

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 51 of 2016

From judgment and order dated 29.07.2016 passed by the Sessions Judge -cum- Special Judge, Phulbani in G.R. Case No.12 of 2014/T.R. No.11 of 2014.

Kunjabihari Nayak

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Appellant

-Versus-

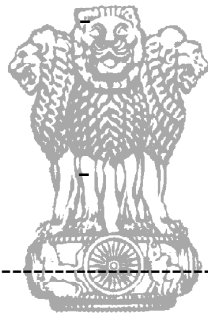
State of Odisha

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Respondent

For Appellant:

For Respondent:



Mr. Akhya Kumar Beura
(Amicus Curiae)

Mr. Manoranjan Mishra
Addl. Standing Counsel

P R E S E N T :

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 14.09.2022

S.K. SAHOO, J. The appellant Kunjabihari Nayak faced trial in the Court of learned Sessions Judge -cum- Special Judge, Phulbani in G.R. Case No.12 of 2014/T.R. No.11 of 2014 for commission of offences punishable under sections 376(2)(i)/354/506 of the Indian Penal

Code and sections 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO Act').

The learned trial Court vide impugned judgment and order dated 29.07.2016 found the appellant guilty under sections 376(2)(i)/354/506 of the Indian Penal Code and sections 6 and 8 of the POCSO Act and sentenced him to undergo R.I. for twelve years and to pay a fine of Rs.500/- (rupees five hundred), in default, to undergo further R.I. for one year for the offence under section 376(2)(i) of the Indian Penal Code, to undergo R.I. for three years and to pay a fine of Rs.500/- (rupees five hundred), in default, to undergo R.I. for three months for the offence under section 8 of the POCSO Act and R.I. for one year and to pay a fine of Rs.100/- (rupees one hundred), in default, to undergo further R.I. for three months for the offence under section 506 of the Indian Penal Code. No separate sentence was imposed for the offence under section 6 of the POCSO Act so also section 354 of the Indian Penal Code taking into account section 42 of the said Act and all the sentences were directed to run concurrently.

2. P.W.5 Manaranjan Panigrahi, Welfare Extension Officer (hereafter 'WEO') of G. Udayagiri Block lodged the first information report (Ext.6) before the Inspector-in-charge of G. Udayagiri police station on 26.02.2014 against the appellant indicating therein that

he came to know about the accusation leveled against the appellant who was a cook -cum- attendant in the Ladies' hostel of Lingagarh Primary School where the victims and other girls and boys belonging to Scheduled Caste and Scheduled Tribe Community were staying and prosecuting their studies from Class-I to Class-V. As per the direction of Block Development Officer, G. Udayagiri, P.W.5 visited the school on different dates and enquired about the incident from the girls students and during course of such inquiry, he came to know how the appellant was sexually harassing the victims. Twenty two boy students and eighteen girl students were staying in the hostel. The informant came to know from P.W.1 and P.W.2, the two victims as to how the appellant forcibly taking them to his room and committing the sexual crime and threatening them with dire consequences. The girl students staying in the hostel were in panic state due to the immoral conduct of the appellant.

On the basis of such first information report, G. Udayagiri P.S. Case No.29 dated 26.02.2014 was registered under sections 354 and 506 of the Indian Penal Code so also section 8 of the POCSO Act. P.W.8 Sukuma Hansda, S.I. of police attached to G. Udayagiri police station was directed by the Inspector-in-charge of G.Udayagiri police station to take up investigation of the case.

During course of investigation, P.W.8 examined the witnesses, visited the spot and prepared the spot map Ext.11. On 27.02.2014, he arrested the appellant from his village and sent him for medical examination to C.H.C., G. Udayagiri. On the next day, the victim was also sent for medical examination to M.K.C.G., Medical College and Hospital, Berhampur and after medical examination, the biological samples of the appellant were produced by the constable collected by the Medical Officer as per the seizure list Ext.14. The wearing apparels of the appellant were seized on his own production by the Investigating Officer as per seizure list Ext.15. The I.O. made a prayer to the learned Special Judge, Phulbani to record the statement of the victim under section 164 Cr.P.C. The Investigating Officer seized the biological samples of the victims as per the seizure list Ext.17 on being produced by the constable which were collected by the Medical Officer. The wearing apparels of the victims were also seized as per seizure list Exts.18 and 19 and intimation was sent to the learned Special Judge, Phulbani to convert the case to one under section 376 of the Indian Penal Code and section 6 of the POCSO Act on the basis of the statements of the victims and other materials. On 22.04.2014, the I.O. dispatched the seized exhibits to S.F.S.L., Rasulgarh, Bhubaneswar through S.D.J.M., Phulbani for chemical examination

