KHANAPURAM GANDAIAH

v.

ADMINISTRATIVE OFFICER & ORS.

(Special Leave Petition (Civil) No. 34868 of 2009)

JANUARY 4, 2010

[K.G. BALAKRISHNAN, CJI. AND DR. B.S. CHAUHAN, J.]

Right to Information Act, 2005:

*ss. 2(f) and 6 – 'Information' – Application u/s 6 before Administrative Officer-cum-Assistant State Public Information Officer, asking as for what reasons a Judicial Officer had dismissed a miscellaneous appeal – **HELD:** Under s.6, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force – The answers sought by petitioner in the application could not have been with the public authority nor could he have access to the information – A judge speaks through his judgments and orders passed by him – He is not bound to explain later on for what reasons he had come to such a conclusion – If any party feels aggrieved, the remedy available is to challenge the decision by way of appeal, revision or any other legally permissible mode – No litigant can be allowed to seek information as to why and for what reason the judge had came to a particular conclusion – Application filed by the petitioner before the public authority is per se illegal and unwarranted – A Judicial Officer is entitled to protection and the object of the same is to protect public from the dangers to which the administration of justice would be exposed if judicial officers were exposed to inquiry as to malice or to litigation with those whom their decision might offend – If any thing is done contrary to this, it would certainly affect the Independence of the judiciary – A judge should be free to make decisions – As the petitioner has misused the*

provisions of the RTI Act, High Court rightly dismissed his writ petition – Judicial Officers' Protection Act, 1850 – Independence of judiciary.

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 34868 of 2009.

From the Judgment & Order dated 24.4.2009 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 28810 of 2008.

V. Kanagraj, Parmanand Gaur for the Petitioner.

The following Order of the Court was delivered

O R D E R

1. This special leave petition has been filed against the judgment and order dated 24.4.2009 passed in Writ Petition No.28810 of 2008 by the High Court of Andhra Pradesh by which the writ petition against the order of dismissal of the petitioner's application and successive appeals under the Right to Information Act, 2005 (hereinafter called the "RTI Act") has been dismissed. In the said petition, the direction was sought by the Petitioner to the Respondent No.1 to provide information as asked by him vide his application dated 15.11.2006 from the Respondent No.4 – a Judicial Officer as for what reasons, the Respondent No.4 had decided his Miscellaneous Appeal dishonestly.

2. The facts and circumstances giving rise to this case are, that the petitioner claimed to be in exclusive possession of the land in respect of which civil suit No.854 of 2002 was filed before Additional Civil Judge, Ranga Reddy District praying for perpetual injunction by Dr. Mallikarjina Rao against the petitioner and another, from entering into the suit land. Application filed for interim relief in the said suit stood dismissed. Being aggrieved, the plaintiff therein preferred CMA No.185 of 2002 and the same was also dismissed. Two other

suits were filed in respect of the same property impleading the Petitioner also as the defendant. In one of the suits i.e. O.S. No.875 of 2003, the Trial Court granted temporary injunction against the Petitioner. Being aggrieved, Petitioner preferred the CMA No.67 of 2005, which was dismissed by the Appellate Court – Respondent No.4 vide order dated 10.8.2006.

3. Petitioner filed an application dated 15.11.2006 under Section 6 of the RTI Act before the Administrative Officer-cum-Assistant State Public Information Officer (respondent no.1) seeking information to the queries mentioned therein. The said application was rejected vide order dated 23.11.2006 and an appeal against the said order was also dismissed vide order dated 20.1.2007. Second Appeal against the said order was also dismissed by the Andhra Pradesh State Information Commission vide order dated 20.11.2007. The petitioner challenged the said order before the High Court, seeking a direction to the Respondent No.1 to furnish the information as under what circumstances the Respondent No.4 had passed the Judicial Order dismissing the appeal against the interim relief granted by the Trial Court. The Respondent No.4 had been impleaded as respondent by name. The Writ Petition had been dismissed by the High Court on the grounds that the information sought by the petitioner cannot be asked for under the RTI Act. Thus, the application was not maintainable. More so, the judicial officers are protected by the Judicial Officers' Protection Act, 1850 (hereinafter called the "Act 1850"). Hence, this petition.

4. Mr. V. Kanagaraj, learned Senior Counsel appearing for the petitioner has submitted that right to information is a fundamental right of every citizen. The RTI Act does not provide for any special protection to the Judges, thus petitioner has a right to know the reasons as to how the Respondent No. 4 has decided his appeal in a particular manner. Therefore, the application filed by the petitioner was maintainable. Rejection of the application by the Respondent No. 1 and Appellate

authorities rendered the petitioner remediless. Petitioner vide application dated 15.11.2006 had asked as under what circumstances the Respondent No.4 ignored the written arguments and additional written arguments, as the ignorance of the same tantamount to judicial dishonesty, the Respondent No.4 omitted to examine the fabricated documents filed by the plaintiff; and for what reason the respondent no.4 omitted to examine the documents filed by the petitioner. Similar information had been sought on other points.

5. At the outset, it must be noted that the petitioner has not challenged the order passed by the Respondent No. 4. Instead, he had filed the application under Section 6 of the RTI Act to know why and for what reasons Respondent No. 4 had come to a particular conclusion which was against the petitioner. The nature of the questions posed in the application was to the effect why and for what reason Respondent No. 4 omitted to examine certain documents and why he came to such a conclusion. Altogether, the petitioner had sought answers for about ten questions raised in his application and most of the questions were to the effect as to why Respondent No. 4 had ignored certain documents and why he had not taken note of certain arguments advanced by the petitioner's counsel.

6. Under the RTI Act "information" is defined under Section 2(f) which provides:

> "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, report, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force."

This definition shows that an applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law. Of course,

under the RTI Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions. A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. A judge is not bound to explain later on for what reasons he had come to such a conclusion.

7. Moreover, in the instant case, the petitioner submitted his application under Section 6 of the RTI Act before the Administrative Officer-cum-Assistant State Public Information Officer seeking information in respect of the questions raised in his application. However, the Public Information Officer is not supposed to have any material which is not before him; or any information he could have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force. The answers sought by the petitioner in the application could not have been with the public authority nor could he have had access to this information and Respondent No. 4 was not obliged to give any reasons as to why he had taken such a decision in the matter which was before him. A judge cannot be expected to give reasons other than those that have been enumerated in the judgment or order. The application filed by the petitioner before the public authority is *per se* illegal and unwarranted. A judicial officer is entitled to get protection and the object of the same is not to protect malicious or corrupt judges, but to protect the public from the dangers to which the administration of justice would be exposed if the concerned judicial officers were subject to inquiry as to malice, or to litigation with those whom their

decisions might offend. If anything is done contrary to this, it would certainly affect the independence of the judiciary. A judge should be free to make independent decisions.

8. As the petitioner has misused the provisions of the RTI Act, the High Court had rightly dismissed the writ petition.

9. In view of the above, the Special Leave Petition is dismissed accordingly.

R.P. Special Leave Petition dismissed.

GANGULA MOHAN REDDY
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 1301 of 2002)

JANUARY 5, 2010

[DALVEER BHANDARI AND A. K. PATNAIK, JJ.]

Penal Code, 1860:

ss. 306 and 107 – Abetment to suicide – HELD: Abetment involves a mental process of instigating a person or intentionally aiding a person in doing a thing – There has to be a clear mens rea to commit the offence – Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

The appellant was convicted by the trial court u/s 306 IPC on the allegation that his farm labour (deceased) committed suicide because of the harassment meted out to him by the appellant. The prosecution case was that the appellant, two days prior to the incident, leveled an allegation of theft of ornaments against the deceased; that the appellant had also demanded from the deceased Rs.7000/- which was given to him as advance at the time when he was kept in employment. The conviction was affirmed by the High Court.

In the instant appeal filed by the accused, it was contended for the appellant that the conviction of the appellant was unsustainable as no ingredients of offence punishable u/s 306 IPC were made out.

Allowing the appeal, the Court

HELD: 1.1. Abetment involves a mental process of

instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. [Para 20] [14-G]

1.2. The intention of the Legislature and the ratio of the cases decided by this court is clear that in order to convict a person u/s 306 IPC there has to be a clear *mens rea* to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide. [Para 21] [14-H; 15-A-B]

1.3. In the instant case, the deceased was undoubtedly hyper sensitive to ordinary petulance, discord and differences which happen in day-to-day life. Human sensitivity of each individual differs from the other. Different people behave differently in the same situation. In the light of the provisions of law and the settled legal positions crystallized by a series of judgments of this Court, the conviction of the appellant cannot be sustained. [Para 18 and 22] [14-D; 15-B-C]

Mahendra Singh & Another v. State of M.P. **1995 Supp. (3) SCC 731;** *Ramesh Kumar v. State of Chhattisgarh* **(2001) 9 SCC 618;** *State of West Bengal v. Orilal Jaiswal & Another.* **(1994) 1 SCC 73; and** *Chitresh Kumar Chopra* v. *State (Govt. of NCT of Delhi)* **2009 (11) SCALE 24, relied on.**

Case Law Reference:

1995 Supp. (3) SCC 731	**relied on**	**para 13**
2001) 9 SCC 618	**relied on**	**para 15**
(1994) 1 SCC 73	**relied on**	**para 16**
2009 (11) SCALE 24	**relied on**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1301 of 2002.

From the Judgment & Order dated 20.3.2002 of the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1039 of 1996.

D. Ramakrishna Reddy (for T. Anamika) for the Appellant.

I. Venkatanarayana, Manoj Saxena, Rajnish Singh, Bachita Barua (for T.V. George) for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This appeal is directed against the judgment of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1039 of 1996 dated 30.3.2002. The appellant was convicted by the Assistant Sessions Judge, Nagarkurnool under Section 306 of the Indian Penal Code (for short 'the Code') and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for six months.

2. The appellant, aggrieved by the said judgment of the learned Assistant Sessions Judge filed an appeal before the High Court. The High Court upheld the judgment of the learned Assistant Sessions Judge, but while affirming the conviction of the appellant under Section 306 of the Code, the sentence of rigorous imprisonment of 10 years was reduced to 5 years. The appellant, aggrieved by the said judgment, approached this Court. This Court granted leave and released the appellant on bail.

3. The brief facts which are relevant to dispose of this appeal are recapitulated as under:

According to the case of the prosecution, the appellant, who is an agriculturist had harassed his agriculture labour

(servant) deceased Ramulu by levelling the allegation that he had committed theft of some gold ornaments two days prior to his death. It was also alleged that the appellant had demanded Rs.7,000/- from the deceased which was given in advance to him at the time when he was kept in employment.

4. The prosecution further alleged that the deceased Ramulu could not bear the harassment meted out to him and he committed suicide by consuming pesticides. The prosecution in support of its case examined the father of the deceased as P.W.1 Urikonda Jammanna in which he had stated that his son Ramulu was a farm servant and used to work at the house of the appellant. He also stated that the appellant gave Rs.7,000/- in advance to his son. PW1 also stated that about two years ago, the appellant had asked his son (Ramulu) that his wrist watch was missing from his house and harassed him on which his son had returned the watch to the appellant. PW1 in his statement stated that the appellant also levelled the allegation that the gold ear-rings were also missing from his house and the same were stolen by Ramulu. PW1 also stated that the appellant also demanded the advance of Rs.7,000/- paid to Ramulu at the time of his employment. He further stated that Ramulu committed suicide because the appellant had levelled the allegation of theft of ornaments.

5. The prosecution also examined Balamma, the mother of the deceased as P.W.2. She also corroborated the statement of PW1 and gave same version of the incident in her testimony. On the basis of the testimonies of P.W.1 and P.W.2, the Trial Court convicted the appellant under Section 306 of the Code and his conviction on appeal was confirmed by the High Court.

6. Learned counsel for the appellant submitted that the conviction of the appellant is totally unsustainable because no ingredients of offence under section 306 of the Code can be made out in the facts and circumstances of this case. It would be profitable to set out section 306 of the Code:

"306. Abetment of suicide – If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine."

7. The word suicide in itself is nowhere defined in the Indian Penal Code, however its meaning and import is well known and requires no explanation. 'Sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. In short a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

8. Suicide by itself is not an offence under either English or Indian criminal law, though at one time it was a felony in England. In England, the former law was of the nature of being a deterrent to people as it provided penalties of two types:

- Degradation of corpse of deceased by burying it on the highway with a stake through its chest.
- Forfeiture of property of deceased by the State.

9. This penalty was later distilled down to merely not providing a full Christian burial, unless the deceased could be proved to be of unsound mind. However, currently there is no punishment for suicide after the enactment of the Suicide Act, 1961 which proclaims that the rule of law whereby it was a crime for a person to commit suicide has been abrogated.

10. In our country, while suicide in itself is not an offence, considering that the successful offender is beyond the reach of law, attempt to suicide is an offence under section 309 of IPC.

11. 'Abetment' has been defined under section 107 of the Code. We deem it appropriate to reproduce section 107, which reads as under:

"107. Abetment of a thing – A person abets the doing of a thing, who –

First – Instigates any person to do that thing; or

Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes places in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly – Intentionally aides, by any act or illegal omission, the doing of that thing."

12. Explanation 2 which has been inserted along with section 107 reads as under:

"Explanation 2 – Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

13. Learned counsel for the appellant has placed reliance on a judgment of this Court in *Mahendra Singh & Another v. State of M.P.* 1995 Supp. (3) SCC 731. In the case of *Mahendra Singh,* the allegations levelled are as under:-

"My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

14. The court on aforementioned allegations came to a definite conclusion that by no stretch the ingredients of abetment are attracted on the statement of the deceased. According to the appellant, the conviction of the appellant under section 306 IPC merely on the basis of aforementioned

allegation of harassment of the deceased is unsustainable in law.

15. Learned counsel also placed reliance on another judgment of this court in *Ramesh Kumar v. State of Chhattisgarh* (2001) 9 SCC 618. A three-Judge bench of this court had an occasion to deal with a case of a similar nature. In a dispute between the husband and wife, the appellant husband uttered "you are free to do whatever you wish and go wherever you like". Thereafter, the wife of the appellant Ramesh Kumar committed suicide. The Court in paragraph 20 has examined different shades of the meaning of "instigation'. Para 20 reads as under:

> "20. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect. or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. the present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

16. In *State of West Bengal v. Orilal Jaiswal & Another.* (1994) 1 SCC 73, this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trail for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and

difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

17. The Court in Ramesh Kumar's case came to the conclusion that there is no evidence and material available on record wherefrom an inference of the accused-appellant having abetted commission of suicide by Seema may necessarily be drawn.

18. In the instant case, the deceased was undoubtedly hyper sensitive to ordinary petulance, discord and differences which happen in our day-to-day life. Human sensitivity of each individual differs from the other. Different people behave differently in the same situation.

19. This court in *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)* 2009 (11) SCALE 24 had an occasion to deal with this aspect of abetment. The court dealt with the dictionary meaning of the word "instigation" and "goading". The court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self esteem and self respect. Therefore, it is impossible to lay down any straight-jacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

20. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

21. The intention of the Legislature and the ratio of the

cases decided by this court is clear that in order to convict a person under section 306 IPC there has to be a clear *mens rea* to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.

22. In the light of the provisions of law and the settled legal positions crystallized by a series of judgments of this Court, the conviction of the appellant cannot be sustained. Consequently, the appeal filed by the appellant is allowed and disposed of.

23. During the pendency of the appeal, the appellant was released on bail. He is not required to surrender. His bail bond is cancelled and he is set at liberty forthwith, if not required in any other case.

24. Consequently, the appeal filed by the appellant is allowed.

R.P. Appeal allowed.

NATIONAL HYDROELECTRIC POWER CORPN. LTD.
v.
COMMISSIONER OF INCOME TAX
(Civil Appeal No. 6 of 2010)

JANUARY 5, 2010

[S.H. KAPADIA AND AFTAB ALAM, JJ.]

Income Tax Act, 1961: s.115JB, Explanation-I Clause (b) – Applicability of – Advance against depreciation (AAD) – Held: AAD is a timing difference – It is not carried to profit and loss account – It is income received in advance subject to adjustment in future and not a reserve and hence clause (b) of Explanation (I) to s.115JB is not applicable.

Assessee is supplier of electricity at notified tariff rate. The sale price included Advance against Depreciation (AAD) which is shown by assessee as sales in its profit and loss account. While computing the book profit, assessee deducted the AAD component from total sale price and took only balance amount into the profit and loss account.

According to the Authority for Advance Rulings, reduction of AAD from the sales was reserve which had to be added back on the basis of Clause (b) of Explanation-I to Section 115JB of the Income Tax Act, 1961.

Allowing the appeal, the Court

HELD: On reading Explanation-I, to Section 115JB of Income Tax Act, 1961, it is clear that to make an addition under clause (b), the two conditions which must be jointly satisfied are that there must be a debit of the amount to the profit and loss account and the amount so

debited must be carried to the reserve. Since the amount of AAD is reduced from sales, there is no debit in the profit and loss account. The amount did not enter the stream of income for the purposes of determination of net profit at all, hence clause (b) of Explanation-I was not applicable. Further, "reserve" as contemplated by clause (b) of the Explanation-I to Section 115JB of the Act is required to be carried through the profit and loss account. There are broadly two types of reserves, viz. those that are routed through profit and loss account and those which are not carried via profit and loss account, for example, a Capital Reserve such as Share Premium Account. AAD is not a reserve. It is not appropriation of profits. It is an amount that is under obligation, right from the inception, to get adjusted in the future, hence, cannot be designated as a reserve. It is nothing but an adjustment by reducing the normal depreciation includible in the future years in such a manner that at the end of useful life of the Plant (which is normally 30 years) the same would be reduced to nil. At the end of the life of the Plant, AAD will be reduced to nil. In fact, Schedule XII-A to the balance sheet for the financial years 2004-05 onwards indicates recouping. AAD is "income received in advance". It is a timing difference and represents adjustment in future which is in-built in the mechanism notified on 26.5.1997. This adjustment may take place over a long period of time. [Paras 10 and 11] [20-A-H; 21-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6 of 2010.

From the Judgment & Order dated 17.12.2004 in AAR 550 of 2010 of the Authority for Advance Rulings (Income Tax), New Delhi.

Soli Dastur, Nishant Thakker, Sunita Dutt, Rajiv Mehta for the Appellant.

Parag P. Tripathi, ASG, D.K. Singh, Kunal Bahri, Rahul Kaushik, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Leave granted.

2. In this civil appeal filed by the assessee we are concerned with accounting treatment of Advance Against Depreciation ("AAD", for short).

3. We are concerned with assessment year 2001-02.

4. Assessee is a public sector enterprise registered under the Companies Act, 1956. Its accounts are prepared in accordance with Parts II and III of Schedule VI to the Companies Act. The entire shareholding of the assessee is with Government of India. Its accounts are audited by Comptroller and Auditor General of India. They are laid before both the Houses of Parliament.

5. Assessee is required to sell electricity to State Electricity Board(s), Discoms etc. at tariff rates notified by CERC. The tariff consists of Depreciation, AAD, Interest on loans, Interest on working capital, Operation and Maintenance Expenses, Return on equity.

6. On 26.5.97, GOI introduced a *mechanism* to generate additional cash flow by allowing generating companies to collect AAD by way of tariff charge. It was decided that the year in which Normal Depreciation fell short of original scheduled loan repayment installment (capped at 1/12th of the original loan) such shortfall would be collected as Advance against Future Depreciation. In other words, once the loan stood re-paid, the Advance so collected would get reduced from the Normal Depreciation of the later years, and such reduced depreciation would be included in the tariff, in turn lowering the tariff.

7. How to account for such an advance is the issue before us?

8. According to the Authority for Advance Rulings (AAR), the assessee supplied electricity at the tariff rate notified by CERC and recovered the sale price, which became its income; that, in future the said sale price was neither refundable nor adjustable against the future bills; that, the sale price (which includes AAD) was shown as "sales" in the profit and loss account; that, it was received in terms of the invoice raised by the assessee and, therefore, it was "income" in the year of receipt. However, according to AAR, when it came to computation of book profit, assessee deducted the AAD component from total sale price and only the balance amount net of AAD was taken into profit and loss account and book profit. Consequently, AAR ruled (which is challenged herein) that reduction of AAD from the "sales" was nothing but a reserve which has to be added back on the basis of clause (b) of Explanation- I to Section 115JB of the Income-tax Act, 1961 ("1961 Act", for short).

9. We quote hereinbelow Explanation-I to Section 115JB of the 1961 Act which reads as under:

> *"Explanation 1* - For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by —
>
> (a) xxx
>
> (b) the amounts carried to any reserves, by whatever name called, other than a reserve specified under section 33AC; or
>
> xxx
>
> if any amount referred to in clauses (a) to (h) is debited to the profit and loss account, and as reduced by …"

10. We find merit in this civil appeal. On reading Explanation-I, quoted above, it is clear that to make an addition under clause (b) two conditions must be jointly satisfied:

(a) There must be a debit of the amount to the profit and loss account.

(b) The amount so debited must be *carried to* the reserve.

11. Since the amount of AAD is reduced from sales, there is no debit in the profit and loss account. The amount did not enter the stream of income for the purposes of determination of net profit at all, hence clause (b) of Explanation-I was not applicable. Further, "reserve" as contemplated by clause (b) of the Explanation-I to Section 115JB of the 1961 Act is required *to be carried through the profit and loss account.* At this stage it may be stated that there are broadly two types of reserves, viz, those that are routed through profit and loss account and those which are not carried via profit and loss account, for example, a Capital Reserve such as Share Premium Account. AAD is not a reserve. It is not appropriation of profits. AAD is not meant for an uncertain purpose. AAD is an amount that is under obligation, right from the inception, to get *adjusted* in the future, hence, cannot be designated as a reserve. AAD is nothing but an *adjustment* by reducing the normal depreciation includible in the future years in such a manner that at the end of useful life of the Plant (which is normally 30 years) the same would be reduced to nil. Therefore, the assessee cannot use the AAD for any other purpose (which is possible in the case of a reserve) except to adjust the same against future depreciation so as to reduce the tariff in the future years. As stated, above, at the end of the life of the Plant AAD will be reduced to nil. In fact, Schedule XII-A to the balance sheet for the financial years 2004-05 onwards indicates recouping. In our view, AAD is "income received in advance". It is a timing difference. It represents adjustment in future which is in-built in the mechanism notified on 26.5.1997. This adjustment may

take place over a long period of time. Hence, we are of the view that AAD is not a reserve.

12. For the aforestated reasons, we hold that AAD is a timing difference, it is not a reserve, it is not carried through profit and loss account and that it is "income received in advance" subject to adjustment in future and, therefore, clause (b) of Explanation-I to Section 115JB is not applicable. Accordingly, the impugned ruling is set aside and the civil appeal filed by the assessee stands allowed with no order as to costs.

D.G. Appeal allowed.

STATE OF HARYANA & ORS.
v.
HEM LATA GUPTA & ORS.
(Civil Appeal No. 4714 of 2006)

JANUARY 5, 2010

[R.V. RAVEENDRAN AND G.S. SINGHVI, JJ.]

Service Law:

Punjab Education Service Class-III (School Cadre) Rules, 1955:

*r.10 – Government of Punjab letter dated 1.9.1960 – Providing for advance increments to Masters on acquiring post graduate qualification – Benefit – Benefit under letter dated 1.9.1960 claimed by teachers falling in State of Haryana on its formation – **Held:** Teachers employed under Government of Haryana could claim the benefit in terms of the policy decisions taken by Government of undivided Punjab only till the revision of their pay scales, which were made effective from 1.12.1967, and not thereafter.*

The respondents, employed as teachers under the Government of Haryana, claimed advance increments in terms of Punjab Government to Memo dated 1.9.1960. The Director of Secondary Education, Haryana rejected their claim on the premise that in terms of Rule.10 of the Punjab Education Service Class-III (School Cadre) Rules, 1955, the pay scales of the teachers were subject to variation from time to time, and since the State of Haryana revised the pay scales of various categories of teaches w.e.f. 1.12.1967, Memo dated 1.9.1960 stood superseded. He also observed that higher start of pay with advance increments for post graduate qualification was provided only to Masters/Mistresses and not to other categories of

teachers. The High Court allowed the writ petitions and directed that the respondents be given advance increments in terms of the Punjab Government Memo dated 1.9.1960 and the letter dated 5.1.1968 of the Government of Haryana. Aggrieved, the State of Haryana filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. The teachers employed under the Government of Haryana could claim benefit of the higher pay scales, advance increments etc. in terms of the policy decisions taken by the Government of undivided Punjab and instructions issued by it only till the revision of their pay scales, which were made effective from 1.12.1967, and not thereafter. [Para 14] [39-E-F]

1.2. The question of revision of pay scales of the teachers employed under the Government of Haryana was considered by the Education Commission which is also known as Kothari Commission. The recommendations made by that Commission were accepted by the President of India and were implemented by the State Government with effect from 1.12.1967. After revision of the pay scales of various categories of teachers, the Government of Haryana issued instructions vide letters dated 26.7.1972, 26.11.1974 and 17.7.1975 for grant of monetary benefits in the form of personal pay to those Government servants who improved their qualifications by undertaking further studies within the country and abroad. Further, by letter No. 4718-2GS-II-77/17173 dated 20.6.1977, all the existing instructions were superseded and fresh instructions were issued on the subject. However, the decisions contained in letter dated 20.6.1977 and other related communications were withdrawn by the State Government by letter dated 20.12.1982. [Para 8 to 10] [33-B-C; 35-A-B; 36-F-G]

1.3. The High Court erred in accepting the plea of the respondents that revision of the pay scales of teachers with effect from 1.12.1967 did not result in automatic supersession of the existing policy decisions. All the financial benefits including increments admissible to the teachers in terms of extant policy decisions must have been taken into consideration by Kothari Commission while recommending grant of revised pay scales. If this was not so, there could be no warrant for separately giving one advance increment to first and second class graduate Masters/Mistresses for whom revised pay scales of Rs.220-8-300-10-400 (for 85% of the cadre) and Rs.400-20-500 (for 15% of the cadre) were prescribed; similarly, there was no justification to give one advance increment to the Lecturers on their attaining professional training; equally, there was no occasion for the State Government to give additional benefit by way of increments in the form of personal pay to the employees on improving qualifications after joining Govt. service. This being the position, the High Court was not right in holding that the decision taken by the President of India to accept the recommendations of Kothari Commission for revision of the pay scales of Government teachers and grant of revised pay scales to them with effect from 1.12.1967 did not have the effect of superseding the policy contained in letter dated 1.9.1960. [Para 13] [38-G-H; 39-A-D]

1.4. The doubts and confusion created due to the judgment in Chaman Lal's case* on the entitlement of the teachers to automatically get particular pay scale prescribed for higher post have been clarified by the judgments in Wazir Singh's case and Kamal Singh Saharawat's case and in view of the latter decisions, the respondents' claim for grant of advance increments in terms of letter dated 1.9.1960 issued by the Government of Punjab cannot be accepted. [Para 21] [47-F-G]**

***Wazir Singh v. State of Haryana* **1995 (4) Suppl. SCR 138 = 1995 Supp. (3) SCC 697;** *State of Haryana v. Kamal Singh Saharawat* **1999 (3) Suppl. SCR 67 = (1999) 8 SCC 44, relied on.**

Chaman Lal v. State of Haryana* **1987 (2) SCR 923 = (1987) 3 SCC 113; *State of Punjab v. Kirpal Singh Bhatia* **1976 (1) SCR 529 = (1975) 4 SCC 740;** *Gurpal Tuli v. State of Punjab* **1984 Supp SCC 716;** *Punjab Higher Qualified Teachers' Union v. State of Punjab* **(1988) 2 SCC 407;** *Baij Nath v. State of Punjab* **(1996) 8 SCC 516;** *State of Haryana v. Ravi Bala* **(1997) 1 SCC 267, referred to.**

Case Law Reference:

1995 (4) Suppl. SCR 138	**relied on**	**Para 4**
1976 (1) SCR 529	**referred to**	**Para 15**
1987 (2) SCR 923	**referred to**	**Para 16**
1999 (3) Suppl. SCR 67	**relied on**	**Para 19**
1984 Supp SCC 716	**referred to**	**Para 20**
(1988) 2 SCC 407	**referred to**	**Para 20**
(1996) 8 SCC 516	**referred to**	**Para 20**
(1997) 1 SCC 267	**referred to**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4714 of 2006.

