IN THE HIGH COURT OF ORISSA AT CUTTACK

<u>CRLA No. 574 of 2017,</u>
<u>CRLA No. 559 of 2022, &</u>
<u>CRLA No. 974 of 2022,</u>

Appeals under Section 13 of the Odisha Protection of Interests of Depositors (OPID) Act, 2011.

AFR **<u>CRLA No. 574 of 2017</u>**

Braja Kishore Sumanta Pattnaik ...... Appellant

-Versus-

State of Odisha & others ...... Respondents

<u>CRLA No. 559 of 2022</u>

M/s. Orissa Homes Pvt. Ltd.
& Others ...... Appellants

- Versus -

State of Odisha ...... Respondent

<u>CRLA No. 974 of 2022</u>

M/s. Sarala Realcon Pvt. Ltd.
& another ...... Appellants

-Versus-

State of Odisha & another ...... Respondents

Advocate(s) appeared in these case:-

For Appellants	:	M/s. Gouri Mohan Rath, S.S. Padhy & P. Mohanty, Advocates [In **CRLA No.574 of 2017**] Mr. Jagannath Patnaik Sr. Advocate along with M/s. A. Patnaik, S. Patnaik,

B.S. Rayaguru, S. Mohapatra, S.P.Moharana, R.K. Pati, S.S. Pradhan & S. Deepak, Advocates.
[In **CRLA No. 559 of 2022**]

Mr. Gautam Mishra, Sr. Advocate
Along with
M/s. Asutosh Mohanty, H.S. Muduli, S.J. Biswal & R. Ray, Advocates.
[In **CRLA No. 974 of 2022**]

For Respondents: Mr. Bibekananda Bhuyan, Special Counsel for OPID
(In all the cases)

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
23rd December, 2022

SASHIKANTA MISHRA, J.

The preliminary issue which arises for consideration in these appeals is as follows:

> Whether a Criminal Appeal or Civil Appeal would lie against an order of attachment passed by the Designated Court exercising power under Section 9 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (in short "OPID Act")?

2. Be it noted here that the appeals being listed for admission, this Court entertained doubt as regards the nomenclature, inasmuch as it was prima facie felt that a Civil Appeal would lie against the impugned order and not a Criminal Appeal. Accordingly, learned counsel appearing for the appellants as well as OPID in all these cases were requested to address the Court on the issue, pursuant to which they have made elaborate submissions.

3. This Court has heard Mr. Jagannath Patnaik, learned Senior Counsel along with Ms. S. Patnaik for the appellants in CRLA No.559 of 2022; Mr. Gautam Mishra, learned Senior Counsel along with Mr. A. Mishra for the appellants in CRLA No.974 of 2022; Mr. G.M. Rath, learned counsel appearing for the appellant in CRLA No. 574 of 2017 and Mr. Bibekananda Bhuyan, learned counsel appearing for the OPID in all the three appeals.

4. A brief reference to the relevant facts at the outset would be in order;

CRLA No.974 of 2022 has been filed challenging the order dated 14.10.2022 in I.A. No. 6 of 2016 passed by the learned Designated Court under the

OPID Act in making absolute the ad-interim order of attachment made by the Government vide Notification No.27966/F dated 19.10.2016 and the competent authority was directed to sell immovable properties, vehicles under attachment in public auction and on realization of the amount, the same along other movable property under attachment such as cash received from the possession of Gayadhar Jena (Appellant No. 2) and from the house at Brajarang Vihar along with cash in the frozen accounts under attachment shall be distributed among the depositors/intending buyers equitably.

In CRLA No. 574/2017, the appellant has challenged order dated 22.08.2017 passed by the learned Designated Court under the OPID Act in I.A. No. 6 of 2015 in making absolute the ad-interim order of attachment dated 12.08.2015 passed by the Government with direction to the competent authority to dispose the attached lands by public auction and take possession of the amounts attached in various banks for equitable distribution of the same amongst the depositors.

In CRLA No. 559 of 2022, the appellants have challenged the order dated 04.02.2022 passed by learned Designated Court under the OPID Act, Cuttack, in I.A. No. 3 of 2019 whereby the ad-interim order of attachment made by the Government vide Notification No. 39167 dated 15.12.2018 in respect of property as per Schedule A and B was made absolute and the Competent Authority was directed to sell the immovable property as per Schedule A in public auction and realise the amount of money kept in the frozen account and on realisation of the above amount both in respect of movable and immovable properties to distribute the same among the investors/depositors equitably.