and on completion of investigation, he submitted charge sheet under sections 376 and 506 of the Indian Penal Code read with section 6 of the POCSO Act against the appellant on 27.05.2014.

3. After submission of charge sheet, the learned trial Court framed charges against the appellant and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, in order to prove its case, the prosecution has examined as many as nine witnesses.

P.W.1 is the victim. She was student of Class-III and supported the prosecution case and stated as to how the appellant who was the cook -cum- attendant of the school committed the indecent acts with her on several times and it was prior to Saraswati Puja which fell on 04.02.2014. She specifically stated that after commission of sexual assault, the appellant threatened her to kill, if she would disclose the incident before anybody.

P.W.2 is another victim, who was a student of Class-V and stated about commission of rape on her by the appellant on Saraswati Puja day (04.02.2004) by undressing her.

P.W.3 Archana Pradhan was a student of Class-III at the time of occurrence and she stated to have heard about the incident from the victims i.e. P.W.1 and P.W.2.

P.W. 4 Supriya Digal is a student of Class-V who was the classmate of P.W.2 (victim) in Lingagarh School and she stated that the alleged incident occurred in the month of February 2014 and during the relevant period, she was prosecuting her studies in Class-V staying in the hostel of the school and the appellant was the cook of their hostel and both P.W.1 and P.W.2 told her that the appellant was putting out the lamp of the hostel room and undressing them and was touching their chests and she was inserting his penis into the vagina of the victims.

P.W.5 Manaranjan Panigrahi who was working as WEO, G. Udayagiri Block is the informant in the case. He stated that on 17.02.2014 at about 4.00 p.m., he had gone to Lingagarh School for official visit. During his visit, the Headmistress of the school orally reported the incident before him that the appellant was harassing the girl inmates of the hostel of the school and he issued a letter to the Headmistress of the school to lodge a written report regarding the matter. Accordingly, the school lodged a written report concerning this matter to the B.D.O., G. Udayagiri who in turn directed him to enquire into the matter.

P.W.6 Miss Pramila Pradhan, who was working as Headmistress of Lingagarh Primary School and she stated that the victims made a complaint against the appellant who was the cook in

the school's hostel. Having heard the complaint from the victims, she reported the matter to WEO. On being heard the incident, WEO communicated the alleged incident to B.D.O., G. Udayagiri and the B.D.O. directed her to submit a written report concerning the occurrence. On dated 22.02.2014, he submitted written report to B.D.O., G. Udayagiri in connection with the alleged incident.

P.W.7 Dr. Sudipa Das was working the Associate Professor of F.M. & T. Department of M.K.C.G. Medical College, Berhampur who examined the victim (P.W.2) on 28.02.2014 and proved his report marked as Ext.8.

P.W.8 Sukuma Hansda was the S.I. of Police, G. Udayagiri police station and he is the Investigating Officer of the case.

P.W.9 was a student of Class-V and she is another victim of this case and she stated that one day before Saraswati Puja of 2014, the appellant entered into the hostel room and bodily lifted her to his room, pressed her breast, undressed her shirt and chadi and inserted his finger into her vagina. She informed the matter to the Headmistress Pramila Pradhan (P.W.6) and police.