From the Judgment & Order dated 8.1.2001 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 17842 of 1998.

WITH

C.A. Nos. 4715, 4716, 4717, 4719, 4720, 4721 of 2006.

P.N. Mishra, Kamal Mohan Gupta for the Appellants.

Shailendra Bhardwaj, Dr. Ramesh K. Haritash, Dr. Kailash Chand, Uma Datta, Sanjay Kapur, D. Mahesh Babu, Tarun Gupta, S. Janani, Ujjal Singh, J.P. Singh, Balbir Singh Gupta, R.C. Kaushik, Anjani Aiyagari, S.K. Sabharwal for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. These appeals are directed against the orders of the Punjab and Haryana High Court whereby the alleged denial of advance increments to the writ petitioners (respondents herein) has been declared illegal and the appellants have been directed to grant them increments in terms of the instructions issued by the Government of Punjab vide Memo No. 6462-ED-II(2)60/32640 dated 1.9.1960 and the Government of Haryana vide letter No.152-Edu-II-69/540 dated 5.1.1968.

2. The respondents joined service as teachers in different categories i.e., Lecturers, Masters/Mistresses, Language Teachers and Physical Training Instructors either in the undivided State of Punjab or the newly formed State of Haryana, which came into being with effect from 1.11.1966. Some of the respondents possessed post-graduate qualifications at the time of entry in the service while others claim to have acquired such qualifications after joining the service. Smt. Hem Lata Gupta and others filed Writ Petition No. 18638/1997 for issue of a mandamus to the concerned authorities of the Government of Haryana to give them benefit of 2/3 advance increments from the date of acquiring post-graduate qualifications in terms of Memo dated 1.9.1960 issued by the Government of Punjab. The same was disposed of by the High Court with a direction that representation dated 1.10.1997 submitted by the writ-petitioners be decided by the competent authority by passing a reasoned order. In compliance of the Court's directive, the Director of Secondary Education, Haryana (for short, 'the Director'), passed order dated 30.7.1998 whereby he rejected the claim of the respondents on the ground that after fixation of their pay in the

revised pay scales in terms of the policy contained in letter dated 5.1.1968 of the Government of Haryana, the teachers are not entitled to advance increments in terms of Memo dated 1.9.1960 issued by the Government of Punjab. The Director also observed that the instructions issued by the Government of Punjab were applicable only to the Masters working in the grade of Rs.110/250 and were not applicable to other teachers like Junior Basic Teachers, Language Teachers, Art and Craft Teachers, Physical Training Instructors, Headmasters and Lecturers and, therefore, they cannot claim advance increments in terms of those instructions. For the sake of reference, the relevant portions of order dated 30.7.1998 are extracted below:-

I. "That the petitioners were the members of Punjab Educational Service Class-III (School Cadre) Rules, 1955 and their conditions of service were governed by the provisions of the said rules. The pay has been defined in para 10 of the said rules as under:

10. Pay: Members of the service will be entitled to such scale of pay as may be authorized by the Govt. from time to time.

This rule clearly contemplates that members of the service like the petitioners will be entitled to such scale of pay as authorized by Govt. from time to time, meaning thereby, as soon as the pay scales of the employees are revised, the present pay scale attached with the post will be of no consequence.

II. That as per rule 10 of the said service rules the petitioners are entitled to such scales of pay as authorized by the govt. from time to time. In Appendix A of the said rules the pay scales of Rs.110/250 with a higher start of 2/5 advance increments on acquiring of M.A./M.Sc. qualifications which was enforced at the time of framing of the said

service rules was only provided for the post of Masters/Mistresses and not to other categories of teachers. The said scale of pay remained operative upto 30.11.1967 because after formation of the State of Haryana, the State Govt. vide letter dated 5.1.1968 had further revised the pay scale of the Masters/Mistresses from Rs.110/250 to 220/400 w.e.f. 1.12.1967. and by virtue of the letter dated 5.1.1968 the earlier circulars regarding revision of pay scales issued by the either Governments stood automatically superseded. Meaning thereby Masters/Mistresses who were earlier made eligible for the grant of benefit of advance increments in terms of the pay scales shown in Appendix A of the service rules 1955 and further supplemented as per joint Punjab Govt. letter No. 6382-Edu.III (2) 60/ 32640 dated 1.9.1960 become disentitled to the benefit of advance increments on acquiring Post Graduation qualifications after having been given revised pay scales w.e.f. 1.12.1967. In other words such Masters/Mistresses who got the Post Graduation qualification on or after 1.12.1967 and were appointed in the service or after 1.12.1967 are not eligible to get the benefit of higher start of 2/3 increments as such provisions did not exist in the Govt. letter dated 5.1.68 under which the grades were revised w.e.f. 1.12.1967. By virtue of the statutory sanction in rule 10 of the Punjab Educational Service Class-III (School Cadre) Rules, 1955 vide which the pay scales were subject to variation from time to time, the petitioners are not entitled to the advance increments as after revision of pay scales w.e.f. 1.12.1967 the pay scales shown in Appendix A in the said service rules 1965 and letter dated 23.7.57 did not remain in existence as the petitioners have either been appointed after 1.12.67 or acquired the M.A./M.Sc. qualifications

after 1.12.67.

III. xxx xxx xxx

IV. That after 1.12.67, the State Govt. had further revised the scales of pay of its employees including the petitioners w.e.f. 1.4.79 and 1.1.86 by framing rules under the proviso of Article 309 of the Constitution of India and these rules are known as Haryana Civil Services (Revised Pay) Rules, 1987 published on 29.2.80 and 29.4.87 respectively. At this time also as provision of grant of 2/3 advance increments on acquiring of M.A./M.Sc. qualification existed and as such the petitioners are not entitled to the benefit of advance increments on acquiring of M.A./M.Sc. qualification existed and as such the petitioners are not entitled to the benefit of advance increments on acquiring of M.A./M.Sc. qualification.

V. xxx xxx xxx

VI. That further mere look of the provisions of Appendix-A of the said rules 1955 and later on supplemented vide Punjab Govt., letter No.6482-Edu.III (2) 60/32640 dated 1.9.1960 would show that the benefit of 2/3 advance increments was only given to the category of Masters/Mistresses working in the grade of Rs.110/250 and not to the other categories of teachers like J.B.T., Maths, Sanskrit, Punjabi, Art & Craft teachers, P.T.I., Headmasters and Lecturers. Thus those petitioners who are working/appointed against the said posts are also not entitled to 2/3 advance increments on acquiring of M.A./M.Sc. qualification."

3. Respondents Smt. Hem Lata Gupta and 11 others challenged the aforementioned order in C.W.P. No. 17842/1998. They pleaded that in view of the instructions issued by

the Government of Punjab vide Memo dated 1.9.1960, they are entitled to advance increments as of right and fixation of their pay in the revised pay scales with effect from 1.12.1967 cannot be made a ground for denying them the benefit of advance increments. In the counter affidavit filed before the High Court, the appellants pleaded that the respondents are not entitled to advance increments in terms of the instructions issued by the Government of Punjab because the same will be deemed to have been superseded with the revision of pay scales of various categories of teachers with effect from 1.12.1967.

4. By an order dated 8.1.2001, the Division Bench of the High Court allowed the writ petition and issued direction, which is under challenge in Civil Appeal No. 4714/2006. The Division Bench relied upon the judgments of this Court in *Wazir Singh v. State of Haryana* 1995 (Supp) 3 SCC 697, *State of Haryana v. Harbans Lal* (2002) 10 SCC 125 and held that even though pay scales of the teaches were revised by the Government of Haryana, the earlier instructions were not superseded and, as such, the writ petitioners are entitled to the benefit of advance increments in terms of the policy decision contained in Government of Punjab Memo dated 1.9.1960. The Division Bench also noted that teachers employed in Kurukshetra District have been allowed personal pay equal to one increment in their respective grades for a period of 5 years and held that other teachers cannot be discriminated. The writ petitions filed by other respondents were likewise allowed and similar direction was issued for grant of advance increments to them.

5. Shri P.N. Misra, learned senior counsel appearing for the appellants argued that as a result of revision of pay scales of the teachers with effect from 1.12.1967, the policy contained in Government of Punjab Memo dated 1.9.1960 will be deemed to have been superseded and the High Court committed serious error by relying upon the said memo for issuing a mandamus for grant of advance increments to the respondents. Shri Misra referred to letters dated 5.1.1968, 20.6.1977 and

20.12.1982 issued by the Government of Haryana and argued that once the State Government took a conscious decision to revise the pay scales of teachers and grant them increments on fulfillment of the specified conditions, the instructions issued by the Government of Punjab could not be invoked by the respondents for claiming benefit of advance increments. On the other hand, Shri Balbir Singh Gupta, learned counsel for the respondents argued that on acquiring higher qualifications, his clients became entitled to advance increments in terms of Memo dated 1.9.1960 issued by the Government of Punjab and they cannot be deprived of that right simply because the Government of Haryana decided to revise the pay scales with effect from 1.12.1967.

6. We have considered the respective submissions. In exercise of the powers conferred upon him by the proviso to Article 309 of the Constitution of India, the Governor of Punjab framed the Punjab Educational Service Class-III (School Cadre) Rules, 1955 (for short, "the 1955 Rules") for regulating recruitment and conditions of service of persons appointed to the Punjab Educational State Service, Class III, School Cadre. The same were notified on 30.5.1957. Rule 10 of the 1955 Rules lays down that members of the service will be entitled to such scale of pay as may be authorized by the Government from time to time. The scales of pay of different categories of teachers, which were in force at the relevant time, were specified in Appendix `A' annexed to the 1955 Rules. For the post of Headmasters, the prescribed pay scale was Rs.250-10-350. For the post of Masters, the prescribed pay scale was Rs.250-10-300. For certain other categories of teachers, the pay scale was Rs.110-8-190/10-250 with a start of Rs.126 to those having the qualification of M.A./M.Sc./M.Ed. with third division and Rs.150 to those possessing qualification of M.A./M.Sc./M.Ed. with second or first division. After two months, the Government of Punjab issued circular dated 23.7.1957 for revision of the scales of pay of certain posts including those of

teachers. This was followed by Memo dated 1.9.1960 vide which the State Government sanctioned grant of advance increments to the Masters on their acquiring postgraduate qualifications. The relevant portions of Memo dated 1.9.1960 which constitutes the foundation of the respondents' claim for advance increments are reproduced below:

"Sanction of the Government of Punjab is accorded to the grant of advance increments to the Masters working in the Punjab Education Department, who improve/have improved their educational qualifications in the manner detailed below:-

Category of personnel	Nature of improved qualifications	Extent of advance increments
Masters	(110-8-190/10-250) MA/MSc./M.Ed. (3rd Division)	2 increments
	MA/M.Sc./M.Ed. (1st/2nd Division)	3 increments

2. The advantage will be enjoyed only once and not for doing any subsequent M.A. It will not be available to those who were given higher start of entry for being MA/M.Sc./M.Ed.

3. These orders will take effect from the date of issue.

The original date of increments shall remain unchanged and the persons concerned should be allowed to retain their old dates of increments."

7. Though not directly relevant to the issue raised in these appeals, we may make a mention of circular letter No. 961-4GS-62/5593 dated 16.2.1962 (this circular finds a mention in letter dated 20.12.1982 issued by the Government of Haryana),

vide which the Government of Punjab decided to give advance increments/rapid promotions to officers going abroad to improve their qualifications. This was done with a view to ensure that the officers who improve their qualifications in foreign countries continue to serve the State.

8. The question of revision of pay scales of the teachers employed under the Government of Haryana was considered by the Education Commission which is also known as Kothari Commission. The recommendations made by that Commission were accepted by the President of India and were implemented by the State Government with effect from 1.12.1967. For this purpose, instructions were issued vide letter No. 152-Edu-II-69/540 dated 5.1.1968, the relevant paragraphs whereof are reproduced below:

> I am directed to say that the matter concerning the revision of scales of pay of teaching personnel working in Govt. Schools in Haryana has been engaging the attention of Govt. for sometime past. After careful consideration, the President of India is pleased to accept the recommendations of the Education Commission popularly known "KOTHARI COMMISSION" and revise the scale of pay of Govt. teachers w.e.f. Ist December 1967 in the following manner:-

Sr.No.	Category of teachers	Revised grade
1.	J.B.T./J.S.T./J.A.V. & V Teacher, Drawing Master, Tailoring Mistresses, Art & Craft teachers, Domestic Mistresses & Shastries	i) Rs.125-5-150/5-250 (for 85% of the cadre) ii) Rs.250-10-300 (for 15% of the Cadre)

N.B. The untrained Teachers with Higher Secondary Matriculation qualifications will draw the starting of Rs.100/- mensum and they will be integrated in the regular pay of scales only after they obtain necessary profession qualification.

2.	Masters/Mistresses (Trained Graduates)	i) Rs.220-8-300-10-400 (for 85% of the cadre) ii) Rs.400-20-500 (for 15% of the cadre)

N.B. (I) The 1st & 2nd class graduates will be entitled to draw one advance increment in addition.

(ii) The Untrained graduates will be allowed the starting salary of Rs.200/- per mensum and will be entitled for the regular scales of pay only after attaining the prescribed professional training.

3.	Lecturers (Post Graduates)	i) Rs.300-25 450-25-600 (For Ist & 2nd class M.A.'s and M.Ed) ii) Rs.250-25-450/25-550 (For 3rd class M.A.'s and M.Sc's)

N.B. The Lecturers will be given one advance increment as soon as they attain professional training.

xxx xxx xxx"

9. After revision of the pay scales of various categories of teachers, the Government of Haryana issued instructions vide letters dated 26.7.1972, 26.11.1974 and 17.7.1975 for grant of monetary benefits in the form of personal pay to those Government servants who improved their qualifications by undertaking further studies within the country and abroad. In 1977, all the existing instructions were superseded and fresh instructions were issued on the subject vide letter No. 4718-2GS-II-77/17173 dated 20.6.1977, the relevant portions of which are reproduced below:

"Subject: Grant of personal pay to Govt. servants who improve their qualifications by further study within the country and abroad.

Sir,

I am directed to refer to the instructions contained in this Department's letter No. 4857-GSII-72/28344 dated 26.9.1972, letter No. 6452-2GSII-74/28173 dated 26.11.1974 and letter No. 434-2GS-II 75/21469 dated 17.7.1975 on the subject noted above and to say that the Government has further considered the matter and in supersession of the aforesaid instructions, taken the following decisions:-

1. Personal pay shall be granted to all employees, who improve their qualifications after joining Govt. service, if the qualifications so acquired from a recognized University is/ are higher than the minimum qualifications prescribed for the post on which they were recruited at the time of entry into Govt. Service, in accordance with the scales and conditions laid down in the succeeding paragraphs/sub-paragraphs:-

(i) Personal pay admissible for acquiring each of the following qualifications shall be equal to the amount of

increment(s) mentioned against each qualifications:-

(a) Diploma of at least one year duration One increment

(b) Law degree or post graduate Two increments

(c) Doctorate or Post Doctorate Four increments qualification

Provided that the maximum benefit will not exceed the equivalent of four increments.

(ii) Govt. employees who have acquired the aforesaid qualifications after 26.9.1972 (i.e. whose result as declared on or after the said date) shall be eligible for the benefit of personal pay with effect from the date of declaration of the result of the examination concerned and those who had improved their educational qualifications before 26.9.1972 i.e. whose result was declared before the said date shall be eligible for the benefit of personal pay with effect from the date of issue of these instructions. In either of the two type of cases, thereto of increment for the purpose of calculating the amount of personal pay shall be taken to be the which was last drawn prior to the date of eligibility.

(iii) No benefit shall not be given for such of these qualifications as had already been acquired by the Govt. employee before joining Govt. service."

10. The decisions contained in letter dated 20.6.1977 and other related communications were withdrawn by the State Government vide letter dated 20.12.1982, which reads thus:

"No.14/38/82-2GS-II

From

The Chief Secretary to Government, Haryana.

To

1. All Heads of Departments, the Commissioners, Ambala and Hissar Divisions, all Deputy Commissioners and Sub-Divisional Officer (Civil) in Haryana

2. The Registrar, Punjab and Haryana High Court, Chandigarh

Dated, Chandigarh, the 20th December, 1982

Subject: Grant of personal pay to Government servants who improve their qualifications by further study within the country and abroad.

Sir,

I am directed to refer to the instruction contained in Punjab Government No.961-4GS-62/5593, dated the 16th February, 1962, Haryana Government letter No.4718-2GS-II-77/17173, dated the 20th June, 1977, letter No.14/3/78-GS-II dated 26.7.78 and letter No. of even number dated the 23rd October, 1978 and letter No.14/18/78-GS-II, dated the 16th July, 1979, on the subject noted above and to say that the matter concerning grant of advance increments as personal pay to Government employees who improve their academic qualifications while in service has been under the consideration of the Government for some time. It has now been decided to discontinue the practice of giving advance increments to Government employees for acquiring higher qualifications and all the instructions issued on the subject as referred to above should be treated as withdrawn with immediate effect.

Yours faithfully
Sd/-
Joint Secretary General Admn.
For Chief Secretary to Government Haryana"

11. Having noticed the factual matrix of the case and various instructions issued by the Governments of Punjab and Haryana, we shall now consider whether the direction given by the High Court for grant of advance increments to the respondents from the date of acquiring postgraduate qualifications is legally correct and justified.

12. A reading of rule 10 of the 1955 Rules and Appendix-A appended thereto shows that the pay scales prescribed for different categories of teachers prior to 30.5.1957 were made part of the Rules. After two years, the Government of Punjab issued instructions vide letter dated 23.7.1957 for grant of higher scales of pay to the teachers from the date of acquiring higher qualifications. By Memo dated 1.9.1960, sanction was accorded for grant of 2/3 advance increments to the Masters from the date of improving their educational qualifications. However, it was made clear that the advantage of advance increments will not be available to those who were given higher start on account of possessing the postgraduate qualifications. This stipulation was incorporated in Memo dated 1.9.1960 because some of the teachers who possessed postgraduate qualifications were already given the benefit of additional increments by being allowed higher start in the prescribed pay scale. These instructions could be treated as having been issued by the Government of Punjab under rule 10 of the 1955 Rules. The teachers employed under the Government of Haryana got benefit of the policy decisions contained in letter dated 23.7.1957 and Memo dated 1.9.1960 till their pay scales were revised vide letter dated 5.1.1968.

13. The argument of the respondents, which found favour with the High Court that revision of the pay scales of teachers with effect from 1.12.1967 did not result in automatic supersession of the existing policy decisions sounds attractive in the first blush, but, on a deeper consideration, we are convinced that the said argument is fallacious and should have been rejected by the High Court . All the financial benefits

including increments admissible to the teachers in terms of extant policy decisions must have been taken into consideration by Kothari Commission while recommending grant of revised pay scales. If this was not so, there could be no warrant for separately giving one advance increment to first and second class graduate Masters/Mistresses for whom revised pay scales of Rs.220-8-300-10-400 (for 85% of the cadre) and Rs.400-20-500 (for 15% of the cadre) were prescribed. Similarly, there was no justification to give one advance increment to the Lecturers on their attaining professional training. Equally, there was no occasion for the State Government to give additional benefit by way of increments in the form of personal pay to the employees on improving qualifications after joining Govt. service. This being the position, we are convinced that the High Court was not right in holding that the decision taken by the President of India to accept the recommendations of Kothari Commission for revision of the pay scales of Government teachers and grant of revised pay scales to them with effect from 1.12.1967 did not have the effect of superseding the policy contained in Memo dated 1.9.1960.

14. In our view, the teachers employed under the Government of Haryana could claim benefit of the higher pay scales, advance increments etc. in terms of the policy decisions taken by the Government of undivided Punjab and instructions issued by it only till the revision of their pay scales, which were made effective from 1.12.1967 and not thereafter.

15. At this stage, we may usefully notice some of the judgments. In *State of Punjab v. Kirpal Singh Bhatia* (1975) 4 SCC 740, this Court was called upon to consider whether teachers were entitled to higher pay scales in terms of the policy contained in letter dated 23.7.1957. On behalf of the State of Punjab, it was argued that the policy decision taken by the Government was not intended to give benefit of higher scales of pay to all the teachers who acquired higher qualifications and before claiming higher post, the concerned teachers were

required to be selected by the Board. While rejecting the argument, this court held as under:

> "The High Court said that the contention of the State that the teachers could not be considered for promotion unless they satisfied the condition of subject combination namely, that if they were ordinary graduates with training qualifications, they must have studied two out of the four subjects, namely. History, Geography, Economics and Political Science is not supported by the letter dated November 7, 1958. The High Court rightly said that the letter does not speak of any limitation of subject combination for promotion.
>
> Some of the teachers were from time to time promoted to the posts of masters but never continuously beyond a period of six months. After completion of six months, there was a break to avoid continuity in service for the posts of masters beyond six months. The State contended that the teachers could not be considered for promotion unless the Board were satisfied that the teachers if ordinary graduates with training qualifications must have also studied two out of four subjects of History, Geography, Economics and Political Science. The teachers on the other hand contended that once the State Government had taken a decision as embodied in the letter dated November 7, 1958, the policy of not allowing the teachers to continue beyond six months on temporary basis was nullifying the letter and spirit of the decision of the letter dated November 7, 1958. The teachers also contended that the promotion of teachers to masters is completely independent of any consideration like the combination of subjects. The High Court rightly held that letter dated November 7, 1958 was subject only to two limitations. One was that teachers could not claim more than one-fourth of the vacancies of the posts of masters and the other was that the claim by way of promotion would be considered

by the appointing authority on the basis of seniority-cum-merit. The High Court rightly held that the letter dated November 7, 1958 was not subject to the condition of subjects combination being fulfilled. There are three categories of teachers — Science Masters, Mathematics Masters and Social Studies Masters. No condition of combination of subjects can be read into the letter of November 7, 1958."

16. In *Chaman Lal v. State of Haryana* (1987) 3 SCC 113, this Court recognized the entitlement of the teachers to get higher scales of pay from the date of acquiring higher qualifications in terms of the policy contained in letter dated 23.7.1957 issued by the Government of Punjab. The plea of the State Government that those teachers who acquired B.T. or B. Ed. after 1.12.1967 i.e. the date on which the 1968 order came into force, and before 5.9.1979, would be entitled to higher grade only with effect from 5.9.1979 and those who acquired higher qualification after 5.9.1979 would not be entitled to the higher grade was negatived only on the ground that 1968 order had not been brought to the notice of the Court in *State of Punjab v. Kirpal Singh Bhatia* (supra). This is evident from the following portion of paragraph 2 of the judgment:

> According to the judgment of the High Court under appeal, the 1968 order did away with the principle of the 1957 order that teachers acquired BT or BEd qualification should get the higher grade and that a concession was shown in 1979 enabling the teachers who acquired the BT or BEd qualification between 1968 and 1979 to get the higher scale from 1979. In our opinion this is plainly to ignore all the events that took place between 1957 and 1980. The principle that pay should be linked to qualification was accepted by the Punjab Government in 1957 and when Kirpal Singh Bhatia case[1] was argued in the High Court and in the Supreme Court there was not the slightest whisper that the principle had been departed

> from in the 1968 order. In fact the 1968 order expressly stated that the Government had accepted the Kothari Commission's report in regard to scales of pay and as already pointed out by us the main feature of the Kothari Commission's report in regard to pay was the linking of pay to qualification. That was apparently the reason why no such argument was advanced in Kirpal Singh Bhatia case. Even subsequently when several writ petitions were disposed of by the High Court of Punjab and Haryana and when the Government issued consequential orders, it was never suggested that the 1968 order was a retraction from the principle of qualification linked pay. The 1968 order must be read in the light of the 1957 order and the report of the Kothari Commission which was accepted. If so read there can be no doubt that the Government never intended to retract from the principle that teachers acquiring the BT or BEd would be entitled to the higher grade with effect from the respective dates of their acquiring that qualification.

17. With respect, we find it difficult to appreciate as to how the so-called failure of the Government to bring the 1968 order to the notice of this Court in *Kirpal Singh Bhatia's* case was relevant for deciding the issue raised in *Chaman Lal v. State of Haryana* (supra). The facts of *Kirpal Singh Bhatia's* case were that the respondents before this Court were employed as teachers in the former State of PEPSU. After merger of the State of PEPSU with the State of Punjab, the respondents claimed the revised scale of pay from the date of acquiring the degrees of B.T. or its equivalent in terms of the policy contained in letter dated 23.7.1957. They also claimed promotion to the post of Master. The High Court allowed the writ petitions filed by the respondents. The appeals preferred by the State were dismissed by this Court. Since letter dated 5.1.1968 issued by the Government of Haryana for giving effect to the decision taken by the President of India to accept the recommendations made by Kothari Commission for revision of the pay scales of

the Government teachers had no bearing whatsoever on the claim of Kirpal Singh Bhatia and others, there was no occasion for the Government of Punjab to produce that letter before the High Court and/or this Court. We are sure, if the contents of letter dated 5.1.1968 are read in a correct perspective, interpretation thereof in *Chaman Lal's* case cannot be treated as correct. As per the recommendations of Kothari Commission, the revision of pay scales was linked with qualifications. This has been noted by the Court in *Chaman Lal's* case and yet the so-called omission on the Government's part to produce letter dated 5.1.1968 before this Court in *Kirpal Singh Bhatia's* case was made a ground for holding that notwithstanding revision of the pay scales of the teachers employed under the Government of Haryana, they would continue to get the benefit of the policy contained in letter dated 23.7.1957.

