointed an expert body who had given a finding that the victim had expressed her willingness to bear a child. As the High Court, as already stated earlier, directed the woman to undergo abortion, Special Leave to Appeal was preferred before this Court. The three Judge Bench referred to The Metical Termination of Pregnancy Act, 1971 (for short, 'the 1971 Act') which clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any "mental illness". The Court observed that

there is clear distinction between "mental illness" and "mental retardation" for the purpose of the 1971 Act. The next issue the Court addressed is the exercise of "*parens patriae*" jurisdiction. The Court opined that the victim's reproductive choice has to be respected in spite of other factors such as lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy with full term and the assumption of maternal responsibilities there for. The Court adopted the said view as the applicable statute contemplates that even a woman who is found to be mentally retarded should give her consent for termination of her pregnancy. Analysing Section 3 of the 1971 Act, the Court ruled that the legislative intention was to provide a qualified right to abortion and the termination of pregnancy has never been recognized as a normal recourse for expecting mothers.

The Court took note of the fact that the 1971 Act was amended in 2002 by way of which the word "lunatic" was replaced by the expression "mentally ill person" in Section 3(4)(a) of the 1971 Act. "Mentally ill person" has been defined under Section 2(b) of the 1971 Act which means a person who is in need of treatment by reason of any mental disorder other than mental retardation.

Dealing with the definition, the Court referred to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, '1995 Act') and opined that in the said Act also "mental illness" has been defined as mental disorder other than mental retardation. The Court also took note of the definition of "mental retardation" under the 1995 Act. The definition read as follows:

"2(*r*) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

The Court also took note of the fact that the same definition of "mental retardation" has also been incorporated under Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. In that context, the Court further expressed the view that the legislative provisions in the various Acts clearly show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(a) of the 1971 Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation". After so stating, the Court opined that there cannot be a dilution of the requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim.

The Court analysed the reasoning enumerated by the High Court and reversing the view of the High Court held:

"32. Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 where the distinction between "mental illness" and "mental retardation" has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing antidiscrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of "mentally ill" and "mentally retarded" persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that "mentally ill" persons and those suffering from "mental retardation" ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.

33. We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights."

The situation can be viewed from another aspect. The POCSO Act has identified minors and protected them by prescribing the statutory age which has nexus with the legal eligibility to give consent. The Parliament has felt it appropriate that the definition of the term "age" by chronological age or biological age to be the safest yardstick than referring to a person having mental retardation. It may be due to the fact that the standards of mental retardation are different and they require to be determined by an expert body. The degree is also different. The Parliament, as it seems, has not included mental age. It is within the domain of legislative wisdom. Be it noted, a procedure for determination of age had been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2000. The procedure was meant for determination of the biological age. It may be stated here that Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) defines "child" to mean a person who not completed eighteen years of age. There is a procedure provided for determination of the biological age. The purpose of stating so is that the Parliament has deliberately fixed the age of the child and it is in the prism of

biological age. If any determination is required, it only pertains to the biological age, and nothing else.

The purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. It provides for a child friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the POCSO Act, it is clear to us that it is gender neutral. In such a situation, to include the perception of mental competence of a victim or mental retardation as a factor will really tantamount to causing violence to the legislation by incorporating a certain words to the definition. By saying "age" would cover "mental age" has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within the sphere of legislature. To elaborate, an addition of the word "mental" by taking recourse to interpretative process does not come within the purposive interpretation as far as the POCSO Act is concerned. I have already stated that individual notion or personal conviction should not be allowed entry to the sphere of interpretation. It has to be gathered from the legislative intention and I have already enumerated how the legislative intention is to be gathered. Respect for the dignity of a person, as submitted, has its own pedestal but that conception cannot be subsumed and integrated into a definition where the provision is clear and unambiguous and does not admit of any other interpretation. If a victim is mentally retarded, definitely the court trying the case shall take into consideration whether there is a consent or not. In certain circumstances, it would depend upon the degree of retardation or degree of understanding. It should never be put in a straight jacket formula. It is difficult to say in absolute terms.

In this regard, I may profitably refer to Section 164 CrPC which deals with recording of confessions and statement. Section 164(5A)(b), which is pertinent, reads as under:

"(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination in chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross examined on such statement, without the need for recording the same at the time of trial."

The purpose of referring to the said provision is to highlight that the Parliament has legislated to safeguard the interest of mentally disabled person.

Needless to emphasise that courts sometimes expand or stretch the meaning of a phrase by taking recourse to purposive interpretation. A Judge can have a constructionist approach but there is a limitation to his sense of creativity. In the instant case, I am obliged to state that stretching of the words "age" and "year" would be encroaching upon the legislative function. There is no necessity. In ***Census Commissioner & others v. R. Krishnamurthy***, the threeJudge Bench has ruled:

"No adjudicator or a Judge can conceive the idea that the sky is the limit or for that matter there is no barrier or fetters in one's individual perception, for judicial vision should not be allowed to be imprisoned and have the potentiality to cover celestial zones. Be it ingeminated, refrain and restrain are the essential virtues in the arena of adjudication because they guard as sentinel so that virtuousness is constantly sustained. Not for nothing, centuries back Francis Bacon61 had to say thus:

"Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue. … Let the Judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne."

**In view of the aforesaid principles, the only conclusion that can be arrived at is that definition in Section 2(d) defining the term "age" cannot include mental age.**

Having said so, I would have proceeded to record the formal conclusion. But, in the instant case, I am disposed to think, more so, when the accused has breathed his last and there is a medical certificate from AIIMS as regards the mental disability of the victim, there should be no further enquiry as envisaged under Section 357A of the CrPC.

On a perusal of the aforesaid provision, it is quite vivid that when Court makes a recommendation for compensation, the District Legal Services Authority or the State Legal Services Authority is required to decide the quantum of compensation to be awarded under the Scheme prepared by the State Government in coordination with the Central Government. The State/District Legal Services Authority has to conduct an inquiry and award the adequate compensation by completing the inquiry. Had the accused been alive, the trial would have taken place in a Court of Session as provided under the CrPC. As the accused has died and the victim is certified to be a mentally disabled person and is fighting the *lis* for some time to come within the purview of the POCSO Act wherein the trial is held in a different manner and the provisions relating to the

compensation are different, I direct that the State Legal Services Authority, Delhi shall award the compensation keeping in view the Scheme framed by the Delhi Government. As regards the quantum, I am of the convinced opinion that it is a fit case where the victim should be granted the maximum compensation as envisaged under the Scheme. I clarify that it is so directed regard being had to the special features of the case.

R.F.NARIMAN, J. (concurring)

Having read the erudite judgment of my learned brother, and agreeing fully with him on the conclusion reached, given the importance of the Montesquiean separation of powers doctrine where the judiciary should not transgress from the field of judicial law making into the field of legislative law making, I have felt it necessary to add a few words of my own.

Mr. Sanjay R. Hegde, the learned Amicus Curiae, has argued before us that the interpretation of Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012 cannot include "mental" age as such an interpretation would be beyond the 'Lakshman Rekha' – that is, it is no part of this Court's function to add to or amend the law as it stands. This Court's function is limited to interpreting the law as it stands, and this being the case, he has exhorted us not to go against the plain literal meaning of the statute.

Bearing in mind that the Act with which we are concerned is a beneficial/penal legislation, let us see whether we can extend the definition of "child" in Section 2(1)(d) thereof to include persons below the mental age of 18 years.