5. Be it further noted that none of these appeals have been formally admitted. To decide the issue as has been noted at the beginning, it is necessary to refer to certain provisions of the OPID Act, at the outset, namely, Sections 3, 4, 6, 8, 9, 13 and 15, which are quoted hereunder:

> ***"3. Notwithstanding anything contained in any other law for the time being in force***,—
>
> *(i) where, upon complaints received from a number of depositors that any Financial Establishment defaults the*

return of deposits after maturity or fails to pay interest on deposit or fails to provide the service for which deposit has been made, or

(ii) where the Government have reason to believe that any Financial Establishment is acting in a calculated manner with an intention to defraud the depositors,

and if the Government are satisfied that such Financial Establishment is not likely to return the deposits or to make payment of interest or to provide the service, the Government may, in order to protect the interest of the depositors of such Financial Establishment, pass an ad-interim order attaching the money or other property alleged to have been procured either in the name of the Financial Establishment or in the name of any other person from and out of the deposits collected by the Financial Establishment, or if it transpires that such money or other property is not available for attachment or not sufficient for repayment of the deposits, such other property of the said Financial Establishment or the Promoter, Director, Partner or Manager or Member of the said Financial Establishment or a person who has borrowed money from the Financial Establishment to the extent of his default or such other properties of that person in whose name properties were purchased from and out of the deposits collected by the Financial Establishment, as the Government may think fit and transfer the control over the said money or property to the Competent Authority.

***4.** (1) The Government may, by notification, appoint a District Magistrate or an Additional District Magistrate for such area or areas or for such case or cases as may be specified in the notification as the Competent Authority to exercise control over the properties attached by the Government under section 3.*

(2) The Competent Authority shall have such other powers as may be necessary for carrying out the purpose of this Act.

(3) Upon receipt of the orders of the Government under section 3, the Competent Authority shall apply within thirty days to the Designated Court for making the ad-interim order of attachment absolute and for a direction to sell the property so

attached by public auction and realize the sale proceeds.

(4) An application under sub-section (3) shall be accompanied by one or more affidavits, stating the grounds on which the belief that the Financial Establishment has committed any default or is likely to defraud, is founded, the amount of money or value of other property believed to have been procured by means of the deposit and the details, if any, of persons in whose name such property is believed to have been invested or purchased out of the deposits or any other property attached under section 3.

(5) The Competent Authority shall make an application to any court having jurisdiction to try similar cases or deal with the subject matter pertaining to money or property belonging to a Financial Establishment or any person specified in section 3 situated within the territorial jurisdiction of that court for appropriate orders.

(6) For the purpose of crediting and dealing with the money realized by the Competent Authority, he shall open an account in any Scheduled Bank.

***6.** Notwithstanding anything contained in section 3, where any Financial Establishment defaults the return of the deposit or defaults the payment of interest on the deposit or fails to return in any kind or fails to render service for which the deposit have been made, every person responsible for the management of the affairs of the Financial Establishment shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees and such Financial Establishment is also liable for a fine which may extend to two lakh rupees.*

***8.** (1) For the purpose of this Act, the Government may, with the concurrence of the Chief Justice of the Orissa High Court, by notification, constitute one or more Designated Courts for such area or areas or such case or cases as may be specified in the notification which shall be presided by an officer belonging to the Odisha Superior Judicial Service.*

(2) No court including the Court constituted under the Provincial Insolvency Act, 1920 other than the Designated Court shall have jurisdiction in respect

of any matter to which the provisions of this Act apply.
(3) Any pending case in any other court to which the provisions of this Act apply shall stand transferred to the Designated Court.
(4) When trying any case, the Designated Court may also try any offence, other than an offence specified in section 6, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

9. *(1) Upon receipt of an application under section 4, the Designated Court shall issue to the Financial Establishment or to any other person whose property is attached by the Government under section 3, a notice accompanied by the application and affidavits and of the evidence, if any, recorded, calling upon the said Establishment or the said person to show cause on a date to be specified in the notice as to why the order of attachment should not be made absolute and the properties so attached be sold in public auction.*
(2) The Designated Court shall also issue such notice to all other persons represented to it as having or being likely to claim any interest or title in the property of the Financial Establishment or the person to whom the notice is issued under sub-section (1), calling upon such person to appear on the same date as that specified in the notice and make objection if he so desires to the attachment of the property or any portion thereof on the ground that he has an interest in such property or portion thereof.
(3) Any person claiming an interest in the property attached or any portion thereof may, notwithstanding that no notice has been served upon him under this section, make an objection as aforesaid to the Designated Court at any time before an order is passed under sub-section (4) or sub-section (6).
(4) If no cause is shown and no objections are made on or before the specified date, the Designated Court shall forthwith pass an order making the ad-interm order of attachment absolute and direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds.
(5) If cause is shown or any objection is made as aforesaid the Designated Court shall proceed to

investigate the same and in so doing, as regards the examination of the parties and in all other respects, the Designated Court shall, subject to the provisions of this Act, follow the procedure and exrecise all the powers of a court in hearing a suit under the Code of Civil Procedure, 1908 and any person making an objection shall be required to adduce evidence to show that on the date of the attachment he had some interest in the property attached.