18. With a view to overcome the difficulties created by the judgment in *Chaman Lal's* case, the Government of Haryana issued instructions dated 9.3.1990 making explicit what was implicit in the instructions issued vide letter dated 5.1.1968 for implementation of the recommendations made by Kothari Commission. In *Wazir Singh v. State of Haryana* 1995 Supp. (3) SCC 697, this Court considered the question whether the teachers employed under the Government of Haryana are entitled to higher grade admissible to Masters with effect from the dates of their acquiring B.T./B.Ed. qualifications. The concerned teachers relied upon the policy contained in letter dated 23.7.1957 of the Government of Punjab, judgment in *Chaman Lal's* case and pleaded that the benefit of higher grade cannot be denied by the Government of Haryana despite the policy contained in Finance Department letter dated 9.3.1990. On behalf of the respondents, it was argued that the policy instructions contained in letter dated 23.7.1957 were superseded by the subsequent instructions issued on 9.3.1990. The Court extracted the observations made in *Chaman Lal's* case, referred to the policy contained in letter dated 9.3.1990

and held that once the Government altered the earlier policy, the judgment in *Chaman Lal's* case will have no application and the appellants who had not acquired B.T./B.Ed. qualification before 9.3.1990 cannot claim the benefit of higher grade of pay automatically.

19. In *State of Haryana v. Kamal Singh Saharawat* (1999) 8 SCC 44, a somewhat similar issue was considered. The High Court had accepted the claim of the teachers that they are entitled to higher scales of pay according to qualifications irrespective of the post held by them. This Court noted that the recommendations made by Kothari Commission were accepted by the State Government and the pay scales of the teachers were revised vide letter dated 5.1.1968. The Court also took cognizance of the policy contained in letter dated 9.3.1990 issued by the Finance Department of the Government of Haryana and rejected the claim of the respondent-teachers that they are entitled to higher scales of pay applicable to the post of Lecturers on their acquiring post-graduate qualifications. Paragraphs 19, 20, 22 and 23 of the judgment which contain detailed consideration of the issue read as under:

> 19. With effect from 1-11-1966, the State of Haryana came into existence. Earlier there was an Education Commission popularly known as "the Kothari Commission" at the national level which made recommendations regarding further revision of pay scales of Teachers who were divided into several categories. The basis for classifications adopted by the Commission was academic qualifications. The recommendations of the Kothari Commission were mostly accepted by the State of Haryana. The pay scales of Teachers were revised and the decision of the Government was contained in Letter No. 152-Edu.II-68/540 dated 5-1-1968 from the Secretary to Government of Haryana, Education Department, Chandigarh to the Director of Public Instruction, Haryana, Chandigarh. The letter also fixed the percentage in which various

incumbents were to be divided for purposes of higher scale or the lower scale as mentioned in the letter. Column II referred to the category of teachers and Column III set out the revised grades. Sl. No. 1 pertains to JBT/JST/JAV etc. Sl. No. 2 pertains to Masters/Mistresses (trained graduates). Sl. No. 3 relates to Lecturers (postgraduates). The NB reads: "The Lecturers will be given one advance increment as soon as they attain professional training." Sl. No. 4 refers to Headmasters/Headmistresses etc. There is nothing in the said letter to show that the post of Lecturers was included in Appendix 'A' to the Punjab Educational Service Rules or that it came to be governed by the said rules. The letter refers merely to revision of scales of pay and does not set out the method of recruitment or conditions of service. There is nothing in the letter to show that the categories of Teachers set out at Sl. No. 1 and Sl. No. 2 were automatically entitled to become Lecturers or entitled to the scales of pay applicable to the Lecturers.

20. It may be mentioned here that there was an earlier letter issued by the Punjab Government on 29-7-1967 revising the pay scales of the teaching personnel of government schools in the State of Punjab w.e.f. 1-11-1966 after consideration of the recommendations made by the Kothari Commission. Though the said letter is not applicable to the Teachers in the present case, reference has been made to the same and reliance has been placed on a decision of this Court in which the said letter was considered. We will advert to that decision later and it is unnecessary for us to dilate any further on the letter of the Punjab Government dated 29-7-1967.

22. Insofar as the State of Haryana is concerned, one other letter has been placed before us by the counsel for the State Government viz. Letter No. 7/2(I)/90-4 FR-I dated, Chandigarh, 9-3-1990 sent by the Financial Commissioner

& Secretary to Government of Haryana, Finance Department to the Commissioner & Secretary to Government of Haryana, Education Department. That letter makes a reference to the circular letter dated 23-7-1957 issued by the Punjab Government to which we have already adverted in detail. The letter also makes reference to the subsequent letter dated 5-1-1968 which has also been referred to by us earlier. Reference has been made to subsequent Notification No. GSR-20/Const./Art/309/89 dated 29-2-1980 by virtue of which the letter dated 5-1-1968 stood inoperative automatically. It is seen from the said letter that the Haryana Government had revised the pay scales further under Notification No. GSR-20/Const./Art/309/87 dated 29-4-1987 with effect from 1986. Ultimately, the letter clarifies that the teachers in the Education Department in the State of Haryana were not entitled to be placed in the higher scales of pay in terms of para 3 of the Punjab Government letter dated 23-7-1957 or any subsequent letter or notification issued by the Haryana Government referred to therein which had become inoperative. The last sentence in para 6 of the letter reads as follows:

"The Masters/Teachers in the Education Department will be placed in the scales of pay of their respective categories to which they are appointed against the sanctioned posts and mere possessing/acquiring of higher qualifications will not entitle them automatically to claim higher pay scales."

23. Thus a perusal of the Educational Service Rules which have been prevailing from 1955 undergoing amendments from time to time and the subsequent government policy letters and circulars show that the Teachers are not entitled to higher scales of pay applicable to the posts of Lecturers automatically on their acquiring postgraduate qualifications or such qualifications as are prescribed for the post of

Lecturers. We have already pointed out that the post of Lecturers has throughout been governed by different sets of rules and never by the Punjab Educational Service Class III School Cadre Rules, 1955 or the amendments thereto. Hence, the common question raised in these matters has to be answered in the negative against the Teachers/Masters/Mistresses some of whom are respondents in Civil Appeal No. 4304 of 1990 and the others being petitioners in SLPs and appellants in Civil Appeal No. 2104 of 1998.

20. The Court then considered various judgments rendered by this Court and the High Court including *Kirpal Singh Bhatia's case, Gurpal Tuli v. State of Punjab* 1984 Supp SCC 716, *Punjab Higher Qualified Teachers' Union v. State of Punjab* (1988) 2 SCC 407, *Baij Nath v. State of Punjab* (1996) 8 SCC 516, *Chaman Lal's case, Wazir Singh's* case, *State of Haryana v. Ravi Bala* (1997) 1 SCC 267 and concluded that on acquiring postgraduate qualification or qualifications prescribed for the post of Lecturers, teachers are not automatically entitled to the scales of pay of the Lecturers without being appointed as Lecturers in accordance with the rules.

21. In our view, the doubts and confusion created due to the judgment in *Chaman Lal's* case on the entitlement of the teachers to automatically get particular pay scale prescribed for higher post have been clarified by the judgments in *Wazir Singh's* case and *Kamal Singh Saharawat's* case and in view of the latter decisions, the respondents' claim for grant of advance increments in terms of Memo dated 1.9.1960 issued by the Government of Punjab cannot be accepted.

22. Before concluding, we consider it necessary to observe that while deciding the writ petitions filed by the respondents, the High Court neither adverted to the reasons assigned by the Director for rejecting the respondents' claim for advance increments nor any fault was found with order dated

30.7.1998. The High Court also failed to notice that the writ petitions were filed not only by the Masters/Mistresses, but also by other categories of teachers i.e., Lecturers, Language Teachers, Physical Training Instructors etc. who could not, by any stretch of imagination, lay claim for advance increments in terms of Memo dated 1.9.1960 issued by the Government of Punjab which was confined to the Masters only. Therefore, on this ground also the direction given by the High Court for grant of advance increments to the respondents cannot be sustained.

23. In the result, the appeals are allowed. The impugned orders are set aside and the writ petitions filed by the respondents before the High Court are dismissed. However, it is made clear that this order shall not be made a ground to deny the benefit, if any, admissible to the respondents or any one of them in terms of the policy contained in letter dated 20.6.1977. Rather, the State Government and the concerned authorities should *suo motu* undertake appropriate exercise for grant of benefit of that policy to the respondents and other similarly situated persons, pass appropriate orders and pay monetary benefits to the concerned teachers within six months from the date of production/receipt of copy of this judgment. Needless to say that such benefit shall not be admissible to the teachers who may have improved their qualifications on or after 20.12.1982 i.e., the date on which the policy contained in letter dated 20.6.1977 was withdrawn.

R.P. Appeals allowed.

ATHAR HUSSAIN
v.
SYED SIRAJ AHMED & ORS.
(Civil Appeal No. 11 of 2010)

JANUARY 05, 2010

[TARUN CHATTERJEE AND V.S. SIRPURKAR, JJ.]

Guardian and Wards Act, 1890 – ss. 7, 9, 17 and 12 – Interim custody of minor Muslim children – Death of mother of minor children, girl aged 13 years and boy aged 5 years – Re-marriage of father – Application by maternal relatives for appointment as guardian and interim custody of minor children till disposal of application u/ss. 7, 9 and 17 – Family court granting interim injunction against father restraining him from interfering with the custody – Vacation of interim order – Set aside by High Court – Interim custody granted to maternal relatives till the disposal of the proceedings – On appeal, held: Custody is distinct from guardianship – In matters of custody, welfare of children is the sole consideration – Personal law governing custody of minor girl dictates that her maternal relatives, especially maternal aunt, shall be given preference, thus, no reason to override the rule of Mohammedan Law – Prima facie case and balance of convenience in favour of granting custody to maternal relatives – Children would suffer irreparable injury if they are uprooted from their present settings against their will – Thus, order of High Court modified to the extent of visitation rights granted to father – Code of Civil Procedure, 1908 – O. 39 r.1 and 2 – Child welfare – Mohammedan Law.

Appellant married the daughter of respondent no. 1, as per the Islamic rites and customs. Two children were born out of the wedlock. Appellant's wife died after thirteen years of marriage and within a year he married again. Respondent no.1-maternal grandfather,

respondent nos. 2, 3 and 4-maternal aunt and uncles of the minor children, girl aged 13 years and boy aged 5 years, initiated proceedings u/ss. 7, 9 and 17 of the Guardian and Wards Act, 1890 for appointment as guardians. They also filed application u/s. 12 of the Act r/w Or. 39 r. 1 and 2 CPC praying for interim protection of the persons and properties of the minor children and also for an injunction order restraining the appellant from interfering or disturbing the custody of the minor children. Family Court passed an interim order restraining the appellant from interfering with the custody of the children with the respondent. Appellant challenged the order. Family court vacated the interim order of injunction. High Court set aside the said order and passed certain directions. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. Section 12 of the Guardian and Wards Act, 1890 empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, the court must be guided by the welfare of the children since s. 12 empowers the Court to make any order as it deems proper. [Para 32] [65-E-F]

1.2 With regard to guardianship, the prima facie case lies in favour of the father as u/s. 19 of the Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. Respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question

of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. The question of guardianship can be independent of and distinct from that of custody in facts and circumstances of each case. [Paras 33 and 35] [65-G-H; 66-A-B; 67-B]

Rosy Jacob v. Jacob A.Chakramakkal **(1973) 3 S.C.R. 918;** *Mt. Siddiqunnisa Bibi v. Nizamuddin Khan and Ors.* **AIR 1932 All 215, referred to.**

1.3. The Court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect. Stability and consistency in the affairs and routines of children is also an important consideration. [Paras 37 and 38] [68-B-C]

R.V. Srinath Prasad v. Nandamuri Jayakrishna **AIR 2001 SC 1056;** *Mausami Moitra Ganguli v. Jayant Ganguli* **AIR 2008 SC 2262, referred to.**

2.1. Keeping in mind the paramount consideration of welfare of the children, the custody of the children which currently rests with their maternal relatives is not disturbed as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship. [Para 36] [67-B-C]

2.2. The children have been in the lawful custody of the respondents from October, 2007. It has the sanction of the order of the High Court granting interim custody of the children in their favour. Hence, the consideration

that the custody of the children should not undergo an immediate change prevails. The question with whom they remained during the period from the death of their mother till the institution of present proceedings is a matter of dispute between the parties and a conclusion on the same cannot be reached without going into the merits of the matter. At any rate, the children are happy and are presumably taken care of with love and affection by the respondents, judging from the reluctance on part of the girl child to go with her father. She might attain puberty at any time. High Court rightly observed, that it may not be in the interests of the children to separate them from each other. Hence, the status quo is not disturbed as the only concern is with the question of interim custody at this stage. [Para 40] [68-G-H; 69-A-E]

2.3. Regarding the matters of custody, the Court is not bound by the bar envisaged u/s. 19 of the Act. The personal law governing the minor girl dictates her maternal relatives, especially her maternal aunt, shall be given reference. As such regarding the interim custody, there is no reason to override the rule of Mohammedan Law and, hence, a prima facie case is found in favour of the respondents. The balance of convenience lies in favour of granting custody to the maternal grandfather, aunt and uncle. In matters of custody of children, their welfare shall be the focal point. Once the focus is shifted from the rights of the contesting relatives to the welfare of the minor children, the considerations in determining the question of balance of convenience also differ. Respondent no.3 stated that she has no intention to get married and her plea that she had resigned from her job as a technical writer to take care of the children remains uncontroverted. Hence, the respondents will be in a position to provide sufficient love and care for the children until the disposal of the guardianship application. The second marriage of the appellant,

though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate to place the children in a predicament where they have to adjust with their step-mother, with whom admittedly they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain. [Paras 43 and 44] [70-G-H; 71-A-E]

2.4. Till the final disposal of the application for guardianship, the interests of the children will be duly served if their current residence is not disturbed and a sudden separation from their maternal relatives does not come on their way. Irreparable injury will be caused to the children if they, against their will, are uprooted from their present settings. There is no conflict between the welfare of the children and the course of action suggested by personal law to which they are subject. [Paras 45 and 46] [72-B-C-E]

Hassan Bhatt v. Ghulam Mohamad Bhat **AIR 1961 J & K 5, approved.**

2.5. Respondent no. 1 is an old person aged about 72 years. Respondent no. 2 is already married, living with his wife and children. Respondent no. 3 and 4 are unmarried and are of marriageable age. Respondent no. 3, the maternal aunt of the children, will go to live with her husband after marriage. Respondent no. 4 after his marriage may or may not live with his father. There is nothing on record to show that the appellant mistreated the deceased mother of minor children. No views can be expressed on the correctness of these averments. These matters must be gone into when the Family Court disposes of the application for guardianship filed by the respondents and not at this stage. [Para 47] [72-F-H; 73-A]

2.6. As far as the denial of the interim custody of children to the respondents on the ground that they had not approached the Court with clean hands, such cannot be inferred. The alleged refusal on part of the appellant to marry respondent no.3 which is said to have led the respondents to file the application for guardianship, is a question of fact which is yet to be proved. [Para 48] [73-B-D]

2.7. In the opinion of High Court, the minor girl who was then was 10 to 11 years old, was capable of making intelligent preference. It may be true that 11 years is a tender age and her preference cannot be conclusive. But as only the question of interim custody is dealt with, there is no reason why the preference of the elder child shall be overlooked. The Family Court had considered fact that the younger child had instinctively approached his father while he met him in the Court premises while vacating the interim order of injunction. The second child who is just 4 years old cannot form an intelligent opinion as to who would be the right person to look after him and, hence, weight must be given to the preference that daughter had expressed. However, the visitation rights granted to the appellant is modified. He shall be allowed to visit the children on Saturdays as well between 9 am and 5 pm. The order of the High Court is modified and the order of the Family Court vacating its injunction order is set aside. The Family Court is directed to dispose of the case relating to the guardianship of the two children after adducing evidence by both the parties (both oral and documentary) at an early date. [Paras 50, 51 and 52] [74-A-F]

Gaurav Nagpal v.Sumedha Nagpal **(2009) 1 SCC 42, distinguished**

Rafiq v. Bashiran and Ors **AIR 1963 Rajasthan 239;** *B.N. Ganguly v. C.H. Sarkar* **AIR 1961 MP 173;** *R.V. Srinath*

Prasad v. Nandamuri Jayakrishna **AIR 2001 SC 1056;** *Mausami Moitra Ganguli v. Jayant Ganguli* **AIR 2008 SC 2262;** *Bal Krishna Pandey v. Sanjeev Bajpayee* **AIR 2004 UTR 1;** *Nil Ratan Kundu and Anr. vs. Abhijit Kundu* **(2008) 9 SCC 413, referred to.**

Case Law Reference:

AIR 1963 Rajasthan 239	**Referred to.**	**Para 28**
AIR 1961 MP 173	**Referred to.**	**Para 29, 49**
(1973) 3 S.C.R. 918	**Referred to.**	**Para 33**
AIR 1932 All 215	**Referred to.**	**Para 34**
AIR 2001 SC 1056	**Referred to.**	**Para 37**
AIR 2008 SC 2262	**Referred to.**	**Para 38**
(2009) 1 SCC 42	**Distinguished.**	**Para 40**
AIR 2004 UTR 1	**Referred to.**	**Para 44**
AIR 1961 J & K 5	**Approved.**	**Para 46**
(2008) 9 SCC 413	**Referred to.**	**Para 48**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11 of 2010.

From the Judgment & Order dated 8.10.2007 of the High Court of Karnataka at Bangalore in Writ Petition No. 9177 of 2007.

S. Balaji, B.M. Arun, Madhusmita Bora for the Appellant.

Nalini Chidambaram, Sunieta Ojha, Vikas Mehta for the Respondent.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 8th of October, 2007 passed by the High Court of Karnataka at Bangalore by which the High Court had set aside the order dated 11th of June, 2007 of the Family Court, Bangalore vacating its order of injunction dated 21st of April, 2007 passed against the appellant in G.W.C. No. 64 of 2007 preventing him from interfering with the custody of his children with the respondents.

3. The appellant is the father of the minor children in whose respect interim custody and guardianship have been sought for. The respondent No.1 is the maternal grandfather of the two minor children of the appellant and respondent Nos. 2, 3 and 4 are their maternal aunt and uncles.

4. The appellant married one Umme Asma, daughter of respondent No. 1, in accordance with Islamic rites and customs on 31st of March, 1993. Two children were born out of the wedlock, Athiya Ali, aged about 13 years and Aayan Ali, aged about 5 years. Their mother Umme Asma died on 16th of June, 2006. Subsequent to the death of Umme Asma, the mother of two minor children, the appellant again married to one Jawahar Sultana on 25th of March, 2007 who in the pending proceeding had filed an application before the Family Court for her impleadment in the same.

5. A proceeding was initiated on 21st of April, 2007 at the instance of the respondents under Sections 7, 9 and 17 of the Guardian and Wards Act, 1890 (hereinafter referred to as `the Act') in the Court of the Principal Family Judge, Bangalore which came to be registered as G.W.C.No.64 of 2007. In the aforesaid pending proceeding under the Act, an application was filed under Section 12 of the Act read with Order 39 Rule 1 and 2 of the Code of Civil Procedure (in short `the Code') in which interim protection was prayed for of the persons and properties of the minor children and also for an order of injunction restraining the appellant from interfering or disturbing the custody of two children till the disposal of the application filed

under Sections 7, 9 and 17 of the Act. The case that was made out by the respondents in the affidavit accompanying their application for injunction filed under Section 12 of the Act read with Order 39 Rule 1 and 2 of the Code was a follows :-

6. On the same day on which the respondents filed the applications for being appointed as guardians and for interim injunction against the appellant, i.e. on 21st of April, 2007, the Family Court disposed of the application under section 12 read with Order 39 Rule 1 and 2 of the CPC, and passed an ex parte interim order restraining the appellant from interfering with the custody of the two children of the appellant.

7. Feeling aggrieved, the appellant filed an application against the order of the family court under Order 39 Rule 4 of the Code praying for vacation of interim order of injunction passed against him. In the Counter Affidavit accompanying the application filed on 28th of April, 2007 to vacate the interim order of injunction, he denied all averments made in the application filed by the respondents as incorrect and fabricated. It is not in dispute that the appellant is the father and natural guardian of the children. While respondent no.1 is aged about 72 years and is retired and hence is in no position to look after his children, respondent no.2 is living separately after his marriage; respondent nos. 3 and 4 are nearing the age of marriage and would go ahead with their own lives once married. Further respondent no.1 has another son whose wife divorced him on account of harassment for dowry and another daughter who was mentally retarded. These heavy responsibilities which already lie on the respondent make him unfit as a guardian of his children. The only motive of the respondents is to gain the property that the appellant had purchased in favour of Umme Asme.

8. Pursuant to a telephonic request made by respondent no.3, he dropped his children at their place on 21st of April, 2007. When he went back to collect them on 22nd of April, 2007, he was informed that they would be back only at night.

On 23rd of April, 2007, he was told that the children had gone to Ooty and would return after a few days. Since the appellant had reasons to suspect the bonafide of the respondents, he lodged a complaint before the Inspector of Police, J.C. Nagar, Bangalore on 23rd of April, 2007. The respondents who were summoned to the police station gave an undertaking to the effect that the children would be back on 24th of April, 2007. It is alleged that though the respondents had procured the interim order of injunction on 21st of April, 2007 itself, they did not inform either the appellant or the Police authorities until 25th of April, 2007 on which day they produced the copy of the interim order to the appellant.

9. Appellant further alleged that his daughter had been missing classes as she was unduly retained by the respondents, who had no concern whatsoever with respect to the same.

10. The death certificate clearly showed leukemia as the sole cause of death of Umme Asma, contrary to the allegations of the respondents. He had deeply loved his wife and as a token ˇof his love, had purchased a property in her name on which he constructed house entirely in accordance with her wishes. Contrary to what the respondents had alleged, all the expenses for the treatment of his wife and the education of the children were borne by the appellant. His relationship with his deceased wife and the children were indeed cordial. In order to secure education of high quality for his daughter, he got her admitted into a good school and had borne all related expenses, as proved from the receipts issued by the school authorities. He had also obtained an insurance policy in the name of his daughter.

11. It is for the vengeance of the appellant's refusal to marry respondent no.3 who wished to marry him after the death of her sister, that they had filed the application claiming custody and guardianship of the children. The photographs produced before the Court were taken when the appellant himself took the

respondents on an excursion along with his family in his own car. The mark sheets produced by the respondents bore forged signatures of the appellant whereas the documents bearing his own signature were not produced.

12. In short, the appellant submitted that in view of suppression and concealment of material facts on part of the respondents, they were not entitled to the equitable relief of injunction. Moreover, he had a prima facie case and the balance of convenience stood in his favour. Irreparable injury would be caused to him as the father of the minor children who would not be safe in the hands of the respondents.

13. The family court by its order dated 11th of June, 2007 vacated the interim order of injunction granted on 21st of April 2007. The Court found that the respondents had neither prima facie case nor balance of convenience in their favour, nor vacating the ex parte interim order would cause irreparable injury to them. It was also the finding of the family court that the respondents did not approach the Court with clean hands. The Court found that in support of their contention that Umme Asma died due to the assault cast upon by the appellant, the respondents had not been able to produce any material evidence; nor was any case filed against the appellant. This appears in contrast to their contention that after the death of Umme Asma, her relatives had enquired about the marks on her face which occurred when the appellant had hit her. If this was the case, the respondents would have initiated an enquiry much before, not when almost ten months had expired after the death of Umme Asma. This prolonged silence, according to the trial court, renders the version of the appellant probable that it is to wreck vengeance towards him who refused to marry the respondent no.3 that the entire proceedings had been launched. The death report produced by the appellant, on the other hand, supports the version of the appellant of bone cancer being the cause of his wife's death. The fact that he bore with all medical expenses is also supported by evidence. The

appellant has also been able to produce the sale deed of the property which he claims to have purchased in his wife's name out of his love and affection for her.

14. The undertaking given by the respondents before Police Authorities with respect to the complaint filed against them by the appellant also strengthens the version of the appellant that as a matter of course, the children stayed with the appellant and that it was the respondents who took them away without his sanction. It is pertinent to note that the respondents did not produce the temporary order of injunction at the time they were asked to file the said undertaking to the Police Authorities. The various receipts produced by the appellant as evincing the expenses he incurred for his wife and children were also considered. Thus it was found that the respondents had no prima facie case.

15. The Family Court found the balance of convenience also leaning in favour of the appellant, who is admittedly the natural guardian of the children. The photographs produced by both the parties were considered as indicating the bond the children shared with both. It was found that they were also happy in the company of their step mother. Though Athiya had stated that she was not willing to go with her father, the Family Court felt that it could be no consequence as she was not old enough to form a mature opinion and was susceptible to tutoring. The fact that the son went to the appellant when he saw him in the Court premises indicated that the children were close to the appellant. Accordingly, balance of convenience was found tilting in favour of the appellant.

16. Irreparable injury will be caused to the father if he is denied interim custody as he is the natural guardian of the children, the care and concern for whom he had established in various ways. Keeping in view the fact that welfare of the children is the paramount consideration, it was noted that the respondent nos. 2 and 3 would get married and start living separately while respondent no.1 is an aged person. Therefore, the appellant

was more competent and fit than all to take care of the children. In order not to deprive the children of the love and affection of their maternal relatives, the appellant had agreed to leave the children at the respondents' place on every alternate Saturday and for five days at the beginning of the summer vacation which shows his magnanimity and generosity.

17. The contentions of the respondents were not supported by documentary evidence and, therefore, the Family Court was of the opinion that they had not approached the Court with clean hands. Hence, the equitable remedy of injunction could not be granted to them.

18. Therefore, by its order dated 11th of June, 2007, the Family Court vacated the ad-interim order of temporary injunction restraining the appellant from interfering with the custody of the children with the respondents.