A reading of the Act as a whole in the light of the Statement of Objects and Reasons thus makes it clear that the intention of the legislator was to focus on children, as commonly understood i.e. persons who are physically under the age of 18 years. The golden rule in determining whether the judiciary has crossed the Lakshman Rekha in the guise of interpreting a statute is really whether a Judge has only ironed out the creases that he found in a statute in the light of its object, or whether he has altered the material of which the Act is woven. In short, the difference is the well-known philosophical difference between "is" and "ought". Does the Judge put himself in the place of the legislator and ask himself whether the legislator intended a certain result, or does he state that this must have been the intent of the legislator and infuse what he thinks should have been done had he been the legislator. If the latter, it is clear that the Judge then would add something more than what there is in the statute by way of a supposed intention of the legislator and would go beyond creative interpretation of legislation to

legislating itself. It is at this point that the Judge crosses the Lakshman Rekha and becomes a legislator, stating what the law ought to be instead of what the law is.

A scrutiny of other statutes in pari materia would bring this into sharper focus. The Medical Termination of Pregnancy Act, 1971, again brings into sharp focus the distinction between "mentally ill persons" and "minors". Sections 2(b), (c) of the said Act are as follows:-

"2. Definitions.-In this Act, unless the context otherwise requires,-

(a) xxx xxx xxx

(b) "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation.

(c) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority."

This provision again makes it clear that when "the age of 18 years" occurs in a statute, it has reference only to physical age. The distinction between a woman who is a minor and an adult woman who is mentally ill is again brought into sharp focus by the statute itself. It must, therefore, be held that Parliament, when it made the 2012 Act, was fully aware of this distinction, and yet chose to protect only children whose physical age was below 18 years.

The same result is reached if we peruse certain provisions of the Mental Healthcare Act, 2017. Sections 2(s), 2(t), 14 and 15 of the said Act are as under:

2(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;

2(t) "minor" means a person who has not completed the age of eighteen years;

14 (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 5, every person who is not a minor, shall have a right to appoint a nominated representative.

(2) The nomination under sub-section (1) shall be made in writing on plain paper with the person's signature or thumb impression of the person referred to in that sub-section.

(3) The person appointed as the nominated representative shall not be a minor, be competent to discharge the duties or perform the functions assigned to him under this Act, and give his consent in writing to the mental health

professional to discharge his duties and perform the functions assigned to him under this Act.

(4) Where no nominated representative is appointed by a person under sub- section (1), the following persons for the purposes of this Act in the order of precedence shall be deemed to be the nominated representative of a person with mental illness, namely:––

(a) the individual appointed as the nominated representative in the advance directive under clause (c) of sub-section (1) of section 5; or

(b) a relative, or if not available or not willing to be the nominated representative of such person; or

(c) a care-giver, or if not available or not willing to be the nominated representative of such person; or

(d) a suitable person appointed as such by the concerned Board; or

(e) if no such person is available to be appointed as a nominated representative, the Board shall appoint the Director, Department of Social Welfare, or his designated representative, as the nominated representative of the person with mental illness:

Provided that a person representing an organisation registered under the Societies Registration Act, 1860 or any other law for the time being in force, working for persons with mental illness, may temporarily be engaged by the mental health professional to discharge the duties of a nominated representative pending appointment of a nominated representative by the concerned Board.

(5) The representative of the organisation, referred to in the proviso to sub-section (4), may make a written application to the medical officer in- charge of the mental health establishment or the psychiatrist in- charge of the person's treatment, and such medical officer or psychiatrist, as the case may be, shall accept him as the temporary nominated representative, pending appointment of a nominated representative by the concerned Board.

(6) A person who has appointed any person as his nominated representative under this section may revoke or alter such appointment at any time in accordance with the procedure laid down for making an appointment of nominated representative under sub- section (1).

(7) The Board may, if it is of the opinion that it is in the interest of the person with mental illness to do so, revoke an appointment made by it under this section, and appoint a different representative under this section.

(8) The appointment of a nominated representative, or the inability of a person with mental illness to appoint a nominated representative, shall not be construed as the lack of capacity of the person to take decisions about his mental healthcare or treatment.

(9) All persons with mental illness shall have capacity to make mental healthcare or treatment decisions but may require varying levels of support from their nominated representative to make decisions.

15. (1) Notwithstanding anything contained in section 14, in case of minors, the legal guardian shall be their nominated representative, unless the concerned Board orders otherwise under sub-section (2).

(2) Where on an application made to the concerned Board, by a mental health professional or any other person acting in the best interest of the minor, and on evidence presented before it, the concerned Board is of the opinion that,––

(a) the legal guardian is not acting in the best interests of the minor; or

(b) the legal guardian is otherwise not fit to act as the nominated representative of the minor, it may appoint, any suitable individual who is willing to act as such, the nominated representative of the minor with mental illness:

Provided that in case no individual is available for appointment as a nominated representative, the Board shall appoint the Director in the Department of Social Welfare of the State in which such Board is located, or his nominee, as the nominated representative of the minor with mental illness." A perusal of the provisions of the Mental Healthcare Act would again show that a distinction is made between a mentally ill person and a minor.

Under Section 14, every person who is not a minor shall have the right to appoint a nominated representative, whereas under Section 15, in case of minors, the legal guardian shall be their nominated representative unless the concerned Board orders otherwise, if grounds are made out under sub-section (2).

A perusal of the aforesaid Sections would show that children with disabilities are dealt with separately and differently from persons with disabilities. Thus, Sections 4, 9 and 31 give certain rights to children with disabilities as opposed to the other provisions, in particular Section 18, which speaks of adult education and participation thereof by persons with disabilities, obviously referring to persons who are physically above 18 years of age.

As a contrast to the 2012 Act with which we are concerned, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 would make it clear that whichever person is affected by mental retardation, in the broader sense, is a "person with disability" under the Act, who gets protection. The Statement of Objects and Reasons of the said Act reads as under:

"STATEMENT OF OBJECTS AND REASONS

The Government of India has become increasingly concerned about the need for affirmative action in favour of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability.

2. In acknowledgement of a wide range of competencies among these individuals, the Central Government seeks to set up a National Trust to be known as a National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability. The said Trust will be promotive, proactive and protectionist in nature. It will seek primarily to uphold the rights, promote the development and safeguard the interests of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability and their families.

3. Towards this goal, the National Trust will support programmes which promote independence, facilitating guardianship where necessary and address the concerns of those special persons who do not have their family support. The Trust will seek to strengthen families and protect the interest of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability after the death of their parents.

4. The Trust will be empowered to receive grants, donations, benefactions, bequests and transfers. The Central Government will make a one-time contribution of rupees one hundred crores to the corpus of the Trust to enable it to discharge its responsibilities.

5. The Bill seeks to achieve the aforesaid objectives." Relevant provisions of this Act are Sections 2(g), 2(j), 14(1) and 17(1), and the same are reproduced as under:

"2. Definitions. – In this Act, unless the context otherwise requires -

(a) to (f) xxx xxx xxx

(g) "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterised by sub-normality of intelligence;

(h) & (i) xxx xxx xxx

(j) “persons with disability” means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability.” “14. Appointment for guardianship.— (1) A parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a guardian of the persons with disability.” “17. Removal of guardian.—(1) Whenever a parent or a relative of a person with disability or a registered organisation finds that the guardian is—

(a) abusing or neglecting a person with disability; or

(b) misappropriating or neglecting the property, it may in accordance with the prescribed procedure apply to the committee for the removal of such guardian.” A reading of the Objects and Reasons of the aforesaid Act together with the provisions contained therein would show that whatever is the physical age of the person affected, such person would be a “person with disability” who would be governed by the provisions of the said Act. Conspicuous by its absence is the reference to any age when it comes to protecting persons with disabilities under the said Act.