The prosecution exhibited twenty numbers of documents. Ext.1 is the 164 Cr.P.C. statement of the P.W.1, Ext.2 is the 164 Cr.P.C. statement of P.W.2 Ext.3 is the letter of the B.D.O.,

G. Udayagiri, Ext.4 is the statement of the victim, Ext.5 is the direction of DWO, Phulbani, Ext.6 is the first information report, Ext.7 is the letter no.325 dated 20.02.2014 of B.D.O., Ext.8 is the examination report of P.W.2, Ext.9 is the police requisition, Ext.10 is the medical examination report of P.W.1, Ext.11 is the spot map, Exts.12 and 13 are the command certificates, Exts.14, 15, 17, 18 and 19 are the seizure lists, Ext.16 is the prayer for recording of 164 Cr.P.C. statement and Ext.20 is the forwarding letter of S.D.J.M., Phulbani.

No witness was examined on behalf of the defence.

5. The learned trial Court after assessing the oral as well as documentary evidence on record formulated the following points for determination are:-

(i) Whether before 22.02.2014, in the night of Saraswati Puja inside the hostel of Lingada Primary School, the appellant assaulted by touching the chest of victim with intent to outrage their modesty?

(ii) Whether on the aforesaid date, time and place, the accused committed rape on the minor victims?

(iii) Whether on the aforesaid date, time and place, the appellant committed criminal intimidation to the victim to kill in life?

(iv) Whether on the aforesaid date, time and place, the appellant committed aggravated penetrative sexual assault on victims who are child?

(v) Whether on the aforesaid date, time and place, the appellant committed sexual assault on victim who are child?

6. The learned trial Court has been pleased to hold that the findings of the doctor relating to the age of the victims i.e., P.W.1 and P.W.2 can be considered a good piece of evidence because she was in a better position to form an opinion and the opinion was given entirely on physical findings, dental examination, secondary sexual characters and radiological findings and that the doctor's evidence is a legal proof of fact that the age of P.W.1 was in between ten years to twelve years as on the date of her examination and the age range of P.W.2 was ten plus minus one year on the date of her examination and accordingly it was held that both the victims were under the age of twelve years at the time of commission of offence. The learned trial Court further held that even if there has been delay in lodging the F.I.R., the same is self-explanatory and the case of the prosecution cannot be viewed in a doubtful eye. It was further held that the case record bristles with full of direct and corroborative evidence to discharge initial burden of the prosecution and therefore, a legal presumption under sections 29 and 30 of POCSO Act was pressed into service in this case and since no

evidence whatsoever was forthcoming either from the cross-examination or any other documentary evidence to overturn the presumption, the learned trial court held the appellant guilty under sections 376(2)(i)/354 of the Indian Penal Code read with sections 6 and 8 of POCSO Act.

7. Mr. Akhya Kumar Beura, learned amicus curiae appearing for the appellant contended that the evidence of the victim (P.W.1) does not get any support from the evidence of the doctor (P.W.7) and even though the act of rape was committed on the victims prior to Saraswati Puja in the year 2014 but the victims' conduct of reporting the matter at a belated stage to their Headmistress create doubt about the authenticity of their version. It is further argued that eighteen girl students were staying in one room of the Hostel and the statements of the victims that the appellant was coming to the said room and lifting them to his bed room and committing the sexual act and nobody could be aware about it appears to be an improbable feature. Learned counsel further submitted that the evidence on record indicates that the doors and windows of the hostel room was locked from inside and it is difficult to believe as to how the appellant could enter into the room to commit the crime.

Learned amicus curiae further argued that the school admission register was not produced to prove the age of the victims rather the prosecution relied upon the medical evidence to establish the age of the victims and the hostel Superintendent was not examined in the case. It is further submitted that P.W.9 was never sent for any medical examination and therefore, the prosecution case that she was subjected to sexual assault is a doubtful feature. It is further submitted that the investigation is perfunctory and when the F.I.R. was lodged after examining the victims by P.W.5 and a case under sections 354, 506 of the Indian Penal Code was registered, it appears that at a belated stage, the prosecution has concocted a case of rape on the victims and therefore, the prosecution case should be disbelieved and the appellant should be acquitted of all the charges.