(6) After investigation under sub-section (5), the Designated Court shall pass an order, within a period of one hundred and eighty days from the date of receipt of an application under sub-section (3) of section 4, either making the ad-interim order of attachment absolute or varying it by releasing a portion of the property from attachment or cancelling the ad-interim order of attachment and then direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds:

Provided that the Designated Court shall not release from attachment any interest, which it is satisfied that the Financial Establishment or the person referred to in sub-section (1) has in the property, unless it is also satisfied that there will remain under attachment an amount or property of a value not less than the value that is required for repayment to the depositors of such Financial Establishment.

(7) The Designated Court shall, on an application by the Competent Authority, pass such order or issue such direction as may be necessary for the equitable distribution among the depositors of the money attached or realized out of the sale.

13. *Any person including the Competent Authority, if aggrieved by an order of the Designated Court, may prefer an appeal to the High Court within thirty days from the date of the order.*

15. *(1) The Designated Court may take cognizance of the offence without the accused being committed to it for trial and in trying the accused person, shall follow the procedure prescribed in the Code of Criminal Procedure, 1973 for the trial of warrant cases by Magistrates.*

(2) The provisions of the Code of Criminal Procedure, 1973 shall, so far as may be, apply to

> *the proceedings before a Designated Court and for the purposes of the said provisions, a Designated Court shall be deemed to be a Magistrate."*

6. There is no dispute that an order of the Designated Court can be challenged in an appeal before the High Court. Therefore, the issue under consideration is not so much as regards the forum of appeal provided by the statute but its nature and nomenclature. It is to be noted at this stage that this Court has entertained some criminal appeals filed against the order of the Designated Court in making the interim order of attachment absolute. Reference may be had to the order of this Court passed in the case of ***Sri Tribikram Padhy and another vs. State of Odisha*** in CRLA No. 580 of 2017.

7. It is stated at the bar that the question regarding nature and nomenclature of the appeal, as has been raised in the present appeals, was never raised before the coordinate Benches hearing the appeals decided earlier. It is therefore, submitted that it is open to this Court, which is a court of co-equal jurisdiction, to consider such issue notwithstanding entertainment and disposal of the appeals by the co-ordinate Bench. It is submitted that to such extent, the orders passed by the

co-ordinate Bench in the said appeals would have to be treated as being passed in *per incuriam* and the principles of *sub silentio* would also came into play.

8. There is no doubt about the legal proposition referred above that a point of law not raised or considered by the Bench passing the earlier order can always be raised and considered by another Bench subsequently. Reference may be had to the decision of the apex Court in the case of ***Union of India v. M.V. Mohanan Nair***, reported in (2020) 5 SCC 421 and ***Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.***, reported in (2019) 4 SCC 376.

9. Mr. J. Patnaik, Learned Senior Counsel, Mr. G. Mishra, learned Senior Counsel and Mr. G.M. Rath, learned counsel as well Mr. B. Bhuyan, learned counsel appearing for OPID have all subscribed to the view that notwithstanding the earlier orders passed by the co-ordinate Bench, this Court can consider the issue raised herein. In view of the ratio decided in ***M.V. Mohanan Nair*** and ***Khoday Distilleries Ltd.*** (supra), this court is also of the same view.

10. The primary hurdle being thus crossed this Court would now proceed to examine the issue with reference to the statutory provisions quoted hereinbefore. In so far as the power of the Designated Court regarding attachment, sale etc. conferred under Section-9 is concerned, the provisions under Section 3 are the starting point inasmuch as an ad interim order of attachment passed by the Government in respect of a property shall have go through the rigors of the procedure laid down in Section 9 before the Designated Court before it is confirmed. If the provisions of Section-9 are read as a whole it would reveal that the Designated Court shall have to follow the procedure and exercise all the powers of a Court in hearing a suit under the Code of Civil Procedure, 1908. It is contended by Mr. G. Mishra, learned Senior Counsel that this indicates that the proceeding is entirely civil in nature and therefore, an appeal arising therefrom must of necessity be in the nature of a Civil Appeal. In support of such arguments Mr. Mishra has relied upon the judgment of the Apex Court in the case of ***S.A.L. Narayan Row v. Ishwarlal Bhagwandas***, reported in

AIR 1965 SC 1818; ***Ram Kishan Fauji v. State of Haryana***, reported in (2017) 5 SCC 533 and ***State of Maharashtra v. Ishwar Piraji Kalpatri***, reported in 2002 SCC OnLine Bom 245.