Thus, it is clear that viewed with the lens of the legislator, we would be doing violence both to the intent and the language of Parliament if we were to read the word “mental” into Section 2(1)(d) of the 2012 Act. Given the fact that it is a beneficial/penal legislation, we as Judges can extend it only as far as Parliament intended and no further. I am in agreement, therefore, with the judgment of my learned brother, including the directions given by him.

The appeals are disposed of, accordingly.

********

***10. Section 17 of Orissa Special Courts Act***

*Amaresh Ku. Jayaswal Versus State of Orissa (Vig.)*

***S. K. Sahoo, J.***

***In the High Court of Orissa, Cuttack***

*Date of Hearing and Judgment: 17.07.2017*

***Issue***

***In the matter of providing report of National Sample Survey Organization by the prosecuting agency for further cross –examination of appellant ,PW No. 1.***

Heard Miss Tejasmita Mohapatra, learned counsel for the appellant and Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department.

The appellant Amaresh Kumar Jayaswal has filed this appeal under section 17 of the Orissa Special Courts Act, 2006 to set aside the impugned order dated 28.06.2017 passed by the learned Authorised Officer, Special Court, Cuttack in Confiscation Case No.08 of 2012 in rejecting the petition dated 05.06.2017 filed by the appellant with a prayer for the production of National Sample Survey Organization report from the year 1987-88 to 2002 from the Directorate of Statistics for the purpose of further cross examination of P.W.1.

The learned Authorized Officer rejected the petition mainly on the ground that the prosecution cannot be compelled to produce documents as a party cannot compel another party to produce documents and therefore, it is not desirable to direct the prosecuting agency for production of voluminous documents such as the reports prepared by the National Sample Survey Organization for the period from 1987-88 to 2002. It is further observed in the impugned order that the learned counsel for the delinquents has already cross examined touching all aspects with regard to per capita consumer expenditure of the delinquent and his family members for the relevant time.

Miss Mohapatra, learned counsel appearing for the appellant contended that there is no dispute that the per capita consumption expenditure report which has been marked as Ext.2 in the confiscation proceeding proved by P.W.2 is based on National Sample Survey Reports. Learned counsel for the appellant further contended that the rates which have been quoted in the National Sample

Survey Reports of the relevant years are at variance with the figure that has been given by P.W.1 in his report under Ext.2 and therefore, a prayer was made to call for the National Sample Survey Reports from the year 1987-88 to 2002.

However, today the learned counsel for the appellant filed an affidavit annexing the reports of the National Sample Survey Reports from the year 1987-88 to 2002 and pointed out the discrepancies in the reports vis-a-vis the report which has been prepared by the P.W.1 as per Ext.2.

It is contended by the learned counsel for the appellant that such reports are available in the website and these are all public documents and since now the reports are available with the appellant, he intends to file all those reports before the learned Authorized Officer and since the cross-examination of the P.W.1 is not yet over, he wants to bring such reports to the notice of P.W.1 and confront the reports with reference to the figures mentioned in Ext.2.

Learned Standing Counsel for the Vigilance Department submitted that since the report is voluminous and in identical matter in Criminal Appeal No.03 of 2017, vide order dated 20.02.2017 such a prayer was turned down, therefore, there is no justification for passing a contradictory order.

Each case depends upon its own facts and circumstances and no straight jacket formula can be laid down that once an order is passed in a particular case in a particular situation that is to be universally applied in all the cases. The ratio of one case cannot be applied like a Euclid's theorems to the other unless the facts of the case in hand, if not exactly, but substantively deals with the same situation. What is of the essence in a decision is its ratio and not every observation found therein not what logically flows from the various observations made in the judgment.

When an application is filed before any Court with a prayer for causing production of any document, the application must specifically state as to in what way such production will assist the Court in adjudicating a matter and thereafter, the Court has to apply its judicial mind and take a decision about the necessity or desirability of such document. The Court cannot pass an order for production of a document in a mechanical manner on a vague petition which does not indicate its necessity or desirability. In other words, the documents called for invoking

power under section 91 of Cr.P.C. must have some sort of relevancy with the matter under investigation, inquiry or trial. Jurisdiction under section 91 of the Code when invoked by the accused before the stage of defence, the necessity and desirability would have to be seen by the Court in the context of the purpose i.e. investigation, inquiry, trial or other proceeding under the code. In the case of **Om Prakash Sharma -Vrs.- C.B.I. reported in A.I.R. 2000 S.C. 2335**, the Hon'ble Supreme Court held that the language of Section 91 Cr.P.C. would, no doubt, indicate the width of the powers to be unlimited but the in-built limitation inherent therein takes in colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceeding as also the compulsion of necessity and desirability, to fulfill the task or achieve the object. The Court concerned must be allowed large latitude in the matter of exercise of discretion and unless in a given case the Court was found to have conducted itself in so demonstrably unreasonable manner unbecoming of a judicial authority, the Court superior to that Court cannot intervene very lightly or in a routine fashion to interpose or impose itself even at that stage.

Since the cross-examination of P.W.1 is not yet over, the appellant is at liberty to file the true copies of the National Sample Survey Reports for the relevant years before the learned Authorized Officer with a memo indicating the source from which he obtained the same. The learned Authorized Officer in such eventuality shall permit it to be brought to the notice of P.W.1. If P.W.1 after verifying the reports produced by the appellant does not dispute its authenticity, the reports can be marked as exhibit from the side of the appellant and then the learned Authorized Officer shall permit the appellant to put questions to P.W.1 on such reports vis-a-vis the report which has been prepared by P.W.1 and marked as Ext.2. With the aforesaid observation, the Criminal Appeal is disposed of.

**********

***11. Section 138 of Negotiable Instrument Act***

*Smt. P. Chandrakala Vs. K. Narender & ANR.*

***J. Chelameswar & S. Abdul Nazeer , JJ.***

*In the Supreme Court of India*

*Date of Judgment -24.07.2017*

***Issue***

***In the matter of awarding exemplary costs for wasting public time*** .

Leave granted.

The respondent No.1 filed a private complaint before the V Metropolitan Magistrate, Hyderabad (Re-designated as III Additional Chief Metropolitan Magistrate, Hyderabad) against the appellant alleging that the appellant had borrowed a sum of Rupees five lakhs from him promising to repay the same on an agreed interest at the rate of 2.5% per annum and later the appellant did not repay 2 the amount and on repeated demands, the appellant issued post-dated cheque dated 29.8.2000 for Rupees seven lakhs and the said cheque on presentation on 8.2.2001 was returned on the ground of 'insufficient funds'.

The appellant did not pay the amount in spite of issue of statutory notice. It was, therefore, alleged that the appellant has committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the N.I. Act').

Learned magistrate took the complaint on file as CC No.103 of 2001 under Section 138 of the N.I. Act against the appellant. After trial, learned magistrate by his order dated 20.7.2005 convicted the appellant and sentenced her to undergo simple imprisonment (SI) for six months and to pay a fine of Rupees five hundred, in default of payment of fine, she was directed to undergo SI for ten days. She was also directed to pay a compensation of Rupees seven lakhs under Section 357(3) of the Cr.P.C. It was further held that if the appellant fails to pay the compensation, she will have to undergo SI for three months.

The appeal filed by the appellant in criminal appeal No.212 of 2005 was dismissed by the appellate court vide order dated 12.1.2006.

The appellant challenged the said judgment of the sessions court before the High Court of Judicature at Hyderabad by filing Criminal Revision No.90 of 2006. The Revision Petition was dismissed by the High Court on 12.8.2014. The

appellant has challenged the legality and correctness of the said order in this appeal.

Learned counsel for the parties submit that during the pendency of the revision case before the High Court the matter was compromised. Learned counsel for the appellant submits that the entire amount has been paid to the first respondent. Learned counsel for the first respondent submits that the first respondent has received the entire amount. Therefore, he has no objection if the conviction already recorded under Section 138 of the NI Act is set aside.