Mr. Manoranjan Mishra, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that minor girls who were subjected to sexual harassment and rape, were threatened by the appellant, who was a cook -cum- attendant in the hostel, for which they could not dare to report the matter to their Headmistress or Hostel Superintendent at an earliest and subsequently when the matter came to light, an intimation was

given by the Headmistress to the informant (P.W.5) and he enquired into the matter, examined the victims and then the F.I.R. was lodged and therefore, it cannot be said that the prosecution has not satisfactorily explained the delay in disclosure of the victims about the occurrence so also the delay in lodging of the F.I.R. Learned counsel further submitted that all the three victims have stated their age to be in and around ten to twelve years at the time of occurrence which was not challenged by the defence in the cross-examination. The learned counsel further submits that even though the victim (P.W.9) has not been medically examined but the other two victims i.e., P.W.1 and P.W.2 were examined medically and the doctors have given some findings which goes in favour of the prosecution case regarding commission of rape. He argued that absence of other signs and symptoms of rape on the victims was an account of their delayed examination by the doctor which was around three weeks. Learned counsel for the State further submitted that the evidence on record indicates that there was an opening in the top of the door of the hostel room where the victims and other girl students were staying and there was only one hook for closing the door and therefore, it could have been very easier for the appellant to open the door through that gap to enter into the room. Learned counsel further submitted that since the minor girl students

were threatened who were staying in that hostel and the accused is none else than the cook -cum- attendant of the school, therefore, they were in a state of panic and belated disclosure in such a scenario, cannot be said to be fatal to the prosecution case. The learned counsel for the State further submitted that even though the School Admission Register has not been proved but since on the physical, dental and radiological examination of the victim, the opinion has been given by the doctor regarding the age of the victims and moreover, the victims have also stated about their age and the same has not been challenged, it can be said that the learned trial Court has rightly held that all the three victims were below the twelve years of age at the time of occurrence. It is further submitted that there is nothing to show that the investigation has been conducted in a perfunctory manner and the offence is heinous in nature and therefore, the learned trial Court has rightly convicted the appellant and sentenced him different punishment for different offences and as such the Jail Criminal Appeal should be dismissed.

8. Adverting to the contention of the learned counsel for the respective parties and to determine the age of the three victims i.e., P.W.1, P.W.2 and P.W.9 at the time of occurrence, it appears that P.W.1 has stated her age to be 12 years when she gave her evidence on 08.12.2014 and according to her, the incident took

place prior to last Saraswati Puja which fell on 04.02.2014. The victim was a student of Class-IV and not a single question has been put to the victim in the cross-examination disputing her age and therefore, the oral evidence of the victim relating to her age at the time of occurrence has remained unchallenged. P.W.2 is the next victim who also stated her age to be twelve years when she deposed in Court on 08.12.2014 and she also stated that the occurrence took place on the day of last Saraswati Puja during the day time which was on 04.12.2014. Like P.W.1, the learned defence counsel has not put any questions on the age of P.W.2 which has thus remained unchallenged. P.W.9 is the last victim who stated her age to be ten years on the date of deposition, which was recorded on 09.12.2015 and she also stated that the occurrence took place one day before Saraswati Puja of 2014 and there has been no challenge to the age of P.W.9 by the defence in the cross-examination. Thus, the oral evidence relating to the age of the three victims have not been challenged by the defence.

The doctor (P.W.7) who was Associate Professor, Department of F.M.T., M.K.C.G. Medical College and Hospital, Berhampur examined P.W.1 and opined taking into account her physical findings, dental examination, secondary sexual characters and radiological findings that her age was in between 10 to 12 years

on the date of her examination. So far as the victim (P.W.2) is concerned, the doctor has stated that the physical findings, dental examination, secondary sexual characters and radiological findings indicate her age to be 10 years (plus minus one year) on the date of her examination and not a single question has been put to the doctor that the finding of the age of the victims as has been given by her in her reports are not correct or that the victims were of higher age. Therefore, the oral evidence of the victims coupled with the medical examination report proved by P.W.7 indicates that the victims P.W.1 and P.W.2 were below twelve years at the time of occurrence. It is correct as contended by the learned amicus curiae that the prosecution has not sent P.W.9 for her medical examination to determine her age and other aspect but since the oral evidence relating to her age has remained unchallenged, I am of the humble view that merely because P.W.9 has not been examined by the doctor, the age of the victim (P.W.9) is not to be disbelieved that she was ten years of age at the time of occurrence. It is correct that in view of section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 so far as presumption and determination of the age of the child, the date of birth certificate from the school, or matriculation or equivalent certificate from the concerned examination Board, if available is to be given 1st preference and in