11. Mr. J. Pattnaik, learned Senior Counsel as well as Mr. G.M. Rath and Mr. B. Bhuyan have fully supported the contentions raised by Mr. Mishra. Mr. Mishra further submits that there have been divergent views of different High Courts in judgments rendered in respect of other statutes. Mr. Mishra has referred to the decision of the Delhi High Court in the case of ***Union of India vs. Mridula Kapur***, reported in 2019 SCC Online Del 12045 and of the ***Radha Mohan Lakhotia v. Deputy Director***, ***PMLA Directorate of Enforcement, Ministry of Finance, Department of Revenue,*** reported in 2010 SCC OnLine Bom 1116.

12. It has been argued that the proceeding under Section 9 is Civil in nature and therefore, an appeal arising from any order passed therein has to be a civil appeal. It has been further urged that proceeding with regard to offences under Section 15 are governed by the

Code of Criminal Procedure and therefore, any appeal arising out of such proceeding has to be treated as Criminal Appeal.

13. Before proceeding further let us try to understand the meaning of the expressions "Civil Proceeding" and "Criminal Proceeding".

The word 'Civil Proceeding' has not been defined as such either under the statute or in the Code of Civil Procedure. However, the **Oxford Advanced Learner's Dictionary, 9th Edition** defines "Civil Law" as "law that deals with the rights of private citizens rather than with crime".

The **Black's Law Dictionary (7th Edition)** defines 'civil law' by referring to a passage in *Introduction to English Law 146 by William Geldart*, which is quoted hereinbelow:

> *"The difference between civil law … and criminal law turns on the difference between two different objects which the law seeks to pursue-redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution the wrongdoer is not punished, he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the*

> *wrongdoer; to give him and others a strong inducement not to commit the same or similar crimes, to reform him if possible, and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution."*

Black's Law Dictionary however, further defines "criminal proceeding" as a proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment; a criminal hearing or trial.

14. A Constitution Bench of the Supreme Court had an occasion to distinguish between "Civil Proceeding" and "Criminal Proceeding" in the case of ***S.A.L. Narayan Row*** (supra) by observing as follows:

> *"...... The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed......".*

15. A reading of Section 9 makes it clear that the proceedings taken thereunder following the procedure of

C.P.C. results either in confirmation of the ad interim order of attachment passed by the Government or varying the same and sale of the property attached leading to equitable distribution among the depositors of money realized out of such sale or cancelling the ad interim order. It does not deal with a proceeding vis-à-vis Section 6, which contains the penal section. Section 15 deals with procedure and power of Designated Court regarding taking cognizance and trial of offences under Cr.P.C.. Section 6 delineates the offence. Sub-Section (3) of Section 8 also speaks of trial of any other offence along with the offence committed under Section 6 under Cr.P.C. It is stated at the cost of repetition that while the proceedings under Section 9 are to be conducted as per Code of Civil Procedure, the one under Section 15 is to be conducted as per Code of Criminal Procedure There is thus a fundamental difference between the two proceedings noted above.

16. Almost a similar case arose for consideration before the Bombay High Court in the case of ***Ishwar Piraji Kalpatri*** (supra), wherein the said Court was

seized with an order of attachment passed under Section 3(1) of the Criminal Law Amendment Ordinance, 1944 and therefore, took up for consideration the question whether the proceedings relating to attachment of the property and the disposal thereof under the said ordinance are of civil nature or not. The Court noted a decision of the Andhra Pradesh High Court in the case of ***State of Hyderabad vs. K. Venkateshwara Rao,*** reported in 1973 Crl. L.J. 1351, whereby the Andhra Pradesh High Court held that "*the special power are conferred upon the District Judge under the said Ordinance in relation to the attachment of the property. But the fact remains that the said Ordinance deals with the schedule of offences which are criminal in nature and therefore, irrespective of the special powers conferred are those under C.P.C., the District Judge acts as a Criminal Court*". Thereafter the Bombay High Court referred to the provision in question and the observations quoted hereinbefore in the case of ***S.A.L. Narayan Row*** (Supra). The Bombay High Court, therefore, held as follows:

15. *Considering the provisions of the said Ordinance and the applicability of various provisions of Civil Procedure Code relating to the attachment, disposal of the property so attached, the expression "District Judge" used therein, the definition of the said expression in the General Clauses Act and the decision of the Apex Court in Ishwarlal's case (AIR 1965 SC 1818), it cannot be said that the proceedings under the said Ordinance in relation to the attachment and disposal of the property are not of civil nature. With respect I am unable to persuade myself to agree with the decision of the learned single Judge of Andhra Pradesh High Court referred to above. Apparently, the definition of the District Judge under General Clauses Act, the decision of the Apex Court of Ishwarlal's case and the fact that the procedure for to the attachment of the property and disposal thereof is required to be in accordance with the various provisions of C.P.C. do not appear to have been brought to the notice of the Court in the said decision. Rather the arguments were on the assumption that the proceedings under the said Ordinance are relating to the scheduled offences. As already observed above, the preamble of the ordinance itself abundantly makes it clear that though the Ordinance is called as "Criminal Law Amendment Act 1944" in fact it relates to attachment and disposal of the property of a person who has procured such property by means of certain scheduled offences, and the Ordinance does not deal with the offences by themselves. Entire proceeding under the said ordinance relate exclusively to the attachment of the property and consequences of such attachment the same no way relate to or deal with the scheduled offences. The relief that can be granted in such proceeding relate to the property sought to be attached and nothing beyond that. The investigation of objection to attachment has necessarily be in terms of the procedure prescribed under C.P.C. It has to be in exercise of the powers of the Court hearing a suit under C.P.C. Any order passed by the District Judge in such processing can be executed in the same manner as provided under C.P.C. for attachment of property in execution of a decree. Being so the first point for consideration is to be answered as that the proceedings pertaining to attachment and disposal thereof under the said*

> *Ordinance are of civil nature and therefore the appeal against the order passed under Section 4 or 6 of the said Ordinance is in to be dealt with on civil side of the appellate jurisdiction of this Court. Hence, no fault can be found with the appeal having been filed and entertained on the civil side of the appellate jurisdiction and the objection sought to be raised by the respondent in that regard is to be rejected being devoid of substance.*

17. In view of the discussion made hereinbefore with reference to the provisions under Section 9 and Section 15 of the Act, this Court is persuaded to respectfully agree with the view taken by the Bombay High Court in case of ***Ishwar Piraji Kalpatri*** (supra).

18. An argument may be made that when the forum of appeal is not disputed and it is a question of proper nomenclature only, it would hardly matter if an appeal is designated either as a Criminal Appeal or Civil Appeal. Such an argument can be considered only to be rejected for the reason that when the provision under Section-9 makes it clear that the proceeding under said Section has to be undertaken under the Code of Civil Procedure, it impliedly takes in its sweep the provisions under Order 38 Rule 5 and related provisions read with Rule 11-A and consequently, Order 21 Rule 41 onwards. An appeal against any order passed under Section-9

therefore would be governed under the provisions of Order-43 Rule 1(q) of C.P.C. On the other hand reference to Criminal Procedure Code in Rule-15(1) and (2) entails the procedure prescribed under Chapter-XIV, Chapter-XVII, Chapter-XIX and the General Provisions relating to trials etc. An appeal would be governed by the provisions contained in Chapter-XXIX.

19. Evidently, there is a sea of difference between the two different procedures referred above. The idea of the same Court acting as both Civil Court and Criminal Court for two different purposes may, at first blush, seem incongruous but then, it only reflects the legislative intent that matters relating to attachment etc., which are basically governed under Civil Law, and the matters relating to cognizance, trial, conviction etc, which are basically governed under Criminal Law, have to be dealt with by application of the appropriate law to each. It would rather be incongruous to expect the Appellate Court exercising criminal jurisdiction to decide questions that may be raised regarding violation of procedure of attachment prescribed under C.P.C.. Therefore, it must be

held that the legislature in its wisdom has provided for two separate procedures for the two separate proceedings by the same Court. It is immaterial that the Court adjudicating upon such separate issues is one and the same.

20. Therefore, on a conspectus of the discussion and analysis made on the basis of contentions raised and the case laws referred, this Court is of the considered view that the appeal filed against the order passed by the Designated Court under Section 9 of the OPID Act as per Section 13 of the said Act has to be treated as Civil Appeal filed under the provisions of the Order 43 Rule (1)(q) of CPC and hence, has to be designated as such and not Criminal Appeal.

21. Such being the finding of this Court, registry is directed to effect necessary change of the nomenclature of the appeal and to register the same as Civil Appeal in the appropriate nomenclature and to place the same for hearing before the assigned Bench. This Court further directs that till passing of appropriate orders by the assigned Bench regarding stay operation of the impugned

orders, no coercive action shall be taken in respect of the properties in question.

....
Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 23rd December, 2022/ A.K. Rana, P.A.