Since the parties have settled their disputes, we allow the parties to compound the offence, set aside the judgment of the courts below and acquit the appellant of the charges against her.

We are of the view that since the appellant has wasted the public time, while setting aside the aforesaid orders, she should be burdened with exemplary costs, which we quantify at Rupees one lakh. The appellant is directed to pay the cost as ordered by us to an orphanage, namely, Delhi Council for Child Welfare, located at Qudsia Bagh, Yamuna Marg, Civil Lines, Delhi 110054, within four weeks from today and produce an acknowledgement for having paid the amount to the orphanage within one week thereafter. If the appellant fails to produce such acknowledgement, the order of conviction and sentence against the appellant 4 would revive and the Registrar (Judicial) shall take appropriate further action for the execution of such revival order. The appeal is allowed in the aforesaid terms.

**********

***12. Sections 2(f).2(s),17 &19 of the Protection of Women from Domestic Violence Act, 2005***

*Manmohan Attavar Vs. Neelam Manmohan Attavar*

***Rohinton Fali Nariman & Sanjay Kishan Kaul , JJ.***

*In the Supreme Court of India*

*Date of Judgment -14.07.2017*

***Issue***

***The matter of granting permission to share the house of the husband during the pendency of the proceeding under the 2005 Act.***

***Relevant Extract***

The appellant is 84 years old and the respondent is 62 years old. The respondent seeks to establish her status as the wife/companion of the appellant who has been left high and dry by the appellant while on the other hand the appellant categorically denies any such status.

The admitted facts are that the respondent was married to one Shri Harish Chander Chhabra. That marriage did not work out and ultimately a consent decree for divorce was obtained on 2 10.10.1996. Even in the interregnum period, the respondent claims to have developed a relationship with the appellant starting from their introduction in 1987.

It is her case that there was continuous interaction between the two and the appellant even proposed to her in December 1993. The appellant earned a National Award on 16.10.1996. The respondent also claims to have been requested to travel with the appellant to Bangalore on 30.10.1996. The appellant's wife was alive when the respondent claims that the appellant took her to No.38/1, Jayanagar, Bengaluru and that the appellant's wife was apparently also aware of the relationship between the two parties.

The respondent claims that she resigned from the job with ICAR at the behest of the appellant. On 10.1.1998, the respondent claims that the appellant applied "kumkum" to her forehead and soon thereafter he was conferred with the Padma Shri Award and the respondent accompanied the appellant for the felicitation ceremony on 21.3.1998.

It is the respondent's claim that from 2002-2008 the respondent was made to stay in different residences hired by the appellant. But apparently the relationship soured. The endeavors for reconciliation, however, did not succeed. The wife of the appellant was incidentally alive at that time and she passed away 3 on 22.2.2010. The endeavor, prior to this, by the respondent seeking remedy for what she claims to be her neglect, through the Women and Child Welfare Department of State of Karnataka, also did not succeed.

The respondent claims to have made various efforts by approaching authorities and high dignitaries apart from police authorities but to no avail.

The respondent initiated proceedings under Section 12 of The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the D.V. Act') on 16.9.2013 being Criminal Misc. Petition No.179 of 2013. This case is stated to have been re-numbered as Crl. Misc. Application No.139 of 2015. The endeavor of the appellant seeking quashing of these proceedings before the High Court vide Criminal Writ Petition No.6126/2013 under Section 482 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Cr.P.C.) did not succeed and petition was dismissed on 2.1.2015.

The trial went on and at the request of the respondent made under Section 410 of the Cr.P.C., the application was transferred from the Court of the Metropolitan Magistrate-VI to the Court of Metropolitan Magistrate-II at Bangalore. This application was finally dismissed by the learned Metropolitan Magistrate on 30.7.2015.

The respondent, aggrieved by the said order, filed Criminal Appeal No.1070/2015 under Section 29 of the D.V. Act on 18.8.2015 which was assigned to the learned Addl. Sessions Judge presiding over Court 67. The interim relief prayed for in this petition was, however, rejected by the learned Addl. Sessions Judge on 5.11.2015.

It is in the aforesaid scenario that the respondent filed Writ petition No.49153 of 2016 under Articles 226 and 227 of the Constitution of India before the High Court of Karnataka praying 5 for the transfer of Criminal Appeal No.1070 of 2015 to the High Court itself on the ground that the order for rejection of the applications for additional evidence did not inspire faith.

Learned Single Judge of the High Court by an ex-parte order dated 19.9.2016, while issuing notice in the petition, stayed all further proceedings and permitted the respondent to occupy the premises No.38/1, 30th Cross, 3rd Main, 7th Block Jayanagar, Bengaluru, 560082 belonging to the appellant. This interim order is subject matter of challenge before us in SLP (C) No. 32783/2016 now numbered as Civil Appeal No.2500 of 2017.

On service being effected on the appellant, the writ petition was opposed along with the prayer for vacation of the ex-parte order. It is the case of the appellant that instead of deciding the Interlocutory Application, the appellant was compelled to pay a lump sum amount of Rs.30,000/- as a onetime payment. This order is stated to have been challenged in SLP No.33150 of 2016. In fact the declining of interim relief by the appellate court was not even specifically challenged before the High Court and yet the High

Court granted an ex parte order.

Learned Single Judge vide the subsequent order dated 24.10.2016 sought to withdraw the appeal proceedings from the learned Addl. Sessions Judge to the High Court itself and this 6 order has been assailed in SLP No.32534/2016 now numbered as Civil Appeal No.2502 of 2017.

We have heard the contentions of the learned senior counsel for the appellant and have also heard the respondent appearing in person, quite elaborately. Written submissions were filed both by the appellant and by the respondent. We have noticed that a large part of the submissions of the respondent relate to the merits of the claim as to why the learned Metropolitan Magistrate fell into error while dismissing the application filed by the respondent on 30.7.2015 under Section 12 of the D.V. Act.

We may note at this stage itself that it would neither be advisable nor proper to dwell into the controversy on merits because the appeal filed by the respondent is yet to be decided. Any observations by us at this stage could affect either of the parties in the appeal proceedings. The controversy before us is in a very narrow compass. We thus set forth the controversy -

(i) Whether an interim order could have been passed on 19.9.2016 permitting the respondent to occupy the premises of the appellant;

(ii) Whether the learned Single Judge was right in withdrawing the proceedings pending before the learned Addl. Sessions Judge to the High Court vide the impugned order dated 7 24.10.2016.

Insofar as the first question is concerned, reliance has been placed by the respondent on the provisions of the D.V. Act and the desirability to construe the provisions liberally in favour of women seeking relief, as it is in the nature of a social legislation meant for protection of women's rights. In order to appreciate the controversy, we reproduce the relevant provisions as under:-

"17. Right to reside in a shared household.-

(1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law. .....

19. Residence orders.-

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in 8 which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman. ....."

A reading of the aforesaid provisions show that it creates an entitlement in favour of the woman of the right of residence under the "shared household" irrespective of her having any legal interests in the same. The direction, inter alia, can include an order restraining dispossession or a direction to remove himself on being satisfied that domestic violence had taken place.

The factual matrix of the present case is such that one would have to look to the definition clauses relevant for the determination of the controversy contained in Section 2 as under: "2(f) "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;

9 ..... 2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right,

title or interest in the shared household. ....."

The facts of the present case are that the respondent has never stayed with the appellant in the premises in which she has been directed to be inducted. This is an admitted position even in answer to a court query by the respondent during the course of hearing. The "domestic relationship" as defined under Section 2 (f) of the D.V. Act refers to two persons who have lived together in a "shared household". A "shared household" has been defined under Section 2(s) of the D.V. Act. In order for the respondent to succeed, it was necessary that the two parties had lived in a domestic relationship in the household.