the absence thereof; the birth certificate given by a corporation or a municipal authority or a Panchayat is to be considered and only in absence of either of them, the age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the committee or the Board. It is not known as to why the Investigating Officer did not seize the School Admission Register to prove the age of the three victims but all the same, since the oral evidence as well as the medical evidence has proved the age of the three victims, I am of the humble view that the prosecution case relating to the age of the victims that they were below 12 years of age as on the date of occurrence, cannot be disbelieved merely on the ground of non-seizure/non-proving of the School Admission Register.

9. Coming to the delayed disclosure before Headmistress and delayed lodging of the first information report, it appears from the evidence of P.W.1 that the appellant committed the indecent act with her on several times and it was prior to Saraswati Puja which fell on 04.02.2014. P.W.1 has specifically stated that after commission of sexual assault, the appellant threatened her to kill, if she would disclose the incident before anybody. It cannot be lost sight of the fact that the appellant was none else than the cook-cum-attendant of the School and he was residing within the school

campus as stated by all the three victims. P.W.1 has further stated that she along with the other victims did not report the incident to Dilip Sir who was the Superintendent of the hostel since the appellant was threatening them. P.W.9 has stated that the appellant gave threat to P.W.2 to kill if she would disclose the incident before anybody. It further appears from the evidence of P.W.1 that the Headmistress was not residing within the school campus. P.W.1 further stated that the Dilip Sir was the Superintendent of the hostel at the material point of time, who was of course not examined in the case. The evidence of the Headmistress who was examined as P.W.6 indicates that the victims complained before her that they did not want to stay in the hostel of the school and that the appellant was entering inside their hostel room and bodily lifting the victims to some other place and committing sexual act with them and also threatening them to kill, if they would disclose the incident before anybody. She further stated that when she reported the matter to WEO, G. Udayagiri Block Manoranjan Panigrahi (P.W.5), on the direction of B.D.O., G. Udayagiri, she submitted a written report to him. P.W.5 has also stated that after getting the written report from P.W.6, he went to the school, enquired into the matter, examined the victims, recorded their statements and placed all the materials before the B.D.O., G. Udayagiri for further action and on the

direction of DWO, Phulbani, he lodged the F.I.R. on 26.02.2014. In the factual scenario and particularly, in view of the conduct of the appellant in giving threat to the victims, who are all minor girls, in my humble view, it cannot be said that the delay in reporting the matter to the Headmistress of the school so also the delay in lodging the F.I.R. has not been satisfactorily explained by the prosecution. Therefore, the contention raised on behalf of the learned amicus curiae that the prosecution case is doubtful on account of these two aspects is not acceptable.

10. The submission of learned amicus curiae regarding improbability feature in the case is the access of the appellant to the hostel room when the same was locked from inside.

It appears that P.W.1 has stated that the upper part of the door of the hostel room was broken and it was open since two years back. P.W.3 has stated that there is an open space near the door of their hostel room and one can easily open the hook of the door from the outside by way of the open space and there was no lock like wooden bar used for locking the door from inside of the door of their hostel room. P.W.9 has stated that the condition of the door of the hostel room was bad. The evidence of the I.O. (P.W.8) indicates that during the spot visit, he noticed a small gap near the

hook of the door frame and there was no other provision except hook of the door to close the door from inside.

From all these evidence, it would be apparent that there was an opening near hook of the door frame and one can easily open the hook inserting his hand by remaining outside and therefore, the access of the appellant to the spot room cannot be a doubtful feature.