19. Aggrieved by this order, the respondents filed a Writ Petition which came to be numbered as W.P. No. 9177 of 2007 before the High Court of Karnataka at Bangalore. Before the High Court, the respondents contended that the parties would be governed by Mohammaden Law which dictates that in the absence of the mother, maternal grand parents shall be the guardian of minor children. It was further contended that the second marriage of the appellant disentitles him to the custody of children. Further, when the children are capable of forming their opinion, they should be allowed to exercise their option with respect to which of the parties they would go with. The well being of the children which is the paramount consideration in matters of custody was not taken into account by the Family Court whose order is liable to be set aside on this count alone.

20. The appellant, in response to these submissions, contended that the High Court could not interfere with the findings of the Family Court unless serious infirmity is proven. The decisions cited by the respondents were distinguished on the ground that these decisions concerned findings that were

recorded after a full fledged trial and not an order passed as an ad-interim relief granting custody to one of the parties.

21. On consideration of these arguments, the High Court by its order dated 8th of October 2007 had set aside the order of the Family Court by which it had vacated the interim order of injunction and passed the following directions:

a. The impugned order is quashed.

b. The respondent father will have visiting rights and shall visit his two children on every Sunday between 9 a.m. and 5 p.m. The father is permitted to take out the children to any place of his and children's choice and shall bring back the children to petitioner's house. This arrangement shall continue pending disposal of the proceedings before the learned Family Judge.

c. Having regard to the sensitive issue involved i.e. as to the guardianship of the minor children, the learned Family Judge is directed to conclude the proceedings within six months from the date of receipt of the copy of this order.

d. Any observation made during the course of this order is only for the purpose of considering as to where the children should stay during the pendency of the proceedings. It shall not be treated as a finding on the merits of the case. The learned Family Judge shall not be swayed by any of the observations made during the course of this order.

22. The High Court in its impugned judgment had held that while appointing the guardian or deciding the matter of custody of the minor children during the pendency of guardianship proceedings, the first and foremost consideration for the Court is the welfare of the children. The factors that must be kept in mind while determining the question of guardianship will apply

with equal force to the question of interim custody. It was observed that the Family Court should have delved a little deeper into the matter and ascertained where the interest of the children lay, instead of recording abstract findings on questions of prima facie case, balance of convenience and irreparable injury.

23. The terms on which the appellant and his deceased wife were, the manner in which the respondents obtained the custody of the children are questions that should be determined during the course of trial.

24. Though when the children's father is not unfit otherwise he shall be the natural guardian, a child cannot be forced to stay with his/her father. According to the High Court, merely because the father has love and affection for his children and is not otherwise shown unfit to take care of the children, it cannot be necessarily concluded that welfare of the children will be taken care of once their custody is given to him. The girl had expressed a marked reluctance to stay with her father. The High Court was of the opinion that the children had developed long standing affection towards their maternal grandfather, aunt and uncles. It will take a while before they develop the same towards their step mother. The sex of the minor girl who would soon face the difficulties of attaining adolescence is an important consideration, though not a conclusive one. She will benefit from the guidance of her maternal aunt, if custody is given to the respondents, which the appellant will be in no position to provide. Further, there is a special bonding between the children and it is desirable that they stay together with their maternal grandfather, uncles and aunt.

25. In case of custody of the minor children, the Family Law, i.e. the Mohammedan Law would apply in place of the Act. Considering the provisions under Section 353 of the Mohammedan Law, the High Court had held that the preferential rights regarding the custody of the minor children rests with the maternal grandparents. After making a doubtful proposition that

in case of a conflict between personal law and welfare of the children the former shall prevail, the High Court held that in the case at hand there is no such conflict.

26. For the reasons aforementioned, the High Court by its impugned order set aside the order of the Family Court, Bangalore which vacated the interim order of injunction issued against the appellant.

27. It is this order of the High Court, which is challenged before us by way of special leave petition which on grant of leave has been heard by us in the presence of the learned counsel appearing on behalf of the parties.

28. It was the contention of the appellant before us that the Act will apply to the present case because there is a conflict between the preferential guardian in Mohammedan Law and the Act. It was pointed out that while deciding the custody of the minor children, the welfare of the children had to be taken into consideration and that it was guaranteed by the Act. They have placed their reliance on the case of *Rafiq v. Bashiran and ors,* [AIR 1963 Rajasthan 239]. The Rajasthan High Court in the cited case held that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter shall prevail over the former.

29. Relying on the case of *B.N. Ganguly v. C.H.Sarkar,* [AIR 1961 MP 173] it was contended by the learned counsel for the appellant that there is a presumption that parents will be able to exercise good care in the welfare of their children.

30. It was argued by the learned counsel on behalf of respondents that the impugned order warrants no interference. Before passing the impugned order, the learned Judge had spent over one hour with the children to ascertain their preferences. The children have been living with the respondents since their mother's death in June, 2006 as the High Court had stayed the order of the Family Court vacating

the injunction order. While the respondents had been complying with the visitation rights granted to the appellant, the children were not happy with the treatment meted out to them during the time they spent with their father and stepmother. In contrast, respondent no. 3, contrary to the apprehensions expressed by the appellant has stated on record that she had no intention to marry and would devote her life towards the welfare of the children. Respondents further asserted that the cases of *Rafiq v. Bashir* (supra) and *B.N. Ganguly* (supra) are not applicable to the facts of this case.

31. We have heard the learned counsel for both the parties and examined the impugned order of the High Court and also the orders passed by the Family Court. After considering the materials on record and the impugned order, we are of the view that at this stage the respondents should be given interim custody of the minor children till the disposal of the proceedings filed under Sections 7, 9 and 17 of the Act. Reasons are as follows:

32. Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor *as it thinks proper."* In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

33. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the GWC Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take

care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. In the case of *Rosy Jacob v. Jacob A. Chakramakkal,* [(1973) 3 S.C.R. 918], keeping in mind the distinction between right to be appointed as a Guardian and the right to claim custody of the minor child, this Court held so in the following oft-quoted words:

> "Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them."

34. In the case of *Mt. Siddiqunnisa Bibi v. Nizamuddin Khan and Ors.,* [AIR 1932 All 215], which was a case concerning the right to custody under Mohammaden Law, the Court held:

> "A question has been raised before us whether the right under the Mahomedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that

she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father."

35. Thus the question of guardianship can be independent of and distinct from that of custody in facts and circumstances of each case.

36. Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship.

37. The appellant placed reliance on the case of *R.V. Srinath Prasad v. Nandamuri Jayakrishna* [AIR 2001 SC 1056]. This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held:

"The Division Bench appears to have lost sight of the factual position *that the time of death of their mother the children were left in custody of their paternal grand parents with whom their father is staying* and the attempt of the respondent no.1 was to alter that position before the application filed by them is considered by the Family Court. *For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith.* The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion

that custody of the minors should be changed immediately."

What is important for us to note from these observations is that the Court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect.

38. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in the case of *Mausami Moitra Ganguli v. Jayant Ganguli,* [AIR 2008 SC 2262]. This Court held:

"We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression on him."

39. After taking note of the marked reluctance on part of the boy to live with his mother, the Court further observed:

"Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. *In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet* and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."

40. The children have been in the lawful custody of the respondents from October, 2007. In the case of *Gaurav Nagpal v. Sumedha Nagpal,* [(2009) 1 SCC 42], it was argued before this Court by the father of the minor child that the child had been in his custody for a long time and that a sudden change in

custody would traumatize the child. This Court did not find favour with this argument. This Court observed that the father of the minor child who retained the custody of the child with him by flouting Court orders, even leading to institution of contempt proceedings against him, could not be allowed to take advantage of his own wrong. The case before us stands on a different footing. The custody of the minor children with the respondents is lawful and has the sanction of the order of the High Court granting interim custody of the children in their favour. Hence, the consideration that the custody of the children should not undergo an immediate change prevails. The question with whom they remained during the period from the death of their mother till the institution of present proceedings is a matter of dispute between the parties and we are not in a position to reach a conclusion on the same without going into the merits of the matter. At any rate, the children are happy and are presumably taken care of with love and affection by the respondents, judging from the reluctance on part of the girl child to go with her father. She might attain puberty at any time. As the High Court has rightly observed, it may not be in the interests of the children to separate them from each other. Hence, at this juncture, we are not inclined to disturb the status quo, as we are only concerned with the question of interim custody at this stage.

41. The learned counsel for the appellant has placed reliance on the case of *Rafiq v. Smt. Bashiran and Another* [supra]. In this case, the High Court had set aside the order of the Civil Judge granting the custody of the child to her mother's paternal aunt, while the father was not proven to be unfit. Quoting from Tyabji's Mahomedan Law, Third Edition, Section 236 (p. 275) the Court observed:

> "The following persons have a preferential right over the father to the custody of (sic) minor girl before she attains the age of puberty.
>
> 1. Mother's mother
> 2. Father's mother
> 3. Mother's grandmother howsoever high
> 4. Father's grandmother howsoever high
> 5. Full sister
> 6. Uterine sister
> 7. Daughter of full sister, howsoever low.
> 8. Dauther of uterine sister, howsoever low.
> 9. Full maternal aunt, howsoever high.
> 10. Uterine maternal aunt, howsoever high.
> 11. Full paternal aunt, howsoever high.

42. However, the High Court of Rajasthan held that in the light of Section 19 which bars the Court from appointing a guardian when the father of the minor is alive and not unfit, the Court could not appoint any maternal relative as a guardian, even though the personal law of the minor might give preferential custody in her favour.

43. As is evident, the aforementioned decision concerned appointment of a guardian. No doubt, unless the father is proven to be unfit, the application for guardianship filed by another person cannot be entertained. However, we have already seen that the question of custody was distinct from that of guardianship. As far as matters of custody are concerned, the Court is not bound by the bar envisaged under Section 19 of the Act. In our opinion, as far as the question of custody is concerned, in the light of the aforementioned decisions, the personal law governing the minor girl dictates her maternal relatives, especially her maternal aunt, shall be given preference. To the extent that we are concerned with the question of interim custody, we see no reason to override this

rule of Mohammedan Law and, hence, a prima facie case is found in favour of the respondents.

44. Further, the balance of convenience lies in favour of granting custody to the maternal grandfather, aunt and uncle. A plethora of decisions of this Court endorse the proposition that in matters of custody of children, their welfare shall be the focal point. Once we shift the focus from the rights of the contesting relatives to the welfare of the minor children, the considerations in determining the question of balance of convenience also differ. We take note of the fact that respondent no.3, on record, has stated that she has no intention to get married and her plea that she had resigned from her job as a technical writer to take care of the children remains uncontroverted. We are, hence, convinced that the respondents will be in a position to provide sufficient love and care for the children until the disposal of the guardianship application. The second marriage of the appellant, though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their step-mother, with whom admittedly they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain. The learned counsel for the appellant placed reliance on the case of *Bal Krishna Pandey v. Sanjeev Bajpayee* [AIR 2004 UTR 1] wherein the maternal grandfather of the minor contested with the father of the minor for custody of a girl aged about 12 years. The Uttranchal High court in that case gave the custody of minor to the father rejecting the contention of grandfather (appellant) that the father (respondent) after his remarriage will not be in a position to give fair treatment to the minor. However, in that case, the second wife of the father had been medically proven as unable to conceive. Hence, the question of a possible conflict between her affection for the children whose custody was in dispute and the children she might bear from the father did not arise. In the

case before us, the situation is not the same and the possibility of such conflict does have a bearing upon the welfare of the children.

45. As this is a matter of interim custody till the final disposal of the application GWC No. 64 of 2007, we are of the opinion that the interests of the children will be duly served if their current residence is not disturbed and a sudden separation from their maternal relatives does not come on their way. Irreparable injury will be caused to the children if they, against their will, are uprooted from their present settings.

46. The learned counsel for the appellant placed strong reliance in the case of *Hassan Bhatt v. Ghulam Mohamad Bhat* [AIR 1961 J & K 5] which held that the words "subject to the provisions of this section" in sub-section 1 of Section 17 of the Act clearly indicates that the consideration of the welfare of the minor should be the paramount factor and cannot be subordinated to the personal law of the minor. The view expressed by the High Court is clearly correct. As far as the question of interim custody is concerned, we are of the view that there is no conflict between the welfare of the children and the course of action suggested by the personal law to which they are subject.

47. At this juncture, we may mention the following factors to which the learned counsel for the appellant invites our attention. In the present case, respondent no. 1 is an old person aged about 72 years and respondent no. 2 is already married, living with his wife and children. Respondent no. 3 and 4 are unmarried and are of marriageable age. Respondent no. 3, the maternal aunt of the children, will go to live with her husband after marriage. Respondent No. 4 after his marriage may or may not live with his father. There is nothing on record to show that the appellant mistreated the deceased mother of minor children. We cannot express our views on the correctness of these averments. These are the matters that must be gone into when the Family Court disposes of the application for

guardianship filed by the Respondents, and not at this stage.

48. According to the appellant, from the fact that the respondents raised the issue of death of his wife 10 months after her death and one month after he refused the marriage offer of Respondent No. 3, it must be inferred that the respondents have raised this issue merely to obtain the custody of children and that the respondents did not come to court with clean hands. As far as the question of denying the respondents the interim custody of children on the ground that they had not approached the Court with clean hands, we are constrained to say that we are not in a position to conclusively infer the same. The alleged refusal on part of the appellant to marry respondent no.3 which is said to have led the respondents to file the application for guardianship, is again question of fact which is yet to be proved. In *Nil Ratan Kundu and Anr. Vs. Abhijit Kundu,* [(2008) 9 SCC 413] this Court had enumerated certain principles while determining the custody of a minor child. This Court under Paragraph 56 observed:

> "A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. Thus the strict parameters governing an interim injunction do not have full play in matters of custody."

49. The learned counsel for the appellant again relied on a decision of *B.N.Ganguly* (supra) in which case the High Court of Madhya Pradesh had held that there is a presumption in law that parents will be able to exercise good care in the welfare of their children if they do not happen to be unsuitable as guardians. The facts of that case are quite different from the one at hand. The contesting guardians in that case where contesting on the basis of an alleged adoption, against the parents of the child. Both the parents had joined in making the application and nothing had been said against their habits or

way of living. The case stands altogether on a different footing.

50. The High court had relied heavily on the preference made by Athiya Ali who then was 10 to 11 years old. In the opinion of High Court, she was capable of making intelligent preference. It may be true that 11 years is a tender age and her preference cannot be conclusive. The contention of the appellant in this respect is also supported by the decision in *Bal Krishna Pandey's* case (supra). But as we are not dealing with the question of guardianship, but only with the issue of interim custody, we see no reason why the preference of the elder child shall be overlooked. It may be noted that the Family Court had considered fact that the younger child had instinctively approached his father while he met him in the Court premises while vacating the interim order of injunction. The second child who is just 4 years old cannot form an intelligent opinion as to who would be the right person to look after him and, hence, we must give weight to the preference that Athiya had expressed.

51. We find it fit, however, to modify the visitation rights granted to the appellant. He shall be allowed to visit the children on Saturdays as well between 9 am and 5 pm.

52. The order of the High court is modified to the extent indicated above, and the order of the Family Court dated 11th of June, 2007 vacating its injunction order is set aside. The Family Court is hereby directed to dispose of the case relating to the guardianship of the two children after adducing evidence by both the parties (both oral and documentary) at an early date, preferably within six months from the date of supply of a copy of this order to it.

53. We, however, make it clear that the observations made in the order of the High Court as well as by this Court, if there be any, shall not be taken to be final while deciding the original application filed under Sections 7, 9 and 17 of the Act and the Family Court shall be at liberty to proceed with the disposal of

the said proceeding independently of any of the observations made by this Court in this judgment.

54. The appeal is thus dismissed. There will be no order as to costs.

55. In view of the above judgment, the application for impleadment becomes infructuous and is dismissed as such.

N.J. Appeal dismissed.

SNEHADEEP STRUCTURES PRIVATE LIMITED
v.
MAHARASHTRA SMALL SCALE INDUSTRIES DEVELOPMENT CORPORATION LTD.
(Civil Appeal No. 10 of 2010)

JANUARY 5, 2010

[TARUN CHATTERJEE AND V.S. SIRPURKAR, JJ.]

Interest on Delayed Payment to Small Scale and Ancillary Undertakings Act, 1993 – s. 7 – Expression 'appeal' under – Scope of – Held: Word 'appeal' u/s 7 includes an application u/s 34 of Arbitration Act in view of language of s.7, object of legislation and contextual meaning of the term 'appeal' – Arbitration and Conciliation Act, 1996 – s.34 – Interpretation of Statutes.

Interpretation of Statutes – In case of doubt about meaning of a word in a statute, the interpretation which harmonizes the object and purpose of the statute should be adopted.

Words and Phrases – 'Appeal' – Meaning of, in the context of s. 7 of Interest on Delayed payment to Small Scale and Ancillary Undertakings Act, 1993.

The question for consideration before this Court was whether the expression 'appeal' occurring u/s. 7 of Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993, whether would include an application u/s. 34 of the Arbitration and Conciliation Act, 1996.

Partly allowing the appeal, the Court

HELD: 1. "Appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can

be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re-agitation of entire matrix of facts and law. It is not correct to say that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/ decree. [Para 32] [95-G-H; 96-A-C]

Nagendra Nath v. Suresh Chandra **AIR 1932 PC 165;** *Raja Kulkarni v. State of Bombay* **AIR 1954 SCR 384; Mela** *Ram v. CIT* **AIR 1956 SC 367;** *S.R.Abhayankar v. K.D. Bapat* **(1969) 2 SCC 74;** *Tirupati Balaji v. State of Bihar* **(2004) 5 SCC 1, relied on.**

Gramophone Company of India vs. Birendra Bahadur Pandey and Ors. **(1984) 2 SCC 534;** *Central Bank of India v. State of Kerala* **2009 (3) SCR 735;** *Santa Singh v. State of Punjab* **(1976) 4 SCC 190;** *State of Gujarat v. Salimbhai Abudul Gaffar Shaikh and Ors.* **(2003) 8 SCC 50;** *Promotho Nath Roy v. W.A. Lee* **AIR 1921 Cal 415, referred to.**

2.1. Keeping in mind the language of Section 7, object of the legislation and the contextual meaning of the term appeal, the term "appeal" appearing in Section 7 of the Interest Act should include an application u/s 34 as well. [Para 58] [108-B-C]

State of Kerala v. M.K. Krishnan Nair **1978 1 SCC 552, referred to.**

2.2. Section 34 envisages only limited grounds of challenge to an award; however, that alone will not take out an application u/s 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction. [Para 32] [96-C-D]

2.3. So far as interest on delayed payment to Small Scale Industries as well as connected matters are

concerned, the Act is a special legislation with respect to any other legislation, including the Arbitration Act. Therefore, it is not correct to say that the matter of interest payment will be governed by Section 37(1) of the Arbitration Act. Section 4 of the Interest Act endorses the same which sets out the liability of the buyer to pay interest to the supplier 'notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force.' Thus, Interest Act is a special legislation as far as the liability to pay interest, or to make a deposit thereof, while challenging an award/decree/order granting interest. [Para 34] [96-H; 97-A-C]

Jay Engineering Works v. Industry Facilitation Council and Anr. **2006 (8) SCC 677, referred to.**

2.4. Section 6(1) of Interest Act empowers the buyer to obtain the due payment by way of any proceedings. Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. As opposed to Section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by Arbitration Act. Hence, the right context in which the meaning of the term 'appeal' should be interpreted is the Interest Act itself. The meaning of this term under Arbitration Act or CPC would have been relevant if the Interest Act had made a reference to them. Therefore, it is not relevant to say that the Arbitration Act deals with applications and appeals in two different chapters. [Para 36] [97-E-G]

Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. **AIR 2007 SC 683, relied on**

Hanskumar Keshavchand v. Union of India **AIR 1958 SC 947, referred to.**

2.5. The word 'appeal' appearing in Section 7 of Interest Act need not be necessarily interpreted within the meaning of that word in CPC. It is not correct to hold that the expression "appeal" shall be construed solely in the context of a decree or order when the Section clearly makes reference to 'Awards' as well. The plea of the Corporation, that the word 'award' appearing in Section 7 relates to those that result from a reference made under Maharashtra Cooperative Societies Act to the Industry Facilitation Council, is not acceptable. The provisions for such reference, which is to be governed by Arbitration Act, were incorporated in 1998 by way of an amendment in the Interest Act. However, Section 7 contained the word 'award' even before such reference mechanism was incorporated. Therefore, it is difficult to see why 'award' in Section 7 should not include an arbitral award other than the one arising from reference made to the Industries Facilitation Council. [Paras 40 and 41] [99-C-G]

2.6. If the word 'appeal' is not construed as including an application under section 34 of Arbitration Act, it would render the term 'award' redundant and the requirement of pre-deposit, a total nullity with respect to all cases where a Small Scale Industry undertaking preferred arbitral proceedings, prior to the incorporation of the reference procedure in 1998. Arbitration necessarily has to result in an award. The only way of challenging an award in a court, in accordance with Section 5 r/w the opening clause of Section 34 is filing an application under the latter Section. If such challenge is not construed as an 'appeal', the requirement of pre-deposit of interest before the buyer challenging an award passed against him, becomes a total nullity. The fact that an order passed on such application/challenge u/s 34 is appealable u/s 37 is of no consequence. [Para 42] [99-H; 100-A-C]

Sri Paravathi Parameshwara Cables, K.M. Valasa represented by its Managing Partner, K. Surapu Naidu and Ors. vs. A.P.Transmission Corpn. Ltd. represented by Chairman and Managing Director and Anr. **2006 (5) ALT 647, disapproved.**

2.7. In almost all definitions of 'appeal', there is reference to removal of a cause from an inferior Court to a superior Court. It is also trite that an arbitrator deriving his authority from a private agreement does not fit into the ordinary hierarchy of courts. However, an appeal need not necessarily lie from an inferior Court to a superior Court, especially within the meaning of Section 7, for the following reasons: (1) Section 7 itself uses the term 'before a Court or other Authority'. Hence, the inter se relation between an arbitrator and court is not relevant for the purpose of interpreting Section 7. If an appeal can lie only from an inferior court to a superior Court, the words 'other authority' in Section 7 will be rendered redundant. The terminology of the Section indicates that it is intended to cover a wide range of judicial/non-judicial determinations and challenges instituted therefrom before courts or any other authority empowered to entertain such challenge. (2) Section 37(2) provides for appeals from arbitral tribunals. Thus it is not impossible to have appeals lying from arbitral tribunals to courts. (3) Though practically unknown in India, there are two tier arbitration mechanisms known to other jurisdictions. These contemplate appeal from an arbitral award to yet another appellate arbitral tribunal. The arbitrator and the appellate arbitral tribunal do not constitute inferior and superior Courts, but a challenge instituted against the award passed by the former before the latter is treated as an 'appeal' nonetheless. (4) There are other legislations in which the term 'appeal' is used when courts are not in the context of reference. [Para 46] [92-A-H]

Virgo Conductors Pvt. Ltd. represented by its Managing Director v. A.P. Transmission Corporation represented by its Chairman and Managing Director and Anr. **AIR 2008 AP 123, held inapplicable.**

Promotho Nath Roy v. W.A. Lee AIR 1921 Cal 415; Sanshin Chemicals Industry v. Oriental Carbons and Chemicals Ltd. and Ors. **(2001) 3 SCC 341, referred to.**

2.8. An application may sometimes be treated as appeal. It is not correct to say that if an application u/s. 34 is treated as an appeal, an appeal u/s 37 from the order disposing of such an application, then will be a second appeal, which is prohibited u/s 37(3) of the Arbitration Act. A second appeal is prohibited from an order that is passed u/s 37. This bar operates with respect to the period post such appeal, and not prior to it. The Section prohibits a second appeal only from an order passed in appeal under that very Section. An award may be challenged by an application u/s 34, which may be treated as an appeal for the purposes of Interest Act, and an order can be made either setting aside/remitting/ or affirming the said award. Only when from that order an appeal is filed u/s 37, the bar of second appeal u/s 37 applies which is clearly evinced by the use of the words: "from an order passed in appeal under this Section." [Paras 51 and 52] [104-E-H; 105-A-B]

M/s. Pandey & Co. Builders Pvt. Ltd. v. State of Bihar and Anr. **(2007) 1 SCC 467, relied on.**

'The Law and Practice of Arbitration and Conciliation' by O.P. Malhotra and Indu Malhotra, **page 1270, referred to.**

2.9. When there is doubt about the meaning of a word appearing in legislation, the interpretation that harmonizes the object and purpose of the statute should

be adopted, rather than the one which renders the legislation a futility. The interest Act is a beneficial piece of legislation intended to expedite timely payment of money owed to Small Scale Industries. Most of the contracts of supply or sale that Small Scale Industries enter into, contain arbitration clauses. These arbitration proceedings result in an 'award'. If the term 'appeal' is interpreted in the limited context of a 'decree or order' and as excluding an application to set aside or remit such awards, the very purpose behind the enactment of Interest Act will be defeated. [Para 56] [107-C-E]

Supdt. and Remembrancer of Legal Affairs to Govt. of West Bengal v. Abani Maity **(1979) 4 SCC 85, relied on.**

Nokes v. Doncaster Collieries **All ER 1940 HL 549, referred to**

2.10. Section 19 of 2006 Act, no doubt, requires the deposit to be made before an application u/s 34 of the Arbitration Act is filed. However, this provision of a subsequent legislation cannot be read into the provision in question. While the appellant-company urged that the Legislature had used the terms 'appeal' and 'application' interchangeably, the same cannot be inferred conclusively. Use of the term 'application' in Section 19 appears to be in the context of the dispute resolution mechanism provided for u/s 17 which essentially comprises of conciliation and arbitration, to be governed by Arbitration Act, 1996. The legislature has intended to bring about improvements to the Interest Act as stated in the Statement of Objects and Reasons of the Act of 2006. Indeed, it might have contemplated a change in the legal position while enacting the Act of 2006, but that change cannot be applied retrospectively. A subsequent enactment cannot be read into an Act which was repealed by the former. [Para 55] [106-F-H; 107-A-B]

Case Law Reference:

(1984) 2 SCC 534	**Referred to.**	**Para 21**
2009 (3) SCR 735	**Referred to.**	**Para 21**
(1976) 4 SCC 190	**Referred to.**	**Para 21**
(2003) 8 SCC 50	**Referred to.**	**Para 23**
AIR 1932 PC 165	**Relied on**	**Para 24**
AIR 1954 SCR 384	**Relied on.**	**Para 25**
CIT AIR 1956 SC 367	**Relied on.**	**Para 26**
AIR 1921 Cal 415	**Referred to.**	**Para 27**
(1969) 2 SCC 74	**Relied on.**	**Para 28**
(2004) 5 SCC 1	**Relied on.**	**Para 29**
(2006) 8 SCC 677	**Referred to.**	**Para 33**
AIR 2007 SC 683	**Relied on.**	**Para 37**
AIR 1958 SC 947	**Referred to.**	**Para 39**
(2006) 5 ALT 647	**disapproved.**	**Para 43**
AIR 2008 AP 123	**held inapplicable**	**Para 48**
(2001) 3 SCC 341	**referred to.**	**Para 50**
(2007) 1 SCC 467	**relied on.**	**Para 52**
All ER 1940 HL 549	**relied on.**	**Para 55**
(1979) 4 SCC 85	**relied on.**	**Para 56**
1978 1 SCC 552	**referred to.**	**Para 57**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10 of 2010.