However, the parties have never lived together in the property in question. It is not as if the respondent has been subsequently excluded from the 10 enjoyment of the property or thrown out by the appellant in an alleged relationship which goes back 20 years. They fell apart even as per the respondent more than 7 years ago. We may also note that till 22.2.2010 even the wife of the appellant was alive. We may note for the purpose of record that as per the appellant, he is a Christian and thus there could be no question of visiting any temple and marrying the respondent by applying "kumkum", and that too when the wife of the appellant was alive.

We are thus unequivocally of the view that the nature of the ex-parte order passed on 19.9.2016 permitting the respondent to occupy the premises of the appellant cannot be sustained and has to be set aside and consequently Civil Appeal No.2500 of 2017 is liable to be allowed.

Now turning to the second controversy, a perusal of the impugned order shows that the learned Single Judge found the remedy sought for by the respondent to be "misconceived". However, the learned Judge found it appropriate to treat the petition as one under Section 407 of the Cr.P.C. The learned Single Judge has expressed the view that the appellate court ought to have called upon the respondent to argue the appeal rather than spend time on interim reliefs, which was not maintainable in the face of the earlier order resulting in a predictable order.

We fail to appreciate the aforesaid observations when the respondent herself sought once again to press for interim relief and applications to adduce additional evidence. Learned ASJ can hardly be faulted on this account. The learned Single Judge has also given latitude to the respondent on account of her appearing in person whereby she may not have documented the bits and pieces of her past with the intention of initiating the proceedings which she was pursuing. In the conspectus of the same, the appeal has been withdrawn to the High Court itself.

The grievance of the appellant against this order is that the valuable rights of the appellant of an additional forum to ventilate his grievance would be lost as against any decision in appeal. A remedy of revision under Section 327 of the Cr.P.C. would be available or a writ petition under Article 227 of the Constitution of India. In this behalf reliance has been placed on what is claimed to be a settled legal position, more particularly, the Constitutional Bench

Judgment of 7 Judges of this Court in A.R.Antulay vs. Ram Naik 1.

It is also the contention of the appellant that such transfer cannot take place at the whims and fancy of the respondent. The respondent, whenever she fails to obtain a favourable order, chooses to file proceedings for transfer whether it be before the 1 (1988) 2 SCC 602 12 MM or before the appellate court. It is submitted that this approach ought not to be encouraged.

On examination of the issue, we tend to agree with the submission of the learned senior counsel for the appellant that there was no reason for the proceedings to be withdrawn from the appellate court to the High Court itself. There is not only absence of the reason for the same but it would also result in the deprivation of valuable rights of the appellant against the order of an appellate authority and thus an additional forum for scrutiny was being negated.

We are unable to agree with the reasoning of the learned Single Judge nor can we fault the appellate authority on any account which could have necessitated such withdrawal of the proceedings to the High Court.

We may also note the concession made by the learned senior counsel for the appellant in court that in the scenario the matter can be entrusted to any ASJ in Bangalore as there are a large number of the same holding court.

We thus set aside even the order dated 24.10.2016 and allow Civil Appeal No.2502/2017. We request the learned Chief Justice of the High Court on the administrative side to nominate any of the ASJs in Bangalore to hear the appeal of the respondent and the appellate authority shall endeavor to 13 conclude the proceedings as expeditiously as possible.

The appeals are accordingly allowed leaving the parties to bear their own costs with the hope that there would be an early end to this contentious dispute between the two parties.

**********

***13. Sections 7 and 13(2) of the Prevention of Corruption Act, 1988***
*Mukhtiar Singh (since deceased) through his L.R. Vs. State of Punjab*
***Arun Mishra & Amitava Roy, JJ.***
*In the Supreme Court of India*
*Date of Judgment -14.07.2017*

***Issue***

***Appellant convicted under section 7 and 13(2) of Prevention of Corruption Act 1988 and sentenced to 1 year rigorous imprisonment and fine Rs. 2000 from the offence under section 7 and 2 years and fine of Rs. 2000 for the offence under section 13(2) of the Act-Challenged.***

***Relevant Extract***

Leave granted.

The appellant, heir of Mukhtiar Singh (since deceased) has carried this appeal to this Court against the affirmation of his conviction under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 (for short, hereafter referred to as 'the Act'), recorded at the first instance by the learned Special Judge, S.A.S. Nagar (Mohali) in his judgment and order dated 04.09.2009. Thereby the predecessor of the present appellant had been, as a consequence of his conviction, sentenced to rigorous imprisonment for one year for the offence under Section 7 and to pay a fine of 2 Rs.2,000/- therefor and further sentenced to 2 years' rigorous imprisonment for the offence under Section 13(2) of the Act along with fine of Rs.2,000/- with related default sentence.

Though this verdict was challenged before the High Court by the original convict, he, during the pendency of the appeal expired, whereupon the present appellant got herself substituted with a bid to purge him of the stigma. She having failed in her endeavour as the appeal has been dismissed, seeks redress from this Court.

We have heard Mr. O.P. Bhadani, learned counsel for the appellant and Ms. Jaspreet Gogia, learned counsel for the respondent.

Sans the unnecessary details, the essence of the prosecution case is that the predecessor of the appellant, Mukhtiar Singh (also referred to hereinafter as original accused) while was serving as Station House Officer of Police Station, Ajnala was entrusted with the investigation of the case launched against Sarabjit Singh (complainant) by his (Sarabjit) wife under Sections

406,498A IPC.

It was alleged by the complainant-Sarabjit Singh that the original accused in order to favour him in the investigation demanded and received bribe of Rs. 3,000/- from him (Sarabjit) and in the process and at the fag-end of the probe, demanded a further amount of 3 Rs.2,000/- as illegal gratification to file a report of exoneration. That the original accused threatened to harass the complainant if he did not submit to his demand, was also imputed. At this, the complainant approached the DSP, Vigilance, FS-I Unit - 2 Punjab, Chandigarh and lodged a complaint disclosing the above facts.

The said officer after recording the statement of the complainant took preparatory steps to lay a trap to intercept the original accused and set up a trap team constituting amongst others of Inspector Satpal (PW2) and Aman Kumar (PW3). Currency notes furnished by the complainant amounting to Rs. 2,000/- were smeared with phenolphthalein powder and handed over to the complainant to be delivered to the original accused on demand. Inspector Satpal (PW2) was nominated as a shadow witness to accompany the complainant so as to be a witness to the possible transaction. Subsequent thereto, on the appointed day, the trap team visited the Ajnala Police Station, whereupon the complainant and the shadow witness met the original accused in his room. Thereafter the original accused having enquired as to whether money had been brought, the complainant handed over the prepared currency notes to the former, who kept it in a card board box placed on his table. The prosecution version is that on this, the 4 shadow witness signalled the other members of the trap team waiting outside, who thereafter entered the room, confronted the original accused with the demand and receipt of the currency notes whereupon, he took out the same from the card board box and handed over those to trap team. As the fingers of the original accused when dipped in the chemical compound prepared for the purpose indicated that he had handled the currency notes, the investigating party completed the formalities and after obtaining the report of the Forensic Science Laboratory, lodged the prosecution against the original accused on obtaining the necessary sanction therefor.

In support of the charge under Sections 7 and 13(2) of the Act laid by the prosecution, which the original accused denied, it examined several witnesses including the complainant Sarabjit Singh (PW1), the shadow witness Inspector Satpal (PW2), Aman Kumar (PW3) and Paramjit Singh Khaira (PW5). In course of his examination under Section 313 Cr.P.C., the original accused

denied the correctness of the incriminating evidence adduced by the prosecution and pleaded to be innocent.