11. Coming to the evidence of rape and sexual assault, it appears that P.W.1 has specifically stated that while she was staying in the hostel, the appellant used to come to the hostel room and putting out the lights of the hostel room and bodily lifting her to his bed room, undressing her shirt and pant and inserting his penis into her vagina and she stated that the appellant committed such indecent act on several times with her and the incident took place prior to Saraswati Puja. In the cross-examination, she has stated that eighteen girl students were residing in one room of the hostel and after taking dinner, they used to lock the door and windows of their hostel room from inside and sleep and they go to attend the call of nature jointly, but as has been already held that there was no difficulty on the part of the appellant to open the door by remaining outside through the gap on the upper part of the door and since the evidence of the victim (P.W.1) given in the chief-examination has

not been shaken in the cross-examination, I am of the humble view that the learned trial Court has rightly placed reliance on such evidence. The doctor (P.W.7) who has examined P.W.1 on 28.02.2014 has stated that an attempt towards penetrative/non-penetrative sexual intercourse cannot be completely ruled out and there were no injuries present either on her person or in and around her private parts. It cannot be lost sight of the fact that P.W.1 was examined by P.W.7 about three weeks after the incident and therefore, on the basis of the doctor's evidence, the evidence of P.W.1 cannot be discarded.

So far as P.W.2, the second victim is concerned, she has stated that on the day of last Saraswati Puja (04.02.2014), the appellant came by breaking open the door and bodily lifted her to his bed room and undressed her and opened her chadi and opened his dress also and then inserted his penis into her vagina and discharged the sperm on his bed. The victim further stated that nobody got up when the appellant lifted her. Nothing has been brought out in the cross-examination to doubt the veracity of this victim. Moreover, the evidence of the doctor (P.W.7) who examined her on 28.02.2014 indicates that there was recent signs of penetrative sexual intercourse and she found her fourchette was

bruised, contused and tenderness was positive and the hymenal tears were present at 3' & 8' O' clock position.

The last victim i.e., P.W.9 has stated that one day prior to Saraswati Puja, the appellant came to the hostel room, bodily lifted her to his room, pressed her breast in his hand, undressed her shirt and chadi and inserted his finger into her vagina. Nothing further has been elicited in the cross-examination to disbelieve the evidence of P.W.9.

Therefore, the evidence of the three victims is clear, cogent, trustworthy and reliable and the evidence of the doctor also lends support to the prosecution case. In view of the foregoing discussions, I am of the humble view that the prosecution has successfully established the charges under sections 376(2)(i)/354/506 of the Indian Penal Code so also sections 6 and 8 of the POCSO Act against the appellant. The sentence imposed by the learned trial Court on the appellant cannot be said to be on the higher side and the manner in which the crime has been committed is heinous and the appellant who was the cook -cum- attendant of the school and had easy access to the victims, exploited them sexually. Therefore, I find no infirmity or illegality in the impugned judgment which is accordingly upheld.

This case gives a sorry state of affairs about the maintenance and security of the Ladies' Hostels where minor girls belonging to Scheduled Caste and Scheduled Tribe Community were staying. Congested room, absence of proper security measures and poor maintenance of the hostel room came into fore while going through the case records and evidence of witnesses. It also appears that the Headmistress of the School and the Hostel Superintendent were not vigilant and acted like the 'blind vulture' for which protector turned perpetrator of the crime and acted like 'cunning cat' and spoiled the lives of the victims.

Though the learned trial Court recommended the case to the Secretary, D.L.S.A., Phulbani to pass compensation for rehabilitation of the victim, it is not known as to whether the three victims have received compensation or not. If the same has not been paid, in view of the enactment of the Odisha Victim Compensation Scheme, 2012 which was revised by Odisha Victim Compensation (Amendment) Scheme, 2018 and keeping in view the age of the victims at the time of occurrence and the nature and gravity of the offence committed and the family background, the District Legal Services Authority, Phulbani shall examine the case of the victims after conducting the necessary enquiry in accordance with law for grant of compensation under the aforesaid Scheme.

Let a copy of the judgment be sent to the District Legal Services Authority, Phulbani for compliance.

The JCRLA sans merit and hence stands rejected.

Trial Court's record with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Akhya Kumar Beura, the learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 14th September 2022/Pravakar