From the Judgment & Order dated 5.2.2008 of the High Court of Judicature at Bombay in Appeal No. 485 of 2006.

Vinod Bobde, Shyam Mudaliar, Arjun V. Bobde, Hrishikesh Baruah, Arjun Singh Bawa, Balvir Dosanjh, Jagjit Singh Chhabra for the Appellant.

S.K. Dholakia, M.P. Rao, A.K. Mishra, Abhay Chandrakant Mahimkar for the Respondent.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

2. This appeal by Special Leave arises from a judgment and order dated 5th of February, 2008 of the High Court of Bombay in Appeal No. 485 of 2006 whereby the Division Bench of the High Court had set aside the order dated 25th of January, 2006 of the learned Single Judge of the same High Court dismissing an Arbitration Petition being Arbitration Petition No.499/2003 filed by the respondents.

3. The crucial question that arises for our consideration is with respect to the interpretation of the term 'appeal' appearing in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993 (hereinafter referred to as 'the Interest Act').

4. The facts of the case can be summarised as follows:

The appellant company is a Small Scale Industrial Undertaking for the purposes of the Interest Act. The Maharashtra State Electricity Board (in short 'MSEB') issued a Work Order dated 27th of March, 1995 in favour of Maharashtra Small Scale Industries Development Corporation (hereinafter referred to as 'the Corporation'). The order was for supply of pipeline, bends and fixtures to be used for laying a slurry pipeline at the Chandarpur Thermal Power Station. The Corporation, in their turn, issued a Supply Order dated 30th of

March, 1995 in favour of the appellant-company. The work was completed and the bills were duly submitted by the appellant-company. However, there was a huge delay on the part of the Corporation in paying the said bills to the appellant company and no reasonable cause was shown. Resultantly, the appellant company demanded interest on delayed payment under the Interest Act by a letter dated 7th of December, 1999. The claim was allegedly denied by the Corporation by a letter dated 24th of April, 2000. On 21st of December, 2001, the appellant-company served a notice on the Corporation pointing out that the refusal of the Corporation to pay interest as demanded by the appellant company has given rise to a dispute which shall be referred to the Chairman of the Corporation/his nominee in accordance with clause 27 of the Supply Order, within 15 days from the date of service of notice. Though the Corporation acknowledged the delay and claim for interest vide a letter dated 05th of February, 2002, it held the view that the liability to pay the interest lay on MSEB, which was the buyer, and not on the Corporation. Therefore, the letter stated that reference to arbitration at that stage was not warranted. Aggrieved by the refusal of the respondent to refer the matter to arbitration, the appellant-company preferred an Arbitration Application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short the 'Arbitration Act') before the High Court of Bombay. The High Court appointed a former Judge of the High Court Mr. Justice S.W. Puranik as the Sole Arbitrator. The Arbitrator by his Award dated 30th of June, 2003 directed the Corporation to pay a sum of Rs.78,19,540.73 to the Appellant company.

5. Aggrieved, the Corporation filed an application under section 34 of the Arbitration Act before the High Court of Bombay for setting aside the award which came to be numbered as Arbitration Petition No. 499 of 2003. During the pendency of these proceedings the Appellant company pointed out that under section 7 of the Interest Act the Corporation has

to deposit 75 % of the amount awarded by Arbitrator under the Award.

6. The Learned Single Judge of the High Court, vide his order dated 23rd of August, 2005 dismissed the application filed under Section 34 of the Arbitration Act for setting aside the award of the Arbitrator. It was found that despite the statement made on behalf of the Corporation that a Bank Guarantee would be furnished to comply with Section 7 of the Interest Act recorded on 9th of August, 2005, they had not done so; nor have they asked for any extension of time. Hence, it was held that the petition under Section 34 of the Arbitration Act was liable to be dismissed.

7. On appeal preferred against the said order by the Corporation, which came to be registered as Appeal No. 855 of 2005, the Division Bench of the High Court, by its order dated 17th of November, 2005 had set aside the judgment and order of the learned Single Judge and restored the Arbitration Petition for consideration of the issue whether Section 7 of the Interest Act was applicable in the instant case.

8. The Learned Single Judge vide his judgment and Order dated 25th of January, 2006 held that an application made under Section 34 of the Arbitration Act is an 'appeal' for the purpose of Section 7 of the Interest Act. The learned Single Judge had taken into consideration the fact that the Interest Act was a beneficial piece of legislation. Since the term 'appeal' takes colour from its context, it must be given the widest meaning for the purposes of the case at hand. A learned Single Judge relied on a decision of this Court in the case of *State of Gujarat v. Salimbhai Abdul Gaffar Shaikh,* [(2003) 8 SCC 50] to understand the meaning of the word 'appeal' and held that the word 'appeal for the purposes of Section 7 of the Interest Act shall include an application filed under Section 34 of the Arbitration Act. The prerequisite to an appeal in form of deposit, hence, was held applicable. Admittedly, no deposit was made. Therefore, it was held that the application for setting aside the

award under Section 34 of the Arbitration Act could not be entertained. The Learned Single Judge also found that the conditions in the Supply Order dated 30th of March, 1995 established the buyer-supplier relationship between the Corporation and the Appellant company and hence the liability to pay interest also lay on the Corporation.

9. The Corporation preferred an appeal before the Division Bench of High Court of Bombay, which came to be numbered as Appeal No. 485 of 2006. The Division Bench of the High Court by the impugned order dated 5th of February, 2008 allowed the appeal and directed that the Arbitration Petition filed by the Corporation shall be heard. The High Court was of the opinion that the expression 'appeal' in Section 7 of the Interest Act cannot include an application under Section 34 of the Arbitration Act. The term 'appeal' is in the context of a decree and can only include 'a judicial determination by a Regular Civil Court considering the hierarchy of Courts'. After considering the general scheme of awards and appeals under the Arbitration Act, 1940 and under the Arbitration Act, 1996, the Division Bench of the High Court was of the view that an order passed under Section. 34 of the Arbitration Act is an order setting aside or refusing to set aside an arbitral award. Therefore, the decision of the competent court under Section 34 is neither a judgment nor a decree. The order so passed is appealable under Section 37(1)(b) of the Arbitration Act. Remedy by way of appeal, therefore, is provided under the Arbitration Act itself. The Arbitration Act, therefore, in respect of an arbitral award makes a distinction between a challenge to an award and an appeal against an order refusing to set aside or setting aside an award in a Petition filed under Section 34(2) of the Arbitration Act. Under the Arbitration Act, in case, the award is not set aside under Section 34, an appeal can be preferred against that order under Section 37. The provisions of Section 7 may apply to such an appeal. Under section 34, the Court hearing the challenge has no power to issue alternative decisions binding on the forum below.

10. The High Court further held that Section 19 of the Micro Small and Medium Enterprises Development Act, 2006 (in short 'the Act of 2006') cannot be made applicable to the present case as the reference to arbitration was not in terms of Section 19 of the Act of 2006. At the time when the challenge of pre deposit under section 7 of the Interest Act was heard by the learned Single Judge of the High Court, the Act of 2006 was not in force.

11. The Division Bench of the High Court after considering various decisions cited by both the parties before us and some of the dictionaries dealing with the term 'appeal', held:

> "Applying these principles, in our opinion and considering the history of the Act and the Legislation which were in force when the Interest Act was enacted, *it would be clear that the application to challenge the award under Section 34 apart from it not being a judicial proceedings or emanating from the court, cannot be considered as an appeal within the meaning of Section 7 of the Act."*

12. As regards the question, whether the respondents were buyers, and not suppliers, the High Court was of the opinion that the said issue would have to be decided when the challenge to the award under Section 34 will be heard and finally disposed of. In sum, the High Court allowed the appeal and ordered that the pending petition to challenge the award be disposed of according to law, as the preliminary objection in terms of the requirement of pre-deposit of interest awarded was ruled out.

13. It is this order of the High Court dated 5th of February, 2008 which is challenged before us by way of this special leave petition which on grant of leave was heard by us in presence of the learned Counsel for the parties.

14. The only question that arises for our consideration is:

Whether the expression 'appeal' used in Section 7 of the

Interest Act includes an application to set aside the arbitral award filed under Section 34 of the Arbitration Act, 1996 ?

It may be pertinent to reproduce Section 7 of the Interest Act, before we proceed to interpret the word 'appeal'.

Section 7 of the Interest Act reads as under:

> "Appeal- No appeal against any decree, award or other order shall be entertained by any court or other authority unless the appellant company (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, other order in the manner directed by such court, or, as the case may be, such authority."

15. The learned counsel for the appellant company strenuously, contended before us that the term 'appeal' in the aforementioned section shall include an application under section 34 of the Arbitration Act and hence deposit of 75 % of the amount awarded was a pre requisite for entertaining the application filed by the respondent corporation to set aside the award passed by the learned arbitrator.

16. The learned counsel for the corporation hotly contested this submission and argued that an "appeal" within the meaning of section 7 of the Interest Act cannot include an application filed under section 34 of the Arbitration Act and hence the corporation was not liable to deposit 75 % of the amount awarded by the learned arbitrator for entertaining the application filed under section 34 of the Arbitration Act.

17. According to the learned counsel for the appellant company, no term can have a definite meaning independent of its context. The exercise of appellate jurisdiction can take various forms. There is no reason to read 'appeal' in a narrow sense as being an appeal under Section 96 of the Code of Civil Procedure (in short 'the Code') against a decree or against an order under Section 4 of the Code. The learned counsel further

argued that the word 'award' in Section 7 cannot be ignored, nor can it be rendered meaningless and hence an "appeal" within the meaning of the said section could lie from an arbitral award as well.

18. The respondents, on the other hand, submit that when a statutory provision is clear and unambiguous, the Court is not empowered to read anything extraneous to the Statute into it. The words of the Statute shall be given effect to, irrespective of the consequences.

19. The contention of the appellant company that while interpreting a statutory provision, its context and the object behind the same cannot be lost view of, is no doubt, correct. At the same time, the contention of the respondents that when a term appearing in the Statute is clear and unambiguous, only the literal rule of interpretation will apply, must also be accepted. What then has to be seen is whether the term 'appeal' is one of clear and definite meaning. If it is so, that meaning shall be given effect to irrespective of the consequences of such construction. If, on the other hand, the meaning of the 'appeal' is ambiguous, the interpretation that advances the object and purpose of the legislation, shall be accepted.

20. Before we proceed to consider the true meaning of the word 'appeal', we may note the contention of the learned counsel for the appellant company that no expression can have a meaning independent of its context. The Appellant company relied on a number of decisions in support of the proposition that: *"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."*

21. In *Gramophone Company of India vs. Birendra Bahadur Pandey & Ors.* [(1984) 2 SCC 534], while interpreting the term 'import', this Court observed that the dictionary was not helpful where word of common parlance with varied

meanings is to be construed and it was held that such word shall be construed in the context in which it appears. Similarly in *Central Bank of India v. State of Kerala,* (in Civil Appeal no. 95 of 2005, decided on 27th of February, 2009) while interpreting the term 'debt' and 'security interest', this Court has followed the principle as mentioned herein above. Similar view was also expressed in *Santa Singh v. State of Punjab,* (1976) 4 SCC 190 while dealing with the ambit of the expression 'shall hear' appearing in Section 235 of the Code of Criminal Procedure.

22. At this stage, we may now deal with the decisions cited by the learned counsel for the appellant in which the meaning of the word 'appeal' was an issue.

23. The case of *State of Gujarat v. Salimbhai Abudul Gaffar Shaikh and others,* [(2003) 8 SCC 50] on which the Single Judge of the High Court relied on while delivering his judgment, which was set aside by the Division bench of the High Court by the impugned order, had categorically held that the term 'appeal' cannot have a universal meaning fitting all contexts and purposes.

24. In the case of *Nagendra Nath v. Suresh,* [AIR 1932 PC 165], their Lordships of the Privy Council were concerned with the construction of Article 182 Schedule 1 of the Limitation Act, 1908. The time of limitation under this provision would run from the date of the final decree or order of the appellate Court, if there was an appeal. However, in an application purported to be an appeal filed by one Madan Mohan, only the decree holders, not the judgment debtors, were made parties. Further, it was incorrectly stated that no decree was drawn up and the 'appeal' was purported to be from the 'order' of the Court below. It was contended that the application was not 'an appeal', but a merely abortive attempt to mean 'appeal' as not all necessary parties were made a party to it, and also because it did not imperil the whole decree. The Court held that: "any application by a party to an appellate Court, asking it to set

aside or revise a decision of a subordinate court, is an "appeal" within the ordinary acceptation of the term, and that it is no less appeal because it is irregular or incompetent." Their Lordships, in that case, adopted the literal meaning of the term 'appeal' and held that it was not open for them to read into the Statute any qualification as to the character of the appeal or as to the parties to it.

25. In the case of *Raja Kulkarni v. State of Bombay,* [AIR 1954 SCR 384], a similar question was raised in the context of Industrial Tribunals (Appellate Tribunal) Act, 1950 which prohibited a workman from going on a strike during the pendency of an appeal. Relying on the decision of *Nagendra Nath* (supra), this Court held that it was not necessary that such pending appeal should be a valid and competent appeal. This Court, however, unlike the Privy Council, looked into the object of the Act i.e. industrial peace should not be disturbed so long as the matter was pending in the Court of appeal, irrespective of the fact whether such an appeal was competent in law.

26. The case of *Mela Ram v. CIT,* [AIR 1956 SC 367] was also relied on as it was pertinent to the issue. In this case, it was held that an appeal presented out of time is an appeal, and an order dismissing it, as time barred is one passed in appeal.

27. In the case of *Promotho Nath Roy v. W.A. Lee* (AIR 1921 Cal 415)**,** an order dismissing an application as barred by limitation after rejecting an application under Section 5 of the Limitation Act to excuse the delay in presentation was held to be one 'passed on appeal' within the meaning of Section 109 of the Code.

28. The learned senior counsel for the appellant-company further argued that an appeal may not necessarily always lead to the review of the impugned judgment on questions of fact and law. It may be an application for possible reversal of the impugned order or award on the ground of illegality or improper

proceedings. Hence, an application under section 34 of the Arbitration Act which empowers the Court to set aside the arbitral award on limited grounds enumerated therein, can also be an appeal. In the case of *S.R.Abhayankar v. K.D. Bapat,* [(1969) 2 SCC 74]**,** the question was whether the High Court could interfere under Articles 226 and 227 of the Constitution with the order of the Appellate Court in proceedings under an Act, when a petition for revision under Section 115 of the Code against the same order had been previously dismissed by a learned Single Judge of the High Court. The following paragraphs from the judgment are apposite to the issue. (Paragraphs 5 & 6)

> "5. It would appear that their lordships of the Privy Council regarded the *revisional jurisdiction to be a part and parcel of the appellate jurisdiction of the High Court. This is what was said in Nagendra Nath Dey v. Suresh Chandra Dey* 59 I.A.283
>
> There is no definition of appeal in the CPC, but their Lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term....
>
> Similarly in *Raja of Ramnad v. Kamid Rowthen and Ors.* 53 I.A.74 a civil revision petition was considered to be an appropriate form of appeal from the judgment in a suit of small causes nature. A full bench of the Madras High Court in *P.P.P. Chidambara Nadar v. C.P.A. Rama Nadar and Ors.* A.I.R.1937 Mad. 385 had to decide whether with reference to Article 182(2) of the Limitation Act, 1908 the term "appeal" was used in a restrictive sense so as to exclude revision petitions and the expression "appellate court" was to be confined to a court exercising appellate, as opposed to, revisional powers. After an exhaustive examination of the case law including the decisions of the Privy Council mentioned above the full bench expressed

> the view that Article 182(2) applied to civil revisions as well and not only to appeals in the narrow sense of that term as used in the Civil Procedure Code…[right of appeal] was one of entering a superior Court and invoking its aid and interposition to redress the error of the court below. Two things which were required to constitute appellate jurisdiction were the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. In the well known work of Story on Constitution (of United States) vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the legislature may choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter, in suits at common law tried by a jury.
>
> 6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction

of the High Court which is being invoked and exercised in a wider and larger sense. We do not, therefore, consider that the principle of merger of orders of inferior Courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal".

29. *The decision in the case of Tirupati Balaji v. State of Bihar,* [(2004) 5 SCC 1] may also be taken note of:

"*Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior Court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand."*

30. The High Court had considered this decision while delivering the impugned judgment and order.

31. It is the contention of the learned counsel for the respondent- corporation, on the other hand, that Section 7 is applicable only when an appeal is filed from a decree or order, under which the entire matrix of facts and law could be re-agitated. Section 34(2) of the Arbitration Act enumerates the limited grounds of challenge under Section 34 and such a challenge is not an "appeal".

32. On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re-agitation of entire matrix of facts and law. We have

already seen in the case of *Abhayankar* (supra) that even an order passed by virtue of limited power of revision under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving such a wide meaning to the term 'appeal', we are constrained to disagree with the contention of the learned counsel for the respondent-corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application under section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.

33. According to the learned counsel for the respondent-Corporation, Arbitration Act treats 'appeals' and 'applications' separately under two distinct chapters: Chapter VIII and Chapter IX respectively. It was also strenuously contended by the learned counsel for the respondent that the Arbitration Act contains specific provisions for awarding interest and that Act being a special enactment will prevail over the Interest Act. He relied on the case of *Jay Engineering Works v. Industry Facilitation Council & Anr.,* [2006 (8) SCC 677] to show that against the provisions of Interest Act, the provisions of Arbitration Act will prevail, as the latter is a complete code in itself. The Interest Act will apply only when the party prefers a suit to arbitration.

34. The preamble of Interest Act shows that the very objective of the Act was "to provide for and regulate the payment of interest on delayed payments to small scale and ancillary industrial undertakings and for matters connected therewith or incidental thereto." Thus, as far as interest on delayed payment to Small Scale Industries as well as

connected matters are concerned, the Act is a special legislation with respect to any other legislation, including the Arbitration Act. The contention of the respondent that the matter of interest payment will be governed by Section 31(7) of the Arbitration Act, hence, is erroneous. Section 4 of the Interest Act endorses the same which sets out the liability of the buyer to pay interest to the supplier 'notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force.' Thus, Interest Act is a special legislation as far as the liability to pay interest, or to make a deposit thereof, while challenging an award/decree/ order granting interest.

35. Section 6(1) empowers the supplier to whom payment is due, to recover the same by way of a suit or any other proceedings. Section 6(2), which was inserted by way of an amendment in 1998, states that any dispute can be resolved by reference to the Industries Facilitation Council who shall conduct arbitration or conciliation proceedings in accordance with the Arbitration Act.

36. It may be noted that section 6 (1) empowers the buyer to obtain the due payment by way of *any proceedings.* Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. It is pertinent to note that as opposed to section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by Arbitration Act. Hence, the right context in which the meaning of the term 'appeal' should be interpreted is the Interest Act itself. The meaning of this term under Arbitration Act or Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term 'appeal' in the Interest Act, and not in the Arbitration Act. The learned counsel for the respondent-corporation invited our

attention to Rule 803 B and Rule 876 of the High Court of Bombay Rules to show the differences in procedures for filing and dealing with applications, on one hand and appeals, on the other hand. The difference in procedures with respect to application and appeal under the Bombay High Court rules is only indicative of the procedural aspect of the matter, that too with limited application for matters pending before that Court.

37. The learned counsel for the respondent-corporation relied on the decision of *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.,* [AIR 2007 SC 683] which held that: "The 1996 Act is a complete Code by itself. It lays down the machinery for making an arbitral award enforceable. In terms of Section 36 of the 1996 Act, an award becomes enforceable as if it were a decree; where the time for making the application for setting it aside under Section 34 has expired, or such application having been made, has been refused."

38. However, it can be seen that this case offers support, if any, to the case of appellant company. The question involved was whether the provisions of the Arbitration Act would prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). It was held that when there is a conflict between the Arbitration Act and the SICA, latter which have been made to seek to achieve a higher goal would be applicable despite non-obstante clause contained in Section 5 of the Arbitration Act.

39. The learned Counsel for the respondent-corporation relied on the decision of *Hanskumar Keshavchand v. Union of India,* [AIR 1958 SC 947]. In that case, a preliminary objection was taken to the maintainability of Civil Appeal on the ground that the judgment of the High Court passed in appeal under Section 19(1)(f) of the Defence of India Act, 1939 was an award and not a judgment, decree or order within the meaning of sections 109 and 110 of the Code of Civil Procedure, and that accordingly the appeal before the Court was incompetent. Thus, the question was whether an order

made in an appeal under Section 19 (1)(f) of Defence of India Act, 1939 will be a judgment, decree, or order to the effect that it is possible to file an appeal from such order under the appeal provisions of Code. The Court held that when the Court acts in the capacity of an arbitrator, as it does under the Section in question, the verdict rendered by it will not be a judgment, decree or order and hence an appeal will be incompetent under the provisions of Code.

40. The High Court, while delivering the impugned judgment had taken this decision into consideration. While we are in respectful agreement with the decision, we have already stated that the word 'appeal' appearing in Section 7 of Interest Act need not be necessarily interpreted within the meaning of that word in CPC.

41. In its impugned judgment, the Division Bench of the High Court had held that if one considers the expression "appeal" in the context of the expression decree, it can only be a judicial determination by a Regular Civil Court considering the hierarchy of courts. We fail to understand why the expression "appeal" shall be construed solely in the context of a decree or order when the Section clearly makes reference to 'Awards' as well. According to the Respondents, the word 'award' appearing in Section 7 relates to those that result from a reference made under Maharashtra Cooperative Societies Act to the Industry Facilitation Council. The provisions for such reference, which is to be governed by Arbitration Act, were incorporated in 1998 by way of an amendment in the Interest Act. However, section 7 contained the word 'award' even before such reference mechanism was incorporated in the Interest Act by way of the Amendment Act, 1998. Therefore, it is difficult to see why 'award' in section 7 should not include an arbitral award other than the one arising from reference made to the Industries Facilitation Council.

42. Further, if the word 'appeal' is not construed as including an application under section 34 of Arbitration Act, we

are afraid that it would render the term 'award' redundant and the requirement of pre-deposit a total nullity with respect to all cases where a Small Scale Industry undertaking preferred arbitral proceedings, prior to the incorporation of the reference procedure in 1998. Arbitration necessarily has to result in an award. The only way of challenging an award in a Court, in accordance with section 5 read with the opening clause of section 34 is filing an application under the latter section. If such challenge is not construed as an 'appeal', the requirement of pre-deposit of interest before the buyer challenging an award passed against him, becomes a total nullity. The fact that an order passed on such application/challenge under section 34 is appealable under section 37 is of no consequence. As the learned counsel for the appellant company rightly argued, such appeal is filed against an order passed by the Court under section 34, not against an award passed against the buyer and in favour of the Small Scale Industry undertaking. In all cases where the Small Scale Industry undertaking enters into arbitration proceedings to obtain payment of interest, if we limit the requirement of pre-deposit to appeal under Section 37, therefore, we will be rendering the term 'award' a nullity, which we are not empowered to do. The requirement of pre-deposit of interest is introduced as a disincentive to prevent dilatory tactics employed by the buyers against whom the Small Scale Industry might have procured an award, just as in cases of a decree or order. Presumably, the legislative intent behind section 7 was to target buyers, who, only with the end of pushing off the ultimate event of payment to the small scale industry undertaking, institute challenges against the award/decree/order passed against them. Such buyers cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires pre-deposit of 75 % interest even when appeal is preferred against an award, as distinguished from an order or decree.

43. In *Sri Paravathi Parameshwara Cables, K.M. Valasa, represented by its Managing Partner, K. Surapu Naidu and*

Ors. vs A.P. Transmission Corpn. Ltd. represented by Chairman and Managing Director and Anr., [2006 (5) ALT 647], a case decided by the High Court of Andhra Pradesh the identical question of law was raised. The Court held, relying on the definition of 'appeal' laid down in the case of *Nagendra Nath Dey v. Suresh Chandra Dey* (supra), that :

> "If we apply the tests whether an application under Section 34 of the Arbitration Act would amount to an appeal or not, one would come to the conclusion that it cannot be termed as an appeal. Whereas, the appeal is heard on questions of fact as well as on questions of law, an application for setting aside the order of award under Section 34 of the Arbitration Act can be heard on limited grounds, which are mentioned in Section 34 of the Arbitration Act. As a matter of fact, generally speaking, the questions of fact decided by an arbitrator cannot be gone into by the Court while hearing an application for setting aside an arbitral award. Secondly, where there is an appeal provided, it lies to a higher Court from the decision of a lower Court, the application under Section 34 of the Arbitration Act lies to a Court against an award passed by an arbitrator and arbitrator cannot be termed as a Court inferior to the Court of appeal."

44. According to the High Court of Andhra Pradesh, thus "when the Court refuses to set aside an arbitral award under Section 34 of the Arbitration Act and an appeal is filed before an appellate Court, Section 7 of the 1993 Act would operate and not at the stage when an application under Section 34 of the Arbitration Act has been moved.

45. We have already stated that the term 'appeal' does not always indicate a process where all questions of fact and law can be re-agitated. We have already seen that various Courts have held even a revision petition to be an 'appeal', keeping in mind the object of the legislation.

46. It is true that in almost all definitions of 'appeal', there is reference to removal of a cause from an inferior Court to a superior Court. It is also trite that an arbitrator deriving his authority from a private agreement does not fit into the ordinary hierarchy of Courts. In our opinion, however, an appeal need not necessarily lie from an inferior Court to a superior Court, especially within the meaning of Section 7, for the following reasons:

(1) Section 7 itself uses the term 'before a Court or other Authority'. Hence, the inter se relation between an Arbitrator and Court is not relevant for the purpose of interpreting S. 7. If an appeal can lie only from an inferior court to a superior Court, the words 'other authority' in S. 7 will be rendered redundant. The terminology of the section indicates that it is intended to cover a wide range of judicial/ non-judicial determinations and challenges instituted therefrom before Courts or any other authority empowered to entertain such challenge.