He categorically denied to have either made any demand for illegal gratification or having received any bribe from the complainant and alleged that the 5 complainant was a relative of Superintendent of Police, Mukhwinder Singh Cheena, who constantly pressurised him (original accused) not to file charge-sheet in the case lodged against the complainant and that as he (original accused) did not succumb thereto, he was falsely implicated in the case through Sarabjit.

The original accused also examined Lakhwinder Singh as a defence witness to demonstrate that the prosecution case of demand and recovery through a trap drill was a myth and that instead on the basis of the stratagem between Sarabjit and Superintendent of Police, Mukhwinder Singh Cheena, he was forcibly lifted from outside the Ajnala Police Station and embroiled by fabricating records.

The Trial Court however on the basis of the evidence on record held the charge against the original accused to be proved and as referred to hereinabove, the High Court by the impugned order, has sustained the conviction and sentence so recorded by it.

As the impugned judgment would reveal, the High Court while noting that the original accused at the relevant time was in-charge of the investigation of the case under Sections 406,498A IPC initiated by the wife of the complainant against him, proceeded on the pre-supposition that as both the original accused and the complainant belonged to the police force, there was a remote 6 possibility of a false complaint being lodged. It held that the demand of Rs. 2,000/- and the receipt thereof had been established by the prosecution and there was no reason for the prosecution or its witnesses to lie against the original accused.

The High Court however recorded that there was no direct demand of illegal gratification by the original accused from the complainant in the presence of the shadow witness at the police station, but the query made by him (original accused) of the money being brought or not did amount to such demand. In addition, the receipt of the currency notes of Rs. 2,000/- which was recovered by the trap team, did substantiate the accusation of demand as well. The High Court held the view that the imputation of false implication at the

instance of the Superintendent of Police, Mukhwinder Singh Cheena, as made by the original accused in his 313 Cr.P.C. statement, in absence of any evidence, did not merit acceptance. To reiterate, the High Court thus affirmed conviction and sentence awarded by the Trial Court.

The learned Counsel for the appellant has strenuously urged that the evidence on record is visibly deficient to prove the demand, receipt and recovery of any amount of illegal gratification as alleged and thus as the indispensable ingredients of the offence with which the original accused had been charged, have remained unproved, 7 the conviction and sentence is patently untenable and if allowed to stand would result in gross travesty of justice.

Without in any manner conceding to the charge of receipt or recovery of the amount of Rs.2,000/- as per the prosecution case, it has been alleged that in absence of any proof of demand therefor, the same is wholly inconsequential qua the prescriptions of Sections 7 and 13 of the Act. The prosecution having failed to establish any demand for bribe as alleged, no presumption under Section 20 of the Act is also available to further the charge, he urged. To buttress these pleas, reliance has been placed on the decision of this Court in P. Satyanarayana Murthy vs. District Inspector of Police, State of Andhra Pradesh and Another.

As against this, the learned Counsel for the respondent has submitted that the evidence adduced by the prosecution is cogent and convincing and in the face of the concurrent findings of the two two courts below holding that the charge against the original accused had been established, no interference is warranted. She has further asserted that not only the essential ingredients of the offence under Sections 7, 13(2) of the Act have been amply proved by the prosecution, the view taken by the Trial Court and affirmed by the High Court finds endorsement in the pronouncements of this 1 (2015) 10 SCC 152 8 Court in Somabhai Gopalbhai Patel vs. State of Gujarat2 and Mukhtiar Singh vs. State of Punjab3.

The contrasting arguments and the evidence on record to the extent essential and relevant have been analysed.

It is in the above adumbrated legal enjoinment, that the evidence on record has to be scrutinised. Having regard to the gravamen of the charge and the imperatives of demand of illegal gratification, the receipt and recovery

thereof, the evidence on record relatable thereto only need be noticed.

Sarabjit Singh (PW1), the complainant stated that on 01.06.2005, he was posted with Traffic Police at Moga and that at the instance of his wife, a case under Section 498A IPC had been registered against him in Ajnala Police Station. He stated that the original accused, who was a sub-inspector of Ajnala Police Station was conducting the investigation of the case, agreed to allow him to 12 participate in the investigation on payment of Rs. 3,000/-, which was accordingly paid.

The witness alleged that the original accused made a further demand of Rs.3,000/-, whereafter negotiation was scaled down to Rs.2,000/-, so as to favour the complainant in the case, with the threat that if the demand was not met, he would see that he is harassed in connection therewith. According to this witness, he being disinclined to advance further illegal gratification, lodged a complaint with DSP Paramjit Singh Khaira, who recorded his statement and requisitioned from him currency notes of Rs. 2,000/- comprised of three notes of Rs.500 and five notes of Rs.100 each, treated those with phenolphthalein powder and constituted a trap team with Inspector Satpal as shadow witness and Aman Kumar Mani and Shashi Kant.

The witness further stated that the police party thereafter visited Ajnala Police Station and he and Inspector Satpal met the original accused in his room and on being asked as to whether the money had been brought or not, he handed over Rs.2,000/- as prepared to the original accused, who received the same and after counting the money kept in a card board box. At this, the shadow witness signalled the waiting members of the raiding party along with the DSP Paramjit Singh Khaira, who entered the room, intercepted the original accused and recovered 13 the currency notes on being handed over by him on demand. The witness also stated about the exercise undertaken by dipping the hands of the original accused in the liquid compound prepared, which turned pink to indicate that he had handled the currency notes treated with phenolphthalein. The witness also proved the currency notes as Ex. P1 to P8.

In his cross-examination, the complainant admitted that M.S. Cheena, the then Superintendent of Police, Vigilance was posted as S.S.P, Moga but denied that he was related to him. He could not recall the date on which he had paid Rs.3,000/- for the first time to the original accused and admitted of not

having made any complaint in connection therewith.

He conceded that one Santosh Singh Lamberdar of his village was with him when he paid this amount but the said person had not been produced as a witness either in the investigation or at the trial. He admitted as well that the card board box containing the money was not seized. He however denied the suggestion that he had been pressurising the original accused to conclude the investigation in his favour and that he had implicated him falsely. He also denied the suggestion that there was neither any demand for illegal gratification by the accused nor was any sum as alleged accepted by or recovered from 14 him.

Inspector Satpal (PW2), who was the shadow witness, after reiterating the statement of the complainant with regard to the pre-trap proceedings, stated that he along with the complainant on that day met the original accused and followed to his quarter in the building of the police station whereafter the original accused enquired of the complainant as to whether he had brought the money, on which, the latter handed over three currency notes denomination of Rs.500 and five currency notes of Rs.100 each to him and that he kept the same in a card board box lying near him. The witness stated that he then gave a signal to the other members of the raiding party including the D.S.P. (Vigilance) who entered the room and undertook the steps pertaining to recovery and seizure as narrated by the complainant.

In cross-examination, this witness did not refer to the quarter of the original accused in the building of the police station and stated that both he and the complainant met him in his room in the police station. He however confirmed that the card board box was lying on the table of the accused which was not seized by the police. He denied the suggestion that he was not a member of the raiding party and that he had signed the memo while sitting in his office.

Aman Kumar Mani (PW3) is a witness to the steps taken by the raiding party after it had entered the room in response to the signal given by the shadow witness. According to him, on being enquired, the original accused took out the currency notes of Rs.2,000/- from the box lying in his room and that the same tallied with those set out in the memo prepared by the police. He proved as well the currency notes as Ex.P1 to P8.