(2) Section 37 (2) provides for appeals from arbitral tribunals. Thus it is not impossible to have appeals lying from arbitral tribunals to Courts.

(3) Though practically unknown in India, there are two tier arbitration mechanisms known to other jurisdictions. These contemplate appeal from an arbitral award to yet another appellate arbitral tribunal. The arbitrator and the appellate arbitral tribunal do not constitute inferior and superior Courts, but a challenge instituted against the award passed by the former before the latter is treated as an 'appeal' nonetheless.

(4) There are other legislations in which the term 'appeal' is used when Courts are not in the context of reference. For instance, under the Right to

> Information Act, 2005 an appeal lies from the order of the Central/State public information officer to a senior official of higher rank. These officials, no doubt, can not be called Courts.

47. For these reasons, we are not in a position to agree with reasoning or conclusion of the High Court of Andhra Pradesh in the decision aforementioned.

48. In the case of *Virgo Conductors Pvt. Ltd. represented by its Managing Director v. A.P. Transmission Corporation represented by its Chairman And Managing Director and Anr.,* [AIR 2008 AP 123], a case decided by the same High Court on 20 December, 2007, it was held:

> "Section 7 contemplates filing of only 'appeal' against any decree, award or other order, but not any other proceeding like original petition. Section 7 casts a liability only on the 'appellant company' to deposit 3/4th of the amount awarded while filing the appeal. There is no prohibition contained in Section 7 of the Old Act with regard to filing of an original petition challenging the award under the provisions of the Arbitration Act without deposit of 3/4th of the awarded amount. *On the other hand, filing of such original petition without deposit of any portion of the awarded amount is permissible under the provisions of the of Sub-section (2) of Section 6 of the Old Act.* The earlier batch Arbitration Act, which provisions are made applicable by virtue of petitions filed by the Appellant company seeking a direction to the first respondent for deposit of the 75% of the awarded amount were accordingly dismissed by the learned Additional Chief Judge and the same was confirmed by this Court also while dismissing the civil revision petitions filed in that regard."

This case does not, however, give any cogent reason for holding that the old Act did not require deposit of any interest.

49. An application may sometimes be treated as appeal. As noted earlier, in the case of *Promotho Nath Ray* (supra) a decision passed on an application to condone the delay was held to be one passed on appeal.

50. The Law Commission, in its 176th Report on "Amendments to the Arbitration Act, 1996" has repeatedly referred to the need of providing appeals from certain orders of the Arbitrator under section 34. Further, this Court in the case of *Sanshin Chemicals Industry v. Oriental Carbons and Chemicals Ltd. and Ors.* [(2001) 3 SCC 341] had also made several references to 'an appeal' under section 34. The English Arbitration Act, 1996 provides that when the parties had excluded the 'right to appeal' (by way of what is known as an 'exclusion agreement') the right to file certain applications to invoke the Court's indulgence in the matter is also taken away. Hence, it is not difficult to see that ordinarily, an application under section 34 is referred to as an appeal.

51. The learned counsel for the Corporation contends that if an application under S. 34 is treated as an appeal, an appeal under S. 37 from the order disposing of such an application, then will be a second appeal, which is prohibited under Section 37(3) of the Arbitration Act.

Section 37 (3) of the Arbitration Act reads:

> "No second appeal shall lie *from an order passed in appeal under this section,* but nothing in this section shall affect or take away any right to appeal to the Supreme Court".

52. A second appeal is prohibited from an order that is passed under S. 37. This bar operates with respect to the period post such appeal, and not prior to it. The Section prohibits a second appeal only from an order passed in appeal under that very section. An award may be challenged by an application under section 34, which may be treated as an

appeal for the purposes of Interest Act, and an order can be made either setting aside/remitting/ or affirming the said award. Only when from that order when an appeal is filed under section 37, the bar of second appeal under section 37 applies which is clearly evinced by the use of the words: 'from an order passed in appeal under this section." Further, this Court, in the case of *M/S. Pandey & Co. Builders Pvt. Ltd v. State Of Bihar & Anr,* (2007)1 SCC 467 held that the bar under Section 37 (3) is inserted only by way of abundant caution since in view of Section 5 read with Section 37 (1) and 37(2), a second appeal would not have been possible at any rate. The Court quoted from *The Law and Practice of Arbitration and Conciliation by O.P. Malhotra and Indu Malhotra, page 1270:*

> "…Section 5 imposes a blanket ban on judicial intervention of any type in the arbitral process except 'where so provided under Part I' of this Act. Pursuant to this provision, Section 37(1) provides appeals against certain orders of the court, while Section 37(2) provides appeal against certain orders of the arbitral tribunal. However, Section 37(3) prohibits a second appeal against the appellate order under Section 37(1) and (2). However, in view of the provisions of Section 5, a second appeal against the appellate order under Section 37(1) and (2) would not be permissible, even if Section 37(3) had not been enacted. It was, therefore, not really necessary to enact this provision, and it seems to have been enacted by way of abundant caution."

53. This decision elaborates on the true scope of Section 37. Hence, we are afraid we will have to disagree with the learned counsel for the respondent in this respect.

54. The learned counsel for the appellant company further relied on the Act of 2006' which has repealed the Interest Act. Section 19 of this Act uses the term 'application' against award, decree or order while providing for a reasonable deposit. Therefore, the learned counsel for the appellant company

argued that the Legislature uses the terms 'appeal' and 'application' interchangeably. In response, the learned counsel for the respondent-corporation argued that the provisions of the 2006 Act cannot be used for the purpose of interpreting the Arbitration Act.

Section 19 of the Act of 2006 reads as follows:

> "No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant company (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:
>
> Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

55. This provision, no doubt, requires the deposit to be made before an application under Section 34 of the Arbitration Act is filed. However, we are not inclined to read this provision of a subsequent legislation into the provision in question. While the learned counsel for the appellant company urged that the Legislature had used the terms 'appeal' and 'application' interchangeably, we are of the view that we cannot conclusively infer the same. Use of the term 'application' appears to be in the context of the dispute resolution mechanism provided for under Section 17 which essentially comprises of conciliation and arbitration, to be governed by Arbitration Act, 1996. The legislature has intended to bring about improvements to the Interest Act as stated in the Statement of Objects and Reasons

of the Act of 2006. Indeed, it might have contemplated a change in the legal position while enacting the Act of 2006, but we cannot make that change apply retrospectively. In this respect, we agree with the reasoning of the High Court and with the contentions of learned counsel for the respondents as we cannot read the provision of a subsequent enactment into an Act which was repealed by the former.

56. The learned counsel for the appellant company further contended that when there is doubt about the meaning of a word appearing in legislation, the interpretation that harmonizes the object and purpose of the object of the Statute should be adopted, rather than the one which renders the legislation a futility. *(See Nokes v. Doncaster Collieries, All ER 1940 HL 549, Supdt. and Remembrancer of Legal Affairs to Govt. of West Bengal v. Abani Maity, (1979) 4 SCC 85).* The interest Act is a beneficial piece of legislation intended to expedite timely payment of money owed to Small Scale Industries. Most of the contracts of supply or sale that Small Scale Industries enter into contain arbitration clauses. These arbitration proceedings result in an 'award'. If the term 'appeal' is interpreted in the limited context of a 'decree or order' and as excluding an application to set aside or remit such awards, the very purpose behind the enactment of Interest Act will be defeated. We are in agreement with the learned counsel for the appellant company in this respect.

57. According to the learned counsel for the appellant company, if the term 'appeal' is restricted to challenges launched against a decree or an order, it will effectively lead to discrimination between Small Scale Industries who have an award in their favour, and the ones which have procured either a decree or an order in their favour, submitted that if there is a construction that leads to the constitutionality of the provision in question, that should be adopted even if straining of language is necessary, relying on the case of *State of Kerala v. M.K. Krishnan Nair,* 1978 1 SCC 552. In the light of our

views expressed hereinabove, we do not need to delve into the question whether section 7 will lead to an unreasonable classification if pre-deposit of interest is not required before an award is challenged under section 34 of the Arbitration Act.

58. Keeping in mind the language of Section 7, object of the legislation and the contextual meaning of the term appeal, we are, therefore, of the view that the term "appeal" appearing in Section 7 of the Interest Act should include an application under Section 34 as well. The judgment and order of the High Court shall, therefore, stand set aside and the appeal is allowed to the extent indicated above. The respondent-corporation shall make a deposit of 75 % of the amount awarded by the learned Arbitrator by his award dated 30th of June, 2003 in Court where the application for setting aside the award is now pending decision. Such deposit shall be made within three months from this date. In the event, such deposit is made the court shall decide the application for setting aside the award filed under Section 34 of the Arbitration Act as expeditiously as possible preferably within six months from the date of deposit to the Corporation.

59. The appeal is thus allowed to the extent indicated above. There will be no order as to costs.

60. In view of the above judgment, the application for impleadment becomes infructuous and is dismissed as such.

K.K.T. Appeal partly allowed.

N.B.C.C. LTD.
v.
J.G. ENGINEERING PVT. LTD.
Civil Appeal No. 8 of 2010

JANUARY 5, 2010

[TARUN CHATTERJEE AND AFTAB ALAM, JJ.]

Arbitration and Conciliation Act, 1996:

s.14(1) – Termination of mandate of arbitrator – Failure on part of arbitrator to conclude the arbitration proceedings/ publish the award within the time limit fixed by parties or such extended time as consented by parties – Held: The mandate of arbitrator is liable to be terminated – Arbitration – Efficacious remedy.

Dispute arose between the parties and matter was referred to arbitration. Due to some reasons, arbitration proceedings were not concluded. Respondent filed application before High Court seeking removal of the arbitrator. High Court directed appellant to appoint a new arbitrator and further directed the arbitrator so appointed to conclude the arbitration proceedings within six months. After the expiry of six months, both the parties extended the time to conclude arbitration. The arbitrator failed to publish the award within the extended time.

Respondent filed application before High Court for a declaration that the mandate of the arbitrator stood terminated. High Court by its order dated 23.3.2006 terminated the mandate of the arbitrator on the ground of delay in making the award. High Court further by order dated 21.9.2007 appointed a sole arbitrator to adjudicate the disputes between the parties. These appeals were filed against orders dated 23.3.2006 and 21.9.2007.

Partly allowing the appeals and remitting the matter to High Court, the Court

HELD: 1. A perusal of arbitration agreement revealed that the arbitrator had power to enlarge the time to make and publish the award by mutual consent of the parties. Therefore, without the consent of both the parties to the dispute, arbitrator had no power to further extend the time beyond that which is fixed. It is an admitted position that the respondent did not give any consent for extension of time. Thus, the arbitrator had no power to further enlarge the time to make and publish the award and therefore his mandate had automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings. Arbitration is an efficacious and alternative way of dispute resolution between the parties. There is no denying the fact that the method of arbitration has evolved over the period of time to help the parties to speedily resolve their disputes through this process and in fact the Arbitration and Conciliation Act recognizes this aspect and has elaborate provisions to cater to the needs of speedy disposal of disputes. The present case illustrates that inspite of adopting this efficacious way of resolving the disputes between the parties through the arbitration process, there was no outcome and the arbitration process lingered on for a considerable length of time which defeated the notion of the whole process of resolving the disputes through arbitration. The contention of the appellant therefore cannot be justified that since the dispute was highly technical in nature, it had to be dealt with elaborately by the arbitrator and that he was justified in being late. High Court correctly fixed the time for the arbitration to be concluded within a period of six months from the appointment of the fourth arbitrator considering the time that was spent for the arbitration process prior to his appointment. That apart, even assuming that the arbitration process involved

highly technical and complex issues, which was time consuming, even then, it was open for the arbitrator or for the parties to approach the Court for extension of time to conclude the arbitration proceeding which was not done either by the arbitrator or by any of the parties. As correctly noted by High Court in its impugned judgment, there was no cogent reason for the delay in making and publishing the award by the arbitrator. He already had the relevant materials at his disposal and could base his findings on the observations made by the three arbitrators who were appointed prior to him. [Para 5] [118-B-H; 119-A-D]

Jatinder Nath v. M/s Chopra Land Developers Pvt. Ltd. & Anr. **AIR 2007 SC 1401;** *General Manager, Department of Telecommunications, Thiruvananthapuram v. Jacob S/o Kochuvarkey Kalliath (Dead) by LRs. And Others* **2003 (9) SCC 662;** *National Aluminum Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd. and Another* **2004 (1) SCC 540, held inapplicable.**

2. It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them. The arbitrator had not concluded the proceedings as had been agreed to by the parties within the time fixed for doing so. The mandate of the arbitrator was terminated only because of the fact that the arbitrator having failed to conclude his proceedings within time did not warrant to be continued as an arbitrator in the absence of the

consent of both the parties. The arbitrator had become *functus officio* in the absence of extension of time to make and publish the award. After the said date, the arbitrator had no authority to continue with the arbitration proceedings. It is clear from a bare reading of sub section 1 (a) of section 14 of the Act, the mandate of an arbitrator shall terminate if he fails to act without undue delay. In the present case, it is clear that the arbitrator had extended the time provided to it without any concrete reasons whatsoever and thus his mandate was liable to be terminated. Sub section 1(b) further states that the mandate of an arbitrator shall also stand to be terminated if he withdraws from his office or the parties agree to the termination of his mandate. The perusal of the records show that the parties had not agreed to the extension of the mandate of the arbitrator. Further, Subsection (2) of Section 14 of the Act stipulates that if a controversy remains concerning any of the grounds referred to under clause (a) of sub-section (1), a party may, unless otherwise agreed to by the parties, apply to the Court to decide on the termination of the mandate. Thus the respondent rightly applied to the Court for the termination of the mandate of the arbitrator pursuant to the provisions of this section, and the Court was within its jurisdiction to decide accordingly. [Paras 5, 7, 11 and 12] [121-F-H; 122-A; 125-B-C-F-G-H]

Northern Railway Administration, Ministry of Railway v. Patel Engineering Company Ltd. **2008 (10) SCC 240, relied on.**

Ace Pipeline Contracts Private Limited v. Bharat Petroleum Corporation Limited **(2007) 5 SCC 304, referred to.**

Case Law Reference:

AIR 2007 SC 1401	**held inapplicable**	**Para 6**

2003 (9) SCC 662	**held inapplicable**	**Para 6**
2004 (1) SCC 540	**held inapplicable**	**Para 6**
2008 (10) SCC 240	**relied on**	**Para 14, 15**
(2007) 5 SCC 304	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8 of 2010.

From the Judgment & Order dated 23.3.2006 of the High Court at Calcutta in G.A. No. 235 of 2006 in A.P. No. 361 of 2005.

WITH

C.A. No. 9/2010

Ginny Jetley Rautray, Kanchan Kaur Dhodi for the Appellant.

A.K. Ganguli, Pranab Kumar Mullick for the Respondent.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

2. These appeals are directed against the final Judgments and orders dated 23rd of March, 2006, and 21st of September, 2007 passed by the High Court at Calcutta in G.A. No.235 of 2006 arising out of A.P. No. 361 of 2005, whereby the High Court had allowed the petition of the respondent and thereby terminated the mandate of the arbitrator and thus appointed a new Arbitrator for deciding the dispute between the parties.

3. In order to appreciate the controversy existing between the parties, it may be important to narrate the facts as emerging from the case made by the appellant, which are as follows :-

In the month of December 1992, the appellant had issued

notice inviting tender for construction of terminal buildings and various ancillary jobs at the Bhubaneshwar Airport at Bhubaneshwar, Orissa. The respondent submitted its offer, which was accepted by the appellant.

On 30th of March, 1993, the appellant entered into a contract with the respondent for construction of the aforesaid work at the Bhubaneshwar Airport for a total consideration of Rs. 5,71,13,541.33/-. The date of commencement of the work was fixed on 1st of March, 1993 and the stipulated date of completion was 31st of October, 1994. However, on 20th of March, 1996, the appellant terminated the contract of the respondent alleging that the respondent had failed to fulfill its part of the obligations required under the contract. On 20th of May, 1996, the respondent invoked the arbitration clause and sought for an appointment of an arbitrator for adjudication of the disputes between the parties. On 9th of August, 1996, the Chairman-cum-Managing Director of the appellant appointed a sole arbitrator to adjudicate upon the claims and counter claims of the parties. The appellant filed its counter claim on 30th of April, 1997 before the sole arbitrator. The respondent submitted its rejoinder and objections to the counter claims on 12th of May, 2001, after about 4 years from the date of reply by the appellant. During this period, the appellant had virtually closed its regional office in Calcutta as most of the work done in its office was completed. This, according to the appellant, caused in several transfers of the arbitrators appointed by the appointing authority. Meanwhile, the appointing authority had appointed three arbitrators due to the above-mentioned reason and the arbitration process had come to a stand still due to the inaction of the respondent and its failure to participate.

Thereafter, on 20th of May, 2004, the respondent filed an application before the Calcutta High Court seeking removal of the then incumbent arbitrator and the arbitral proceedings were stayed by the Court. On 20th of September, 2004, the High Court directed the Chairman-cum-Managing Director of the

appellant company to appoint a new arbitrator in terms of the arbitration clause within a period of four weeks from the date of communication of its order. The High Court further directed the arbitrator *so appointed to conclude the arbitration proceedings within a period of six months from the date of his appointment.* Pursuant to the order of the High Court, the Chairman-cum-Managing Director of the appellant company appointed Shri A.K. Gupta, Deputy General Manager of the appellant as the sole arbitrator. The said arbitrator finally concluded the proceedings after hearing on 18th of June, 2005. It is an admitted position that the time to conclude the arbitration proceeding in terms of the order of the High Court before Shri A. K. Gupta, who was appointed as the sole arbitrator by the Chairman-cum-Managing Director of the company had by then already expired.

However, both the parties extended the time to conclude the arbitration proceeding and to pass an award accordingly, the time was enlarged for conclusion of the arbitration to 30th of September, 2005.

It is also an admitted position that the time limit so fixed i.e. arbitration must be concluded and award must be passed within 30th of September, 2005, could not be adhered to by the arbitrator and he failed to publish the award within this period. About three months after the expiry of the period of concluding the proceeding and passing of the award, it was the respondent who moved an application before the High Court for a declaration that the mandate of the arbitrator had already stood terminated. We may keep it on record that the appellant had not filed any application for enlargement of time for the conclusion of the arbitration proceeding or to pass the award after the expiry of the period.

On 22nd of December, 2005, the High Court, vide an interim order, restrained the arbitrator from making an award and at the same time, had refused to accept the award produced by the arbitrator before it which were well beyond the

period fixed by the High Court. On 23rd of March, 2006, the High Court, by its impugned order, terminated the mandate of the arbitrator on the ground of delay in making the award. The appellant then challenged the above mentioned order of the Calcutta High Court before this Court vide SLP No.19471 of 2007 on 12th of September, 2007. At the same time, the High Court by the impugned order dated 21st of September, 2007 passed in AP No. 361/2005 appointed Mr. Justice Chittatosh Mookherji (As His Lordship then was) as the sole arbitrator to adjudicate the disputes between the parties. The appellant, feeling aggrieved by this order as well has filed a special leave petition which came to be registered as SLP No. 22243 of 2008, which after hearing the learned counsel for the parties and on grant of leave, was heard in presence of the learned counsel for the parties.

4. We have heard the learned counsel appearing on behalf of the parties and examined the impugned orders of the High Court and also other materials on record in depth and in detail. As noted herein earlier, the respondent had made an application before the Calcutta High Court under Section 14 of the Arbitration and Conciliation Act, 1996 (in short the "Act") for a declaration that the mandate of the arbitrator Shri A.K. Gupta had already stood terminated. As had already been mentioned above, the appointing authority had appointed three arbitrators prior to the appointment of Shri Gupta who were all unable to conduct the arbitral proceedings for some reason or the other. It may be kept on record that the respondent filed an application before the High Court for a declaration that the appointment of the arbitrator namely, Shri Amitava Basu, who was appointed as the sole arbitrator prior to the appointment of Shri A. K. Gupta had stood terminated by an order dated 20th of September, 2004, by which the High Court had terminated the appointment and ordered the appointing authority of the appellant to appoint a new arbitrator who will conclude the proceeding and pass an award within six months from the date of his appointment. Subsequent to this order of

the High Court, the appellant appointed Mr. AK Gupta as the new arbitrator who was to complete his proceedings by 27th of March, 2005 i.e. six months from the date of his appointment. It is pertinent to mention that the appellant did not file any appeal against the above-mentioned order of the High Court. Therefore, it may be taken that the appellant had accepted the aforesaid order of the High Court and thereby accepted its decision to fix the time of the arbitration proceedings to be mandatorily concluded within six months from the date of appointment of the arbitrator. The order, thus having assumed finality, a time limit was imposed for the conclusion of the arbitration proceedings. Thus, the appellant is estopped from raising any objection against the imposition of the time limit as had been done by the Court in this respect. From the records before us, we have noticed that inspite of conducting a number of proceedings, the arbitrator was unable to conclude the proceedings within the time fixed by the High Court. The arbitration clause in the contract enables the arbitrator to extend the time for making and publishing the award *by mutual consent of the parties.* From a perusal of the documents before us, we notice that the parties mutually agreed to extend the time till 31st August, 2005 for making and publishing the award, which were further extended by the parties till 30th of September, 2005 on account of the arbitrator having failed to conclude the proceedings within the previous date fixed by the parties. But the arbitrator having failed to do so by 30th of September, 2005, the respondent moved the High Court to terminate the mandate of the arbitrator as he had failed to conclude the proceedings within the time limit fixed by the parties. The High Court accordingly terminated the mandate of the arbitrator on account of his failure to publish the award within the time fixed by the parties. We are of the opinion that the High Court was perfectly justified in doing so on an application filed by the respondent before it. Quite interestingly, it has come to our notice that the arbitrator in question had appeared before the High Court and submitted that the award was ready but the same could not be published on account of the interim order

passed by the same restraining him from publishing it. There was, however, no order of the Court restraining the arbitrator from publishing the award till almost three months after the expiry of the time fixed by the mutual consent of the parties to make and publish the award prior to the interim order passed by the High Court.

5. A perusal of the arbitration agreement quite clearly reveals that the arbitrator has the power to enlarge the time to make and publish the award by mutual consent of the parties. Therefore, it is obvious that the arbitrator has no power to further extend the time beyond that which is fixed without the consent of both the parties to the dispute. It is an admitted position that the respondent did not give any consent for extension of time of the arbitrator. Thus given the situation, the arbitrator had no power to further enlarge the time to make and publish the award and therefore his mandate had automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings. The learned counsel contended that the arbitration proceedings involved questions of highly technical and complex issues which would require sufficient amount of time to be decided in a just and proper way. However the records clearly illustrate that even after a passage of over nine years, the matter which was to be decided between the parties by way of arbitration, could not be resolved and the process lingered on. Arbitration is an efficacious and alternative way of dispute resolution between the parties. There is no denying the fact that the method of arbitration has evolved over the period of time to help the parties to speedily resolve their disputes through this process and in fact the Act recognizes this aspect and has elaborate provisions to cater to the needs of speedy disposal of disputes. The present case illustrates that inspite of adopting this efficacious way of resolving the disputes between the parties through the arbitration process, there was no outcome and the arbitration process had lingered on for a considerable length of time which defeats the notion of the whole process of resolving the disputes through arbitration. The

contention of the appellant therefore cannot be justified that since the dispute was highly technical in nature, it had to be dealt with elaborately by the arbitrator and thus, he was justified in being late. The High Court had thus correctly fixed the time for the arbitration to be concluded within a period of six months from the appointment of the fourth arbitrator Shri A.K. Gupta considering the time that had been spent for the arbitration process prior to Mr. Gupta's appointment. That apart, even assuming that the arbitration process involved highly technical and complex issues, which was time consuming, even then, it was open for the arbitrator or for the parties to approach the Court for extension of time to conclude the arbitration proceeding which was not done by either by the arbitrator or by any of the parties. As had been correctly noted by the High Court in its impugned judgment, there was no cogent reason for the delay in making and publishing the award by the arbitrator. He already had the relevant materials at his disposal and could base his findings on the observations made by the three arbitrators who were appointed prior to him. The Arbitrator was bound to make and publish his award, within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time. Therefore, the condition precedent for enlargement of time would depend only on the consent of the parties, that is to say, that if the parties agree for enlargement of time. If consent is not given by the parties, then the authority of the arbitrator would automatically cease to exist after the expiry of the time limit fixed. In the present case, the arbitrator had failed to publish the award within the time limit fixed by the parties, and hence, the High Court was justified in terminating the mandate of the arbitrator. We therefore do not find any fault with the impugned order of the High Court in this regard. From a perusal of the records, we can see that the respondent had filed an application to terminate the mandate of the arbitrator before the High Court almost after three months from the date of expiry of the time to publish the award although the appellant did not choose to file any application for enlargement of time for conclusion of the

arbitration proceeding. It is obvious that the respondent could not have possibly known about the outcome of the award. Even after the expiry of the time as mentioned above, the arbitrator did not make any effort to publish the award nor was anything conveyed on behalf of the appellant to the respondent for extending the time of the arbitrator to publish his award. It was a clear lapse on the part of both the arbitrators and the appellant who was well aware that the mandate of the arbitrator had already expired and it could only be extended by a mutual consent of the parties according to the arbitration agreement.

It has been correctly observed by the High Court that the arbitrator had become functus officio in the absence of extension of time beyond 30th of September, 2005 to make and publish the award. After the said date, the arbitrator had no authority to continue with the arbitration proceedings. The learned counsel appearing on behalf of the appellant argued that in the absence of any statutory period prescribed under the Act for rendering an award, the direction of the Court to conclude the arbitration proceedings within the time prescribed by it, would not make an award passed beyond the time so prescribed, null and void. He further argued that the High Court was wrong in not extending the time fixed by it in the order dated 20th of September, 2004, for early conclusion of the arbitration proceedings and terminating the mandate of the arbitrator when neither the Act nor the arbitration agreement prescribed any time for making and publishing the award.

6. The learned counsel appearing on behalf of the appellant had drawn our attention to a decision of this Court in *Jatinder Nath Vs. M/s Chopra Land Developers Pvt. Ltd. & Anr.* [AIR 2007 SC 1401] to satisfy us that the award which was passed after four months of entering upon reference does not ipso facto become nonest and the Court has power to extend time and give life to the vitiated award. So far as this decision is concerned, we may keep it on record that this decision was rendered under the Arbitration Act of 1940 and not under the

present act with which we are only concerned. In view of our reasonings given hereinafter and in view of the facts involved in this case, we do not find any ground to rely on this decision of this Court for the purpose of this case. The other decision cited by the learned counsel for the appellant is the decision reported in *General Manager, Department of Telecommunications, Thiruvananthapuram Vs. Jacob S/o Kochuvarkey Kalliath (Dead) by LRs. And Others* [2003 (9) SCC 662]. The learned counsel particularly relied on para 8 of the said decision. We have carefully gone through para 8 of the decision relied on by the learned counsel for the appellants. We may not forget that we are concerned in this case with the Arbitration and Conciliation Act, 1996 and not under the Land Acquisition Act, 1894. Without going into the details of this decision, we may simply say that this decision cannot have any manner of application and the principles laid down to the facts and circumstances of the present case. The last decision, which was cited by the learned counsel for the appellant is the decision reported in *National Aluminum Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd. and Another* [2004 (1) SCC 540]. In our view, this decision also is of no help to the appellant. The principles laid down in the said decision cannot have any application in the present case although the decision rendered in this case is the decision under the Arbitration and Conciliation Act, 1996.

7. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an award. It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the Arbitration agreement itself provides the procedure for enlargement of time

and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.

8. The counsel for the appellant further contended that the High Court could not have terminated the mandate of the arbitrator on the ground that the award was passed beyond the time limit fixed by it. It is clear from an apparent perusal of the judgment of the High Court and the records before us that the High Court had not terminated the mandate of the arbitrator on the ground that the arbitrator could not pass the award within the time fixed by it vide its order dated 20th of September, 2004. In fact, the arbitrator had continued to proceed with the arbitration procedure after the time fixed by the Court had expired on account of the mutual consent of the parties to extend the time limit. Such an action was clearly warranted under the arbitration agreement in force between the parties. On the contrary, the arbitrator had ceased to have any authority only after the time limit fixed by the parties had expired and the respondent did not give consent to the extension of the time for publishing the award. Thus, such a contention of the appellant cannot be accepted. The High Court had merely asserted this fact that the mandate of the arbitrator had automatically expired after the time fixed by the parties to the effect that it had lapsed.

9. The Appellant further argued that the High Court had failed to appreciate that the parties had undergone the process of arbitration for a long time and it was not wise to terminate the mandate of the arbitrator when the award was ready and fit to be published, considering the fact that a huge sum of money had been spent during the proceedings. Therefore, the High Court should not have ordered the appointment of a new arbitrator. It is to be noted that the High Court in its impugned judgment had ordered Shri A.K. Gupta to hand over the relevant materials relating to the proceedings to the newly appointed

arbitrator. Thus, such an action would inherently make it clear for the newly appointed arbitrator to conduct the proceedings and it is not required from him to start the proceedings from scratch all over again. Further, if the award was ready as had been contended by the appellant, it is baffling that even after three months from the expiry of the period fixed by the parties for publication of the award, the arbitrator had not come out with the award or had notified the respondent that the award was ready. It was only when the High Court restrained the arbitrator from coming out with any award in the dispute that the arbitrator submitted before the Court that the award was ready to be published. At the risk of repetition, we may once again note, that the Court has no inherent power to enlarge the time for publication of the award once it has not been extended by the parties to that effect.

10. The appellant further argued that the arbitrator having concluded the proceedings couldn't be said to have failed to act so as to attract the provisions of Section 14 of the Act and call for termination of the mandate of the arbitration. He had also contended that under Section 15 (2) of the Act, substitute arbitrator should be appointed according to the rules that were applicable to the appointment of the arbitrator. Accordingly, his contention was that the High Court had erred in holding that the appointing authority had not appointed an arbitrator while terminating the mandate of the arbitrator in the same proceedings.

It is necessary to mention here Section 14 and Section 15 of the Act for the sake of convenience.

"Section 14: Failure or impossibility to act –

(1) *The mandate of an arbitrator shall terminate if-*

(a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) He withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of subsection (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

"Section 15: Termination of mandate and substitution of arbitrator-

(1) *In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-*

(a) Where he withdraws from office for any reason; or

(b) By or pursuant to agreement of the parties

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3)Unless otherwise agreed by the parties, where an arbitrator is replaced under subsection (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely

because there has been a change in the composition of the arbitral tribunal."

11. With reference to the contention made by the appellant that the arbitrator having concluded the proceedings couldn't be said to have failed to act so as to attract the provisions of Section 14 of the Act, which will call for termination of the arbitration proceeding. It is pertinent to mention here that the arbitrator had not concluded the proceedings as had been agreed to by the parties within the time fixed for doing so. The mandate of the arbitrator was terminated only because of the fact that the arbitrator having failed to conclude his proceedings within time did not warrant to be continued as an arbitrator in the absence of the consent of both the parties. It is clear from a bare reading of sub section 1 (a) of section 14 of the Act, the mandate of an arbitrator shall terminate if he fails to act without undue delay. In the present case, it is clear that the arbitrator had extended the time provided to it without any concrete reasons whatsoever and thus his mandate was liable to be terminated. Sub section 1(b) further states that the mandate of an arbitrator shall also stand to be terminated if he withdraws from his office or the parties agree to the termination of his mandate. From the perusal of the records and the submissions of the parties, we observe that the mandate of the arbitrator was extended by an agreement between the parties, which was not extended beyond 30th September, 2005. Thus it can be construed that the parties had not agreed to the extension of the mandate of the arbitrator failing which, the mandate was automatically terminated.

12. Further, Subsection (2) of Section 14 of the Act stipulates that if a controversy remains concerning any of the grounds referred to under clause (a) of subsection (1), a party may, unless otherwise agreed to by the parties, apply to the Court to decide on the termination of the mandate. Thus the respondent rightly applied to the Court for the termination of the mandate of the arbitrator pursuant to the provisions of this

section, and the Court was within its jurisdiction to decide accordingly.

13. However, the contention of the Appellant that the High Court had erred in not allowing the appellant to decide upon the appointment of an arbitrator pursuant to sub-section (2) of Section 15 of the Act must be accepted. Section 15 (2) of the Act provides that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator replaced. In this connection, it would be appropriate to refer to the relevant portion of the impugned judgment of the High Court, which gives an elaborate observation on the above-mentioned issue raised by the appellant:

> "The question therefore is, whether in view of section 15 (2) of the 1996 Act, an independent arbitrator can be appointed by this Court as prayed for by the appellant or whether the appellant should once again invoke the Arbitration Clause, call upon the Chairman-cum-Managing Director of the respondent to appoint an arbitrator, wait for a further period of 30 days, to see whether the Chairman-cum-Managing Director acts or not and then make a request to the Hon'ble Chief Justice or his designate under Section 11(6) of the 1996 Act to appoint an arbitrator.
>
> Arbitration is an informal, quick and easy alternative mode of adjudication of disputes by agreement of the parties. This Court cannot but take judicial notice of the fact that the Arbitration Clause was invoked way back in May 1996 and almost 10 years have expired since then. The appointment of successive Arbitrator by the Chairman-cum-Managing Director of the respondent has only resulted in delay.
>
> When the mandate of an arbitrator is terminated on the ground of delay, the rules applicable to the appointment of the arbitrator are to apply to the appointment of a new

arbitrator. It would, however, be a mockery of justice, if every time the mandate of an arbitrator was terminated or the arbitrator resigned or otherwise became unable to proceed, the parties were to start from scratch, by invoking the Arbitration Clause.

Once the mandate of the arbitrator terminates, the person required to appoint arbitrator is required to fill up the vacancy with utmost expedition, failing which the provisions of section 11 (6) of the 1996 Act would be attracted. In the instant case, as per the Arbitration agreement the Chairman-cum-Managing Director was required to appoint a new arbitrator in case the arbitrator became unable to continue, whatever be the reason. Even thought the time limit for conclusion of arbitration expired on 30th September, 2005, the Chairman-cum-Managing Director of the respondent did not appoint another arbitrator."

14. We have carefully examined the aforesaid observations of the impugned judgment of the High Court. We are of the view that in view of a three-Judge Bench decision of this Court in the case of *Northern Railway Administration, Ministry of Railway vs. Patel Engineering Company Ltd.* [2008 (10) SCC 240] in which a decision of this Court in *Ace Pipeline Contracts Private Limited vs. Bharat Petroleum Corporation Limited* [(2007) 5 SCC 304] was also referred to, the application for appointment of an Arbitrator under Section 11 of the Act should be referred back to the High Court for fresh decision. Arijit Pasayat, J (as His Lordship then was), heading a three-Judge Bench of this Court after considering the scope and object of the Act particularly Section 11 of the Act concluded the following :-

"A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been

done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

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In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of Sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

In the aforesaid decision in the case of *Northern Railway Administration* (Supra), Arijit Pasayat, J. (as His Lordship then was), held that the High Court in the said case did not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator. In the aforesaid decision, this Court also concluded that since the requirement of sub-section (8) of Section 11 was not at all dealt with by the High Court in its order, the appointment of an arbitrator without dealing with Sub-Section 8 of Section 11 of the Act became vulnerable and accordingly, such appointment must be set aside. Similar is the position in this case. In this case also, before appointing an

arbitrator under Section 11(6) of the Act, the High Court had failed to take into consideration the effect of Section 11(8) of the Act as was done in Northern Railway Administration (supra).

15. In view of the discussions made hereinabove and particularly, in view of the principles laid down by this Court in *Northern Railway Administration* (supra), we set aside the impugned order and remand the case back to the High Court for fresh decision of the application under Section 11(6) of the Act and while considering the application afresh, the High Court is directed to take into consideration the aforesaid decision of this Court.

16. The appeals are thus allowed to the extent indicate above. There will be no order as to costs.

D.G. Appeals partly allowed.

STATE OF KARNATAKA & ANR.
v.
G.R. NADAGOUDA (DEAD) BY LRS. & ANR.
(Civil Appeal Nos. 2547-2548 of 1998)

JANUARY 05, 2010

[TARUN CHATTERJEE AND AFTAB ALAM, JJ.]

Interest – Payment of – Suit between parties decreed – Direction by High Court to State authorities to deposit the decretal amount within the prescribed time – In case of default, State liable to pay interest @ 15% p.a. to respondents from the date of the order up to the date on which the amount actually tendered – Rate of interest – Challenge to – Held: Rate of interest modified to 10% p.a. from the date of the order till the time specified, failing which, State liable to pay interest @15% p.a.

The question which arose for consideration in these appeals is whether the High Court was justified in directing the State Authorities to pay interest @ 15% p.a. to the respondents from the date of its order up to the date on which the amount was actually tendered in the Court.

Disposing of the appeals, the Court

HELD: The judgment of the High Court is modified to the extent that the respondents are to be paid interest at the rate of 10 per cent per annum and not 15 per cent from the date of the order passed by High Court. It is further directed that in the event, the said amount is not paid by the State within six months from the date of supply of a copy of this order to it by the respondents, the State shall be liable to pay interest at the rate of 15 per cent per annum as directed by the High Court. [Para 5] [133-E-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2547-2548 of 1998.

From the Judgment & Order dated 15.11.1996 of the High Court of Karnataka, Bangalore in Civil Revision Petition Nos. 714/1992 C/W 2867 of 1991.

Sanjay R. Hedge, Amit Kr. Chawla, A. Rohen Singh, Vikrant Yadav, Anil Verma for the Appellants.

S.K. Kulkarni, Sangeeta Kumar for the Respondents.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. This is an old litigation carried on by the State of Karnataka and the dispute centers around a long history of sixty years. But it is unnecessary for this Court, as rightly pointed out by the High Court in the impugned Judgment, to recount the various developments and the manner in which the present position has arisen as now it is confined within a very narrow ambit. From the arguments advanced by Mr. Sanjay R. Hegde, learned counsel appearing on behalf of State of Karnataka, the appellant herein, we only need to consider the penultimate directions in the impugned order. Accordingly, for the proper disposal of the present appeals, that portion of the impugned Judgment of the High Court may be reproduced as under :-

> "The State authorities are accordingly directed to deposit the amount in question in the trial Court within an outer limit of three months from today. The petitioners would undoubtedly be required to pay the requisite court fees on the amount in question, but the trial Court will have to take note of the fact that under normal circumstances, the Court fee is payable on the date when the suit is filed or in those of the cases, where for any reason, the Court fee is directed to be paid when the decree is passed, then, it is these two dates that have been taken into consideration.

> In this case, the suit was filed in the year 1955, the decree came to be passed in the year 1957 and it is therefore, on the basis of Court fees that would have been payable as on that date, that the petitioners would be liable. The Trial Court shall accordingly this factor into account. It shall be open to the petitioners to either tender the Court fee separately or to pray to the trial Court to adjust the same while releasing the payments to them. It is made clear however, that if the State commits any default in depositing the amounts within the prescribed period of time, which I have deliberately kept sufficiently long, that in the event of any such default, *the State shall be liable to pay interest quantified at the rate of 15% p.a. to the petitioners from the date of this order namely, 15.11.1996 upto the date on which the amount is actually tendered in Court."* (Emphasis supplied)

2. Before us, the only submission that was raised by Mr. Sanjay R. Hegde, learned counsel appearing for the State of Karnataka is whether the judgment of the High Court directing the State to pay interest at the rate of 15 per cent per annum to the respondents from the date of its order i.e. 15th of November, 1996 up to the date on which the amount was actually tendered in the Court, was justified.

3. In view of the aforesaid stand taken by the learned counsel appearing for the appellants, we need not go into the facts of these appeals in detail nor are we concerned with any other ground except the ground mentioned earlier. On behalf of the appellants, Mr. Hegde contended that in view of the nature of the claim and in view of the fact that the State of Karnataka had diligently pursued these litigations all through, it was improper on the part of the High Court to hold that the State was liable to pay interest at the rate of 15% P.A. as the said rate of interest if accepted and if the State is directed to pay it to the respondents, would have the effect of nearly tripling the decretal amount. Accordingly, it was submitted that the rate of

interest may be modified to 6% P.A.

4. On the question of rate of interest, we have also heard Mr. S.K. Kulkarni, learned counsel appearing for the respondents, who duly contested the submission of Mr. Hegde. According to him, the High Court in its discretion was fully justified in granting interest at the rate of 15% P.A. from the date mentioned in the impugned judgment. It was further submitted by Mr. Kulkarni, learned counsel appearing on behalf of the respondent, that the entire litigation carried on by the State against the respondent was fictitious and therefore, it was justified for the High Court to award interest at the rate mentioned above. Mr. Kulkarni further submitted that in view of the admitted facts of the present case, the question of reducing the interest from 15% to 6% does not arise at all. Accordingly, he submitted that the appeals shall be dismissed with exemplary costs in favour of the respondents.

5. Having heard the learned counsel appearing for the parties and after going through the impugned judgment and the directions to the State to pay interest at the rate of 15% P.A. w.e.f. 15th of November, 1996, we are of the view that the impugned judgment of the High Court may be modified to the extent that the respondents be paid interest at the rate of 10 per cent per annum and not 15 per cent from the date mentioned in the impugned judgment of the High Court. Accordingly, we dispose of these appeals with the above modification and we further direct that in the event, the amount, as directed above, is not paid by the State within six months from the date of supply of a copy of this order to it by the respondents, the State shall be liable to pay interest at the rate of 15 per cent per annum as directed by the High Court.

6. With this modification, these appeals are disposed of with no order as to costs.

N.J. Appeals disposed of.

HARI KISHAN

v.

STATE OF HARYANA

(Criminal Appeal Nos.133-134 of 2009)

JANUARY 6, 2010

[AFTAB ALAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860:

*ss.302 and 324 – Conviction of one of the seven accused u/ss 302 and 324 and three others u/s 323 - Testimony of the witness who claimed to have received injuries in the same incident in which deceased was killed – **Held:** Trial court has observed about the witness that he did not seem to have particular respect for truth and that he had mixed up falsehood with truth – Assumption drawn by trial court and High Court that the witness had received injuries in the occurrence is not borne out by evidence on record – A substantial part of prosecution story has been disbelieved by trial court – Presence of three of the accused and two other eye witnesses at the place of occurrence was doubted by trial court – Medical evidence at clear variance with ocular vision – In such a situation, it would be highly unsafe to uphold and sustain appellant's conviction – Accordingly, he is acquitted giving him benefit of doubt – Evidence – Credibility of eye witness – Medical evidence at variance with ocular vision – Effect.*

The appellant along with six others was prosecuted for commission of offences punishable u/ss 148, 302,324,323 read with s.149 and s.506 IPC. The prosecution case, based on the statement made by PW-2 to the police in the hospital where he had taken the dead body of his younger brother 'D' (deceased) at 7.20 A.M. on 24.6.1995, was that at about 6.15 A.M. the

appellant and other accused attacked 'D'; two of the accused gave lathi blows on his back and as he fell down, the appellant gave a knife blow on left side of his chest; that accused 'R' also gave knife blows to him. PW-2 further stated that when he and his uncle tried to save 'D', accused 'R' gave a knife blow on his left hand thumb and two other accused gave him 4-5 lathi blows. His uncle was also stated to have received a lathi blow on his head. As to the cause of the incident, PW-2 stated that as his other brother, PW-6, who had been elected as Village Sarpanch, did not pay any heed to unreasonable demands of accused persons, an altercation took place between both the sides the previous evening, but the matter was then patched up. The post-mortem examination of the body of 'D', which was conducted at 12.45 p.m. on 24.6.1995, indicated one stab wound on the left side of the chest as the cause of death, and the 3 other injuries as post-mortem in nature. The trial court convicted and sentenced the appellant u/ss 302 and 324 IPC. Three other accused were convicted and sentenced u/s 323 IPC. The remaining three were acquitted of all the charges. By a separate judgment, the appellant was also convicted u/s 25 of the Arms Act and was sentenced to the period already undergone. The High Court upheld the judgments of the trial court. Aggrieved, the appellant filed Crl. Appeal No.133/2009 challenging his conviction and sentence u/ss 302 and 324 IPC and Crl. Appeal No.134/2009 challenging his conviction u/s 25 Arms Act.

Allowing Crl.A.No.133/2009, and dismissing Crl.A.No.134/2009 as not pressed, the Court

HELD: 1.1. The trial court doubted the presence of PW-4 and PW-6 at the place of occurrence and did not accept their testimonies as eye witnesses. According to the prosecution, the occurrence in which the deceased was killed took place shortly after 6.15 in the morning of

June 24, 1995. PW-2 was medically examined at 7.10 and his companion at 7.15 am, that is to say, within an hour when the wounds/injuries on their person would be very fresh. But, according to the medical evidence, injuries on PW-2 were caused on the evening previous to the morning of June 24. This takes away the basis on which he was accepted by the trial court and the High Court as an eyewitness notwithstanding his proclivity to mix up falsehood with truth. A substantial part of the prosecution story has been disbelieved and the conviction of the appellant rests solely on the testimony of PW-2 who, as observed by the trial court, does not seem to have particular respect for truth and had mixed up falsehood with truth. His credibility as an eye witness lay only in that the trial court and the High Court assumed that he had received injuries in the same occurrence in which the deceased was killed. That assumption does not appear to be very sound and is not borne out by the evidences on record. [Para 23, 24, 26 and 30] [145-D-E; 145-H; 147-A-B; 148-A-C]

1.2. The defence plea that PW-2 had received the injuries on the evening of June 23 and not in the morning of June, 24 gains credence from the fact that an incident between the two sides had admittedly taken place on the evening of June 23, 1995. In the face of this admitted position and the medical evidence, it is difficult to accept that the injuries found on the person of PW-2 were received by him in the morning of June 24. From this, either of two inferences would logically follow – one, PW-2 was not present at the occurrence in which the deceased was killed in the morning of June 24; or the other, the occurrence in which the deceased was killed did not take place in the morning of June 24 and he was not killed in the manner as suggested by the prosecution. Both the inferences are equally damaging to the prosecution case. [Para 27 and 29] [147-B-C; 147-F-H]

1.3. In view of the facts and the circumstances, it would be highly unsafe to uphold and sustain the appellant's conviction for the offence of murder, and the prudent and safe course would be to give him the benefit of doubt. Accordingly, he is acquitted of the charges u/s 302 and 324 IPC. [Para 30] [148-C-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos.133-134 of 2009.

From the Judgment & Order dated 8.1.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 206-DB and 207-DB of 1998.

J.L. Gupta, Nidhi Gupta, S. Janani for the Appellant.

Alok Sangwan, Devashish Bharuka, Lokinder Singh, Rishad Choudhary for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. These appeals are directed against the judgment of the Punjab and Haryana High Court dated January 8, 2008 in Criminal Appeals Nos. 206 & 207-DB of 1998, confirming the appellant's conviction under section 302 of the penal code and the sentence of life imprisonment awarded to him by the trial court for having committed the murder of one Dinesh.

2. The case of the prosecution that led to the sentencing of the appellant is based on the statement of Harkesh (PW-2), one of the brothers of Dinesh, made before Bhup Singh SI/SHO of Sadar Palwal PS (PW-8) at 7.20 am on June 24, 1995 at Palwal hospital where he had brought the dead body of Dinesh.

3. In his statement before the police Harkesh said that at about 6.15 in the morning he along with his two younger brothers, Suresh Kumar (PW-6) and Dinesh (the deceased)

was sitting on the chabutra of their baithak in village Gailpur, when Dinesh proceeded for his house to bring the clothes for getting ready to go to Faridabad, where he was due to appear in the B. Ed examination. As he reached the chaupal, where the lane turned, he was waylaid by the accused Hari Kishan (the appellant) and Rambir who were armed with knives, Shyam Lal armed with gun, Nain Pal and Kanwar Pal armed with lathis and Roshan and Nathi son of Gurdayal who were empty handed. Roshan and Nathi exhorted the other accused to kill Dinesh, saying that they would face the consequences. Hearing this, Harkesh and Suresh ran to save Dinesh. Bhim Singh (PW-4) also came there on hearing the noise. Even before Harkesh or his uncle Kanti Prakash reached the spot, Nain Pal and Kanwar Pal struck Dinesh on his back with lathis causing him to fall to the ground. As he lay on the ground, the appellant gave knife blow on the left side of his chest. Rambir too gave knife blows to Dinesh. When Harkesh and Kanti Parkash tried to save Dinesh, Rambir gave a knife blow to Harkesh that hit him on the thumb of the left hand. Nain Pal and Kanwar Pal gave Harkesh 4/5 lathi blows. Nain Pal also gave one lathi blow on the head of Kanti Parkash. When Harkesh tried to save Kanti Prakash, Shyam Lal hit him on the shoulder by the butt of his gun. He also shouted that anyone coming to their victim's rescue would be shot dead.

4. As to the cause of the incident Harkesh stated that shortly before the occurrence his younger brother Suresh was elected as the village Sarpanch. He did not pay any heed to the unreasonable demands of the accused and this greatly annoyed them as they thought of themselves as the Choudhary of the village. This had led to an altercation and an exchange of hot words between the two sides on the previous evening but the matter was then patched up by discussion. He finally stated that the accused in league with one another had killed his brother Dinesh by giving him knife and lathi blows.

5. After the occurrence he brought Dinesh to the civil

hospital, Palwal where he was declared 'brought dead'. Dr. Krishna Kumar (PW-3) who was in the hospital on duty sent information in that regard to the SHO, PS Sadar Palwal whereupon PW-8 came to the hospital and took down the statement of Harkesh. He read his statement as recorded by PW-8 (the SI police) and finding it to be correctly recorded put his signature at the bottom. The statement of Harkesh, as recorded by PW-8, was incorporated in a formal First Information Report (FIR no. 286) drawn up at PS Sadar Palwal at 9.30 a.m. on the same day for offences under sections 148, 149, 506 & 302 of the Penal Code. The FIR was delivered at the residence of the area Magistrate on the same day at 12.20 p.m. through a special messenger, namely, constable Chander Bhan.

6. Harkesh and Kanti Prakash, who, according to the statement made in the FIR, had received injuries while trying to save Dinesh were medically examined by Dr. Krishna Kumar (PW-3) at 7.10 and 7.15 a.m. respectively on June 24, 1995. The post-mortem examination on the dead body of Dinesh was conducted on the same day at 12.45 p.m. by a team of three doctors of which Dr. Chandrika Malik (PW-5) was also a member. The post-mortem report noted the following injuries on the person of the deceased:

> "1. Stab wound on left side of chest, measuring 3.5 cm medial to the left nipple in the 5th intercostal space. Size 2.5 cm x 1 cm margins - upper marginal lacerated, lower margins (angled) obliquely placed; on following the path of injuries upper border of rib (6th) is cut and then piercing pericardium and entering the apex of the ventricle anteriorly (size 2.3 cm.) passing through cavity of the left ventricle and then going through the posterior wall(size 2 cm) and entering the left lung.
>
> 2. Incised wound on left arm, middle part on lateral aspect, 1.5 cm x 0.25 cm, margins inverted, skin deep.

> 3. Incised wound 1.5 cm x 0.25 cm on the left forearm on lateral aspect on upper part 3 cm below elbow, skin deep, margins inverted.
>
> 4. Incised wound 4 cm x 0.50 cm on middle part of thigh, lateral aspect. Skin deep, margins inverted."

7. According to the post-mortem report, death was caused due to shock and hemorrhage as a result of injury no. 1 which was ante-mortem in nature and was sufficient to cause death in ordinary course of nature. *Injuries Nos. 2, 3, 4 were found to be post-mortem in nature.* It was further stated that time elapsed between death and post-mortem was within 18 hours.

8. The police after investigation submitted charge-sheet against all the accused named in the FIR and all of them were put on trial on charges under sections 148, 302, 324, 323 read with section 149 and section 506 of the Penal Code. The appellant, Hari Kishan, was also charged under section 25 of the Arms Act for possession and unlawful use of the knife and was tried separately for that offence.

9. In the main case the prosecution examined eight witnesses out of whom three, namely Harkesh (PW-2), Bhim Singh (PW-4) and Suresh Kumar (PW-6) claimed to be eye witnesses. Of the rest, Dr. Kishan Kumar (PW-3) was the doctor who had examined the injuries on the person of Harkesh and Kanti Prakash, Dr. Chandrika Malik (PW-5) was a member of the team of three doctors who had conducted post-mortem on the body of Dinesh, Bhoop Singh (PW-8) was the SHO Sadar Palwal PS who had recorded the statement of Harkesh and had investigated the case. The remaining two, Ashok Kumar (PW-1) and Ramesh Chand (PW-7) were formal witnesses. The prosecution also produced some documents and some material exhibits. The accused, of course, took the plea of false implication but they did not lead any evidence in their defence.