Superintendent of Police, Paramjit Singh Khaira (PW5), deposed that he was posted as DSP (Vigilance) FS-I, Unit-2, Punjab, Chandigarh on 01.06.2005. He stated that on that day, he recorded the statement of the complainant pertaining to the demand of illegal gratification made by the original accused. He thereafter constituted a trap team as above and treated currency notes totalling Rs.2,000/- for the exercise and led the party to the Ajnala Police Station. The witness affirmed that Inspector Satpal was nominated as the shadow witness to accompany the complainant to witness the actual transaction and track the accompanying conversation and to give signal to the trap team at the appropriate point of time.

This witness however stated in categorical terms that the complainant and the shadow witness went to the house of the original accused whereas the other 16 members of the trap team waited outside and when Inspector Satpal flagged his signal, the house of the accused situated near Ajnala Police Station was raided. He stated that the police party intercepted the accused and on being asked, he took out the currency notes of Rs.2,000/- from the card board box placed on the nearby table which tallied with those mentioned in the pre-trap, prepared memo and seized the currency notes. That the fingers of the original accused were dipped in the liquid compound, which turned pink was also stated.

In cross-examination, this witness admitted that Mr. Mukhwinder Singh Cheena was at the relevant time posted as Superintendent of Police, Mohali and that he was his in-charge, then. To the suggestions made, the witness stated that he had no knowledge that the complainant was related to Mukhwinder Singh Cheena and that the latter had been pressurising the original accused not to pursue the case against the complainant. He also denied the suggestion that the Mr. Cheena was the brain behind the raid and the registration of the case against the original accused.

It would thus be patent from the materials on record that the evidence with regard to the demand of illegal gratification either of 17 Rs.3,000/- which had been paid or of Rs.2,000/- as made on the day of trap operation is wholly inadequate to comply with the pre-requisites to constitute the ingredients of the offence with which the original accused had been charged. Not only the date or time of first demand/payment is not forthcoming and the allegation to that effect is rather omnibus, vague and sweeping, even the person in whose

presence Rs.3,000/- at the first instance is alleged to have been paid i.e. Santosh Singh Lamberdar, has neither been produced in the investigation nor at the trial. In other words, the bald allegation of the complainant with regard to the demand and payment of Rs.3,000/- as well as the demand of Rs.2,000/- has remained uncorroborated.

Further to reiterate, his statement to this effect lacks in material facts and particulars and per se cannot form the foundation of a decisive conclusion that such demand in fact had been made by the original accused. Viewed in this perspective, the statement of complainant and the Inspector Satpal, the shadow witness in isolation that the original accused had enquired as to whether money had been brought or not, can by no means constitute demand as enjoined in law as an ingredient of the offence levelled against the original accused. Such a stray query ipso facto in absence of any other cogent and persuasive evidence on record 18 cannot amount to a demand to be a constituent of the offence under Section 7 or 13 of the Act.

In addition thereto, not only the prosecution version of demand and acceptance of illegal gratification in the police station seems to be unusual, contradictions of the witnesses, PW-1, PW-2 and PW-5 with regard to the location of the transaction relating to Rs.2,000/- also renders it doubtful. It is also noticeably unusual that the currency notes when allegedly handed over by the complainant to the original accused, the same instead of being keenly kept with him, were placed casually in the card board box placed on his table.

Though the original accused, apart from imputing his false implication at the instance of Superintendent of Police Cheena, said to be the relative of the complainant could not adduce any evidence to consolidate the same, the fact remains that this officer at the relevant point of time was indeed Superintendent of Police at Mohali and was the superior of PW5 who led the trap operation.

On an overall appreciation of evidence on record, in the context of the elucidation of law pertaining to proof of the ingredients of Sections 7 and 13 of the Act as adverted to herein-above, we are of the unhesitant opinion that the prosecution 19 has failed to prove the charge levelled against the original accused beyond all reasonable doubt. The charge against him therefore fails. The Trial Court as well as the High Court had failed to analyse the factual and legal aspects as involved in their true perspectives and resultantly the determinations made are not sustainable. The impugned judgment and order of the High Court affirming the conviction and sentence recorded by the Trial Court is set aside. The appeal is allowed.

**********

***14. Sections 23(1),24(1) & 55(c) of Orissa Tenancy Act 1919***
***State of Orissa and another Versus Purusottam Barik and others***
***Dr. A. K. Rath, J.***

*In the High Court of Orissa: Cuttack*
*Date of Judgment:10.7.2017*

***Issue***

***In the matter of acquiring occupancy right over the suit land***.

Defendant nos. 1 and 2 are the appellants against a confirming judgment.

Respondent no.1 as plaintiff instituted O.S.No.42 of 1982-I in the court of the learned Addl. Munsif, Balasore for declaration of occupancy right, confirmation of possession and permanent injunction impleading the appellants and respondents 2 and 3 as defendants. The case of the plaintiff is that the suit schedule land was recorded in the name of Kumar Udayanath Birbar in C.S. R.O.R. He was the proprietor of the estate. Jumina Bibi and others were the intermediary of the holding having Bajyapti Madhya Satwadhikary interest over the land. The intermediary abandoned the possession of the suit land just after the C.S. operation was over. Thereafter the proprietor took over the possession of the land in question. The kissam of the land was recorded as Puruna Padia, but in the column meant for recording the name of tenants, the same was recorded as canal, which was obviously a mistake. Though, in fact, there was a canal in the early part of 20th century, but aportion towards south of river Budha Balanga lying unused for more than fifty years. The same was neither used for irrigation nor for navigation purposes. The settlement authorities have mentioned the category of the land as Puruna Padia and recorded it under Bajyapti Madhya Satwadhikari status. While the proprietor was in possession of the land, the plaintiff wanted to cultivate the same in question, whereafter the proprietor permitted him to reclaim the land in the year 1940. The father of the plaintiff was looking after the property of the proprietor for which the proprietor allowed his father to cultivate the land without taking any salami and rent. Before vesting of the estate, his father expired when he was young. His mother cultivated the land through labourers. While the matter stood thus, the Tahasildar, Balasore, defendant no.2 issued public notice to put the land into auction in the year 1968. The plaintiff came forward with a claim for settlement of the land. The defendant no.2 granted temporary lease in his favour in the year 1968 and, thereafter, renewed the lease till 1981. In the year 1982, defendant no.2 issued a notification to put the land into auction. He is a resident of suit mouza. He stacked claim before defendant no.2 to settle the land in his favour as he has acquired right of occupancy over the said land. The prayer was rejected by defendant no.2 on the

ground that he was not eligible for settlement. Thereafter defendant no.2 put the land into auction and leased out the same in favour of defendants 3 and 4. His father and thereafter the plaintiff is in possession of the land since 1940 openly, peacefully and uninterruptedly and, as such, he has acquired right, title and interest over the same. He is a settled raiyat of mouza Tundara. He is cultivating the land as tenant under the Government. Although he had taken lease from year to year and the Revenue Officer, Balasore leased out the same either on selection basis or on auction basis annually, the character of the land being the occupancy holding, the act of the Government in leasing out annually under misconception and the act of the plaintiff in taking it lease cannot not operate as an estoppel. The defendants 3 and 4, who were the purchasers in auction sale dated 24.7.1981, tried to take forcible possession of the disputed land. With this factual scenario, he instituted the suit after issuing notice under Section 80 of C.P.C.

The defendants 1 and 2 filed a comprehensive written statement denying the assertions made in the plaint. The case of the defendants 1 and 2 is that kissam of the land recorded in C.S.Khatian is canal. The land was under the management of P.W.D. The same was actually utilized for maintenance of canal for navigation purpose till middle part of 20th century. It is a Government land. The same is in possession of the Government as Coast Canal Nayanjori. Neither Kumar Udayanath Birabar nor Jumina Bibi had any right, title and interest over the suit land. The reclamation and possession of the suit land by the plaintiff's father has been denied. The specific case of the defendants 1 and 2 is that the land was not in possession of the plaintiff's father nor the plaintiff prior to 1968-69. The suit land was leased out to the plaintiff in the year 1968-69 on annual auction sale basis as highest bidder. The coast canal was under the direct control and management of the Power & Irrigation Department. The suit land was recorded under Bharat Samrat as Proprietor in First Part Khewat-6. To gear up the "grow more food programme" all the surplus land of the Government (including the land found surplus for the time being) were brought into cultivation by granting annual lease to the intending cultivators of the locality. The suit land including other lands of Power and Irrigation Department were leased out by the respective Department. For better management of the surplus land of other Department including the suit land of Power and Irrigation Department were temporarily relinquished to the Revenue Department during the year 1962-63. As per the Government Orders contended in Revenue Departments G.O.No.30115-R dated 21.5.1966, the suit land was leased out to the plaintiff through auction sale for the year 1968-69 at Rs.25/-. Since then lease of the auction holder was renewed on his application form year to year and

payment of premium equal to ten times of annual rent prevailing the vicinity in execution of the annual agreement. There was no intention of conferring occupancy right on the lessee nor any other right except to cultivate it annually on payment of lease money. The lease could have been revoked at any time in violation of the terms of lease agreement signed from year to year. Right of occupancy will not accrue in respect of the suit land under Section 55 (C) of the Orissa Tenancy Act, 1913.

The defendants 3 and 4 have filed written statement contending inter alia that the plaintiff was in occupation of the land and used to raise paddy crops. They took part in the auction. The plaintiff did not handover possession of the suit land. Thereafter they requested the defendant no.2 to hand over the possession of the land. Defendant no.2 kept quite.

On the inter se pleadings of the parties, the learned trial court struck eleven issues. To substantiate the case, the plaintiff had examined three witnesses and on his behalf, nine documents had been exhibited. The defendants had examined one witness and on their behalf, twenty one documents had been exhibited. The learned trial court came to hold that Kumar Udayanath Birabar was the proprietor of the suit land. Lease was granted to the plaintiff in the year 1968-69 on annual lease basis. The same was renewed from time to time till 1981. The plaintiff was a lessee under the Government from the year 1968 to 1981. It further held that the plaintiff was not in possession of the suit land from 1940. Notwithstanding bar contained in Section 55(C) of the Orissa Tenancy Act, the plaintiff acquired occupancy right over the land. Held so, it decreed the suit. The defendants 1 and 2 unsuccessfully challenged the said judgment and decree before the learned District Judge, Balasore, which was subsequently transferred to the court of the learned Additional District Judge, Balasore and renumbered as M.A.No.6/40 of 1990/87-I. The same was eventually dismissed.

The Second Appeal was admitted on the substantial question of law enumerated in ground no.4 of the memorandum of appeal. The same are:
"A) Whether in view of the findings that the respondent no.1 was a lessee from year to year since 1968, he has acquired occupancy right over the suit land.
B) Whether Section 23 of the Orissa Tenancy Act, 1913 is applicable to the instant case ?
C) Whether Section 55(c) of the Orissa Tenancy Act is a bar to institution of the suit ?

D) Whether in view of Section 2(c) of the Orissa Act 10 of 1951, the respondent no.1 can be said to have acquired occupancy right over the suit land ?"

In course of hearing, the following substantial question of law was formulated.

"1. Whether the judgment of the learned appellate court is sustainable in law when the specific case of the plaintiff was that he took possession of the suit schedule land in the year 1940, when he was born in the year, 1941 ?"

Heard Mr.Swayambhu Mishra, learned Additional Standing Counsel for the appellants and Mr.N.C.Mohanty, learned counsel for respondent no.1 as well as Mr.Debasis Pattnaik, learned counsel for respondent nos.2 and 3.

Learned Additional Standing Counsel for the appellants submitted that the suit land belongs to the Government. The same was put to auction annually. In the year 1968-69 the plaintiff participated in the auction. He was the highest bidder. Lease was executed in his favour on payment of salami. The lease was renewed from year to year on the application filed by the plaintiff till 1981. The plaintiff had taken a prevaricating stand. According to him, he approached the proprietor to cultivate the land in the year 1940. The proprietor permitted him to reclaim the land as the suit was instituted in the year 1982. The plaintiff was forty years at the time of institution of the suit. Thus he was born in the year 1941. He advanced claim that he was the proprietor in the year 1940. He further submitted that the plaintiff is not an occupancy raiyat. The suit is thoroughly misconceived.

Per contra, Mr.Mohanty, learned counsel for respondent 1 submitted that father of the plaintiff approached the proprietor to cultivate the land. The land was lying fallow. The proprietor accorded permission. His father reclaimed the suit land. He was in possession of the same. Before estate vested in the State, he expired. Thereafter the mother of the plaintiff and thereafter the plaintiff are in possession of the suit land. Since the suit land was put to auction, the plaintiff had no option to participate in the same. The plaintiff is in possession of the suit land since the time of his father. He has acquired occupancy raiyat over the same, since he is a settled raiyat of the village. Both the courts below concurrently held that the plaintiff has acquired occupancy right. There is no perversity in the findings of the courts below.

Mr.Pattnaik, learned counsel for respondents 2 and 3 submitted that defendant nos.3 and 4 had participated in the auction in the year 1981-82. They were the highest bidder, but possession of the land was not delivered to them.

The word 'raiyat' has been defined in Sec. 5(2) of Orissa Tenancy Act. It means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest or persons who have acquired such a right. Sec. 23 (1) of the Act provides that every person who, for a period of twelve years whether wholly or partly before or after the commencement of Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village. Sec. 24 (1) postulates that every person who is a settled raiyat of a village within the meaning of Sec. 23 of the Act shall have a right of occupancy in all land for the time being held by him as a raiyat in that village.

Admittedly, the land belongs to the Government. The same was put to auction in the year 1968-69. The plaintiff participated in the same. He was the highest bidder. The land was leased out annually. On the application filed by the plaintiff, the lease was renewed from time to time till 1981. The plaintiff is a lessee. The lessee by no stretch of imagination can be said to be occupancy raiyat. The suit is thoroughly misconceived. Both the courts below abruptly came to a conclusion that the plaintiff is an occupancy raiyat. Though, on a threadbare analysis of the evidence on record and pleadings, the courts below came to hold that the plaintiff was a lessee from 1968 to 1981, but abruptly came to a conclusion that he was occupancy raiyat. The findings of the courts below are perverse.

Section 55 (C) of the Orissa Tenancy Act provides as follows:

"55. Bar to acquisition of right of occupancy in and to application of Chapter VI to, proprietor's private lands and certain other lands.

xxx xxx xxx

(c) land recorded or demarcated as belonging to the Government or to any Local Authority which is used for any public work, such as a road, canal or embankment, or is required for the repair or maintenance of the same, while such land continues to be so used or required."

Section 55 (C) of the Orissa Tenancy Act is a bar to institute the suit in respect of land belonging to the Government or any local authority which is used for any public work mentioned in the section. The land was recorded in the name of the Government in C.S. R.O.R. It's kissam is "Canal". Thus, suit for declaration of occupancy raiyat is a bar.

In paragraph-5 of the plaint, it is stated that the plaintiff had approached the ex-proprietor in the year 1940 to cultivate the land in question and the ex proprietor accorded permission. The suit was instituted in the year 1982. The plaintiff was 41 years at that time. Thus he was born in the year 1941. Thus the very foundation of the claim of the plaintiff is false. Evidence adduced by the plaintiff that his father approached the ex-proprietor in the year 1940 is beyond pleadings.

In the result, the plaintiff's suit must fail. The appeal is allowed, but in the circumstances of the case, the parties are to bear their own costs throughout.

**********