10. On conclusion of trial, the trial court held the appellant Hari Kishan guilty of killing Dinesh by giving a knife blow on the left side of his chest and, accordingly, convicted him under section 302 and sentenced him to imprisonment for life and a fine of Rs.5000/- and in default in payment of fine, to a further period of imprisonment for one year. The trial court also convicted accused Shyam Lal, Nain Pal and Kanwar Pal under section 323 of the Penal Code for causing simple injuries to Harkesh (PW-2) and his uncle Kanti Parkash and sentenced them to imprisonment for the period already undergone by them as under-trial and fine of Rs.1000/- each.

11. What is, however, of significance for our purpose is that the trial court disbelieved a substantial part of the prosecution story. The trial court did not accept the prosecution case that accused Nathi and Roshan were present at the place of occurrence and, accordingly, directed their acquittal. As regards Rambir, the trial court pointed out that the three incised wounds on the person of the deceased that were attributed to him were, according to the medical evidence, post-mortem in nature, that is to say, those three injuries were inflicted after Dinesh was already dead. The medical evidence, thus, clearly eliminated the participation of Rambir in the case. He too was, therefore, acquitted. The acquittal of the three accused brought down the number of the remaining accused to less than five. Hence, the aid of section 149 was no longer available to bring about the conviction of the remaining three accused Shyam Lal, Nain Pal and Kanwar Pal under section 302 for the shared common intention with the appellant Hari Kishan to kill Dinesh. Apparently, that was one of the reasons for their conviction simply under section 323. The trial court further disbelieved the prosecution case that Nain Pal and Kanwar Pal had given lathi bows to Dinesh on his back and observed that this part of the prosecution story was an addition to rope in the two accused and to bring them within the mischief of section 149 of the Penal Code.

12. Apart from the three accused whose presence at the place of occurrence was not accepted, the trial court also doubted the presence of two out of the three eye witnesses, namely Bhim Singh (PW-4) and Suresh Kumar (PW-6) at the time of occurrence. The trial court further held that even Harkesh (PW-2), the only remaining eye witness, had mixed-up truth with falsehood but his testimony was not liable to be discarded wholly since he had himself received injury in the same occurrence. In regard to the injury sustained by Harkesh, the trial court came to a truly amazing conclusion. It was the specific case of the prosecution that the injury to Harkesh on the thumb of his left hand was caused by a knife blow given by Rambir while he was trying to save Dinesh and Harkesh in his deposition before the court also attributed that injury to Rambir. Rambir, however, was held by the trial court to be not present at the place of occurrence. But the injury on the hand of Harkesh was certainly in existence and it was also proved by the medical evidence. The trial court resolved the contradiction by fastening the injury to Harkesh too on to the appellant Hari Kishan even though that was not the case of the prosecution. The appellant Hari Kishan was, thus, held guilty also of causing the knife injury to Harkesh and came to be convicted under section 324 in addition to section 302 of the Penal Code. Under section 324 he was sentenced to rigorous imprisonment for one year. He was also convicted under section 25 of the Arms Act by a separate judgment of the trial court dated February 2, 1998 in Sessions case No. 28 of 1995 and sentenced to the period of imprisonment already undergone as under-trial.

13. Against the two judgments of the trial court, three appeals were filed in the High Court. One (Criminal Appeal No. 206-DB of 1998), by the appellant and the three other accused convicted and sentenced by the trial court as noted above in the main case; the second (Criminal Appeal No. 207-DB of 1998), by the appellant Hari Kishan alone against his conviction under section 25 of Arms Act and the third appeal (Criminal Appeal No. 379-DBA of 1998) was filled at the instance of the

State of Haryana against the acquittal of the three accused from all charges and the acquittal of the other three accused from the main charge of murder. Along with the three appeals the complainant also filed a revision (Criminal Revision No. 486 of 1998) agitating similar grievances as in the State's appeal.

14. The High Court by the judgment and order coming under appeal dismissed all the three appeals and the revision and, thus, upheld the judgments of the trial court in all aspects.

15. Mr. J. L. Gupta, Senior Advocate, appearing for the appellant assailed the High Court and the trial court judgments and contended that the appellant's conviction for the offence of murder was not sustainable both in law and on facts. Mr. Gupta submitted that there were at least four circumstances that falsified and completely demolished the prosecution case. First, there was a patent contradiction between the prosecution case and the motive assigned by it to the accused for committing the crime. Secondly, it was undeniable that injuries were fabricated both on the person of the deceased and Harkesh, the only eye witness whose evidence was accepted by the High Court and trial court. Thirdly, the prosecution had indisputably tried to falsely implicate three out of seven accused. Fourthly, the medical evidence completely belied the alleged time and the manner of occurrence.

16. Elaborating the points Mr. Gupta submitted that according to the prosecution the main cause of conflict between the two sides was the election of Suresh Kumar as the village Sarpanch who did not pay any heed to the demands of the accused. If that were so, the accused should have targeted Suresh Kumar and not Dinesh. Suresh Kumar was admittedly present at the time of the occurrence. He was unarmed and was also physically disabled, yet no attempt was made to assault him and he got away without a scratch and in his place Dinesh was killed against whom the accused had no animus.

17. Mr. Gupta further submitted that even according to the

prosecution case it was a chance encounter. The accused persons had no means to know that Dinesh would be coming from his baithak to his house to pick up his clothes and would be passing through that particular spot at that particular time, so as to ambush him there, differently armed with gun, knife and lathis.

18. Mr. Gupta next submitted that according to the prosecution case Dinesh was first struck on his back by lathis causing him to fall down on the ground. But in the post-mortem examination, no mark of injury of any kind was found on the back of the deceased. The post-mortem report further showed that three incised wounds (Injuries 2, 3, and 4) were inflicted on his body after he was dead. Obviously, those three injuries could not be attributed to any of the accused. In other words, the complainant had fabricated the injuries on the dead body of Dinesh with intent to make out a false case against the accused. Further, according to the post-mortem report, the time elapsed between death and post-mortem report was within *eighteen* hours. This, according to Mr. Gupta, clearly showed that death had taken place sometime the previous evening and not in the morning of June 24.

19. Mr. Gupta further stated that the stab by knife (Injury No. 1) that caused the death of Dinesh had pierced through his heart and would have naturally led to profuse bleeding. Shortly after receiving the injury the body of Dinesh was picked up from the ground by Harkesh (PW-2) and Bhim Singh (PW-4) to place him in the truck. And yet in reply to questions in the cross-examination Harkesh stated that his clothes or the clothes of Bhim Singh were not stained with blood. No blood stained clothes of Harkesh or Bhim Singh were produced before the police.

20. All these circumstances, according to Mr. Gupta, strongly indicated that the death of Dinesh did not take place in the manner and at the time as claimed by the prosecution.

21. Mr. Gupta further submitted that the conviction of the appellant was based solely on the testimony of Harkesh whose presence at the time of occurrence was extremely doubtful. He once again referred to the medical evidence to support his submission that Harkesh had not received the injuries in the morning of June 24 when Dinesh was alleged to have been killed and hence, he could not have been present at the time of occurrence and he falsely claimed to be an eye witness of the occurrence.

22. On hearing Mr. Gupta and Mr. Alok Sangwan appearing for the State and on going through the judgments of the High Court and the trial court and the evidence on record we find that the submissions of Mr. Gupta are not entirely without substance and at least some of the points raised by him deserve serious consideration.

23. It is seen above that the trial court doubted the presence of Bhim Singh (PW-4) & Suresh Kumar (PW-6) at the place of occurrence and did not accept their testimonies as eye witnesses. Even in regard to Harkesh (PW-2), the only eye witness remaining in the case, the trial court observed that he had mixed up falsehood with truth. Nevertheless, it did not reject his testimony as a whole and accepted his evidence as regards the knife blow given to Dinesh by the appellant because *"he (PW-2) had some injuries in that incident as is clear from the statement of Dr. Krishan Kumar (PW-3)"* and hence, the presence of Harkesh (PW-2) at the place of occurrence could not be doubted. The High Court has also adopted the same approach and it has described Harkesh as an "injured witness". Mr. Gupta questioned the very premise that the injuries found on the person of Harkesh were caused in the same incident in which Dinesh was killed and which, according to the prosecution case, had taken place in the morning of June 24 and submitted that the trial court and the High Court had completely misread the medical evidence.

24. According to the prosecution, the occurrence in which

Dinesh was killed took place shortly after 6.15 in the morning of June 24. Harkesh was medically examined at 7.10 and Kanti Prakash at 7.15 am respectively, that is to say, within an hour when the wounds/injuries on their person would be very fresh.

25. But the injury report of Harkesh disclosed as follows:

"(1) An incised wound on left hand between the thumb and index finger. 0.3 cm x 0.2 cm skin deep clotted blood was present on the wound.

(2) Four contusions Parallel to each other present on the left shoulder and upper part of chest, horizontally placed reaching on the upper arm anteriorally in the area 8"x4" red in colour.

(3) A contusion on right upper arm on the meddle 1"x05" cm red in colour.

Injury No. 1 was caused by sharp edged weapon and injury No(s). 2 and 3 were caused by blunt weapon. Nature of injuries were simple, duration was 12 hours"

The injury report of Kanti Prakash noted as follows:

"(1) An abrasion and contusion on the parietal region of scalp in the vertex in the mid lone 11/2 x1cm blood was oozing.

The injury was simple, caused by blunt weapon. The probable duration was 12 hours".

Further PW-3, the doctor who examined Harkesh and Kanti Prakash, in cross-examination, deposed before the court as follows:

"It is correct that the injuries on both these injured have been caused probably on 23/6/95 between 6 PM and 8 PM."

26. Thus, according to the medical evidence, injuries on Harkesh were caused on the evening previous to the morning of June 24, when Dinesh was killed in the alleged occurrence. This takes away the basis on which he was accepted by the trial court and the High Court as an eye witness notwithstanding his proclivity to mix up falsehood with truth.

27. The submission that Harkesh had received the injuries on the evening of June 23 and not in the morning of June, 24 gains credence from the fact that an incident between the two sides had admittedly taken place on the evening of June 23, 1995.

28. In regard to the incident on the evening of June 23, 1995, Harkesh (PW-2) stated as follows:

> "On 23.6.95 there was an altercation between the accused and us and it was compromised with the interventions of the respectable of the village."

As regards the incident on the evening of June 23, Harkesh further stated in his cross-examination that:

> "Bhim PW was not present at the time of earlier altercation on the previous day i.e. 23.6.95. That altercation lasted for 2 minutes. About 50/60 persons had collected including ladies had collected at that time. There are 4/5 houses near the Chaupal where this altercation took place."

29. In the face of the medical evidence and the admitted position that an incident between the two sides had taken place on the evening of June 23, 1995 it is difficult to accept that the injuries found on the person of Harkesh were received by him in the morning of June 24. From this, either of two inferences would logically follow. One, Harkesh was not present at the occurrence in which Dinesh was killed in the morning of June 24; or the other, the occurrence in which Dinesh was killed did not take place in the morning of June 24 and he was not killed in the manner as suggested by the prosecution. Both the

inferences are equally damaging to the prosecution case.

30. Summing up the discussions made up, we have before us a case where a substantial part of the prosecution story has been disbelieved and the conviction of the appellant rests solely on the testimony of Harkesh (PW-2) who does not seem to have particular respect for truth as observed by the trial court. His credibility as an eye witness lay only in that the trial court and the High Court assumed that he had received injuries in the same occurrence in which Dinesh was killed. As shown above that assumption does not appear to be very sound and is not borne out by the evidences on record. In such a situation, we find it highly unsafe to uphold and sustain the appellant's conviction for the offence of murder. To us, it appears that the prudent and safe course would be to give him the benefit of doubt.

31. We, accordingly, allow the Criminal Appeal No. 133/09 and set aside the judgments of the High Court and the trial court and acquit him of the charges under sections 302 & 324. Criminal Appeal No. 134/09 relating to his conviction under section 25 of the Arms Act was not pressed, presumably because the conviction no longer carries any sentence. This is, accordingly, dismissed.

32. The appellant Hari Kishan is directed to be released forthwith if he is not wanted in any other case.

R.P. Crl. A.No. 133 of 2009 allowed and Crl. A. No. 134 of 2009 dismissed.

BODDELLA BABUL REDDY

v.

PUBLIC PROSECUTOR, HIGH COURT OF A.P.

(Criminal Appeal No. 451 of 2007)

JANUARY 06, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 – ss. 147, 148, 324, 326, 307 and 302/149 – Rivalry between two political factions – Accused armed with dangerous weapons and bombs, attacked deceased and prosecution witnesses – Allegation that appellant hurled bomb on deceased, resulting in his death on the spot and four accused hurled bombs resulting in splinter injuries to prosecution witnesses – Trial of accused persons for various offences – Acquittal by trial court – High Court upholding acquittal of all the accused except appellant – Conviction of appellant u/s. 302 – On appeal, held: High Court not justified in interfering with the judgment of trial court – It did not exercise the caution while dealing with the judgment of acquittal by trial court – Evidence of witnesses full of contradictions and omissions – Discrepancies regarding filing of FIR – Thus, judgment of High Court set aside and that of trial court restored – Explosive Substances Act, 1908 – ss. 3 and 5 – Arms Act, 1959 – ss. 25(1)(b) and 27 – Appeal against acquittal.

According to the prosecution case, there was a fierce enmity between the accused party and the complainant party. On the fateful day, accused persons armed with dangerous weapons and bombs attacked the deceased and the prosecution witnesses. Appellant hurled bomb on deceased and he died on the spot and others also hurled bombs and prosecution witnesses suffered splinter injuries. Accused persons were tried for various

offences u/ss. 147, 148, 324, 326, 307 and 302/149 IPC, ss. 3, 5 of the Explosive Substances Act, 1908 and ss. 25(1)(b), 27 of the Arms Act, 1959. Trial court acquitted all the accused persons. The High Court upheld the acquittal of all the accused except the appellant and convicted the appellant u/s. 302 IPC.

Allowing the appeal, the Court

HELD: 1. The High Court has not exercised the caution that was expected to while dealing with the judgment of acquittal by the trial court. High Court was not justified in interfering with the well considered judgment of the trial court. The judgment of the High Court is set aside and that of the trial court is restored. [Paras 13 and 17] [170-C-D; 170-E-F]

2.1. The well considered judgment of the trial court has been upset by the High Court and in its judgment, the High Court relied on the complaint given by PW-1. Barring the evidence of PW-1, PW-2, PW-3, PW-4 and PW-5, there is hardly any consideration in the High Court's judgment, more particularly of the mix up of timings as regards the complaint. In the complaint it is specifically alleged that the Telugu Desam Party was led by the appellant. Both the parties, on 13.12.1998, had fought in connection with using the road and the witness PW-1 himself and his party people were accused in that case and were absconding. It is then suggested on 16.12.1998, in the morning at 7.30, PW-1 and the other persons went to cart the paddy hay of RR and while they were bundling the hay, the 16 accused persons came there and the appellant, A-2, A-3, A-4 and A-5 were holding bombs in their hands, A-6 was holding a gun and other persons were holding hunting sickles and spears and the appellant raised loud cries shouting not to leave anybody there and kill all of them. It was the appellant who hurled a bomb on deceased. The said bomb

exploded and deceased fell down and died on the spot; then the others also started hurling the bombs. PW-1 then refers to his being hacked by other accused persons with a hunting sickle and on the right knee with the spear. He then refers to an injury caused on his little finger because of the spear. He then refers to the police firing a gun. After that he refers that all the injured came to the Government Hospital and were being treated. There is an endorsement that this statement has been given at 10.35 A.M., while it was dispatched to the Court at 1.04 P.M. Also report is given by A-14 on the same day at 7.45 A.M., wherein the hurling of the bomb is attributed to complainant party. [Para 13] [165-G-H; 166-A-G]

2.2. On seeing the evidence of PW-1 in the light of evidence of PW-14, Head Constable and PW-15, Circle Inspector, the falsity of his evidence becomes clear. Though in his Examination-in-Chief, he claimed that all of them along with the woman folk were taken in the tractor of PW-7 to the Government Hospital, that claim appears to be incorrect. The two police witnesses are contradicting each other in the matter of the timings and also the timing of the Complaint. On this backdrop, when the evidence of PW-11, the Medical Officer is seen, it is seen that at 9.30 A.M. itself, the doctor examined PW-2 on the requisition of SHO (Rural), who was accompanied by Police Constable who was PW-14. This requisition is said to have been sent by PW-14 and PW-15. PW-15 has given a graphic description and timings as to when he examined all the injured witnesses. If PW-2 was available at 9.30 A.M. itself and a requisition was already prepared even before 9.30 A.M., there is no question of PW-1 registering the FIR at 10.35 A.M. PW-14 also admitted that even by the time they reached the Hospital, M.L.A. was stated to have come to the Hospital and the legal advisors were also found in the Hospital. All this creates a big suspicion about the complaint as also evidence of PW-

1. Once it is proved that the FIR itself was given with the consultation of the legal advisors and in the guidance of the local Member of Legislative Assembly who was inimical towards the appellant on account of the party factions, the whole story and the part played by PW-1 becomes suspicious. [Para 14] [167-A-H; 168-A-C; 168-C-D]

2.3. Considering evidence of PW-7 that they had started from the Village at about 8.10 or 8.20 A.M. and that they were traveling in a tractor, it cannot be said that they would reach only at 10.35 A.M. The evidence of PW-2, PW-3, PW-4 and PW-5 is full of contradictions and omissions. Most of these witnesses figured of the accused in the counter case. Therefore, their evidence was bound to be appreciated little carefully. The judgment of the High Court is not satisfactory and more particularly, the appreciation of the evidence, mainly of PW-1, PW-2, PW-3, PW-4 and PW-5. High Court does not seem to have exercised the caution that it was expected to, in view of the fierce enmity between the accused party and the complainant party. The appreciation of the evidence by the trial court appears to be more satisfactory. Therefore, the evidence of these eye-witnesses, particularly against the appellant cannot be accepted. [Para 15] [168-E-F; 168-F-H; 169-A-B]

2.4. High Court did not consider that there was no explosive substance found at the place where allegedly the bombs were exploded. On the other hand, they were found somewhere else. That is clear from the evidence of PW-15, Circle Inspector. Even the High Court has noted this. This shows that the role of PW-1, PW-2, PW-3, PW-4 and PW-5 and more particularly, their evidence regarding the overt act attributed to the appellant was not above suspicion. It is also surprising that insofar as A-2, A-3, A-5, A-7 and A-14 are concerned, the High Court

chose to disbelieve the evidence of PW-1, PW-2, PW-3, PW-4 and PW-5 on the ground that there was no corroboration to the evidence of each witness about the injuries received by the respective accused person. High Court expressed the view that the prosecution witness might have received splinter injuries while running away from the scene and it was not possible for them to observe as to which accused hurled bombs against each of them. Once the benefit of such kiosk has been given to the other accused, the same advantage should have been given even to the appellant, because he was admittedly a leader and the version against him was absolutely parrot-like. The judgment of the High Court is not correct. It did not consider the important findings regarding the FIR and the other important circumstance that before the FIR was given, the lawyers/legal advisors had already reached the place alongwith their leader, who was a Member of Legislative Assembly. High Court also did not consider the contradictions between the evidence of PW-1, PW-11, PW-14 Medical Officer, Head Constable and PW-15, Circle Inspector *inter se*. [Para 16] [169-B-C; 170-C-E]

Ram Sunder Yadav and Ors. vs. State of Bihar **1998 (7) SCC 365;** *The State of Uttar Pradesh vs. Sahai and Ors.* **1981 Crl. L.J. 1034;** ***V.*** *Satyamaiah and Ors. vs. State of A.P.* **1978 (1) A.P.L.J. 83;** *Raghunath and Ram Kishan and Ors. vs. State of Haryana and Ors.* **2003 Crl. L.J. 401;** *Mool Chand vs. Jagdish Singh Bedi and Ors.* **1992 Crl. L.J. 1539, referred to.**

Case Law Reference:

1998 (7) SCC 365	**Referred to.**	**Para 11**
1981 Crl. L.J. 1034	**Referred to.**	**Para 12**
1978 (1) A.P.L.J. 83	**Referred to.**	**Para 12**
2003 Crl. L.J. 401	**Referred to.**	**Para 12**
1992 Crl. L.J. 1539	**Referred to.**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 451 of 2007.

From the Judgment & Order dated 8.12.2006 of the High Court Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 1769 of 2004.

V. Kanakraj, M. Vijaya Bhaskar for the Appellant.

I. Venkat Narayan, Anuradha Rustogi, Fatima (for D. Bharathi Reddy) for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This appeal is directed against the judgment of the High Court whereby the High Court upset the judgment of the Trial Court, acquitting all the accused persons. The High Court, in the impugned judgment, has maintained the verdict of acquittal in case of others while the verdict in case of Boddella Babul Reddy (appellant herein), who was the original accused No. 1 (A-1) was upset and he was convicted of the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC' for short).

2. As many as 16 accused persons came to be tried for the various offences by the Trial Court including offences punishable under Sections 147, 148, 324, 326, 307 and 302, IPC read with Section 149, IPC; Sections 3 and 5 of the Explosive Substances Act and Section 25 (1) (b) and 27 of the Indian Arms Act.

3. As per the prosecution case, all the accused persons and the witnesses were the residents of village Sankarpuram of Proddatur Mandal in Kadappa District. As usual, there were two factions in the village, one belonging to the Congress Party and the other belonging to the Telugu Desam Party. All the original accused persons, including the appellant herein,

belonged to the Telugu Desam Party. These factions in the village resulted in bitter enmity in between the two groups. While Boddella Babul Reddy (appellant/A-1) was the leader of the party faction belonging to Telugu Desam Party, one Chandra Sekhar Reddy (PW-7) was the leader of the faction belonging to the Congress Party. In 1997, elections took place in the Association called Water Users Association. As a usual sequel of the elections, there were faction clashes and one of such clashes took place on 13.12.1998 between these two groups on account of passage which was used by both the groups. The cases were filed which later on ended in acquittal. On 15.12.1998, the party belonging to the Congress workers went to the field of one Ramireddy Ramasubba Reddy for shifting the heap belonging to that group. However, Boddella Babul Reddy (appellant/A-1) is said to have caused obstruction for transportation of the paddy crop. This fact was informed to one T.N. Satyanarayana Reddy (PW-9), a *Bandobast* Constable posted in the village and he promised that he would admonish the accused.

4. On the day of incident i.e. 16.12.1998, at about 6.30 a.m., K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) along with one Pilli Pedda Yesanna (the deceased) and one Gopireddy Venkatarami Reddy (List Witness No. 6) went to the said field of Ramireddy Ramasubba Reddy to transport the hay along with a tractor which was brought for the purpose of transportation. At that time, Boddella Babul Reddy (appellant/A-1), Bodella Malikarjuna Reddy, original accused No.2 (A-2), Yedula Nagamuni Reddy, original accused No.3 (A-3), Mopuru Ramanjaneyula Reddy, original accused No.4 (A-4) and Yeddula Maruthi Prasad Reddy, original accused No. 5 (A-5) armed with bomb and Yeddula Ramachandra Reddy, original accused No. 6 (A-6) armed with gun and Yeddula Manohar Reddy, original accused No. 7 (A-7), Yeddula Sankar Reddy, original accused No. 8 (A-8), Mopuru Naga Subba Reddy, original accused No. 9 (A-9), Mopuru Subba Reddy, original

accused No. 10 (A-10), Mopuru Jayarami Reddy, original accused No. 11 (A-11), Yeddula Rajeswara Reddy, original accused No. 12 (A-12), Boddella Madhusudhana Reddy @ Madhukesava Linga Reddy, original accused No. 13 (A-13), Yeddula Prabhakar Reddy, original accused No. 14 (A-14), Yeddula Konda Reddy, original accused No. 15 (A-15), Boddela Naga Ramesh Reddy, original accused No. 16 (A-16), all armed with dangerous weapons like Eetakodavallu and spears came and attacked these persons. There, A-1, the present appellant is said to have hurled bomb on the chest of Pilli Pedda Yesanna (deceased), resulting in his instantaneous death.

5. According to the prosecution, Bodella Malikarjuna Reddy (A-2), Yedula Nagamuni Reddy (A-3), Mopuru Ramanjaneyula Reddy (A-4) and Yeddula Maruthi Prasad Reddy (A-5) also hurled bombs, which exploded and caused splinter injuries to Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) as also to others including Gopireddy Venkatarami Reddy (List Witness No. 6). Yeddula Prabhakar Reddy (A-14) is said to have assaulted Y. Chinna Narayana Reddy (PW-1) with Eetakodavallu on his head while Yeddula Sankar Reddy (A-8) is said to have beaten him with spear stick on his right knee. All other accused caused injuries to the others. On hearing the explosion, T.N. Satyanarayana Reddy (PW-9) who was a constable on *Bandobast* duty came to the scene of offence. It is also alleged that Yeddula Ramachandra Reddy (A-6) had opened fire at the prosecution witness referred to above. Seeing that, even T.N. Satyanarayana Reddy (PW-9) opened fire into air so as to disperse the mob on which the accused ran away from the scene of the offence. The injured persons were taken by K. Chandra Sekhar Reddy (PW-7) to the General Hospital, Proddatur, where Y. Chinna Narayana Reddy (PW-1) is said to have given complaint and on that basis Crime No. 105/98 was registered and investigation began on that

basis. The investigating team came to the spot, i.e., the field of Ramireddy Ramasubba Reddy and usual investigation began. The body of the deceased Pilli Pedda Yesanna was sent for post mortem examination and after the investigation, a charge-sheet was filed against the 16 accused persons, including the present appellant. Since the case was triable exclusively by the Sessions Court, the matter was committed to the Sessions Court, District Kadappa and was registered as Sessions Case No. 268/99. At the trial, various charges were framed against the accused persons. The accused abjured the guilt. As many as 15 witnesses being PW-1 to PW-15 came to be examined before the Trial Court. During their examination, the accused persons denied the accusations. The present appellant-accused pleaded that he had no enmity with the Pilli Pedda Yesanna (deceased) who was a mere coolie and also did not belong to the Congress Party and that he was framed in this case as the person who hurled the bomb at the deceased with the active support of Varadarajulu Reddy, a Member of Legislative Assembly (MLA) belonging to the Congress Party and a false case was foisted against him. The Trial Court disbelieved the evidence of the prosecution. In the opinion of the Trial Court, there was deliberate delay in giving the First Information Report (FIR) and the said was given after due deliberations with the political leaders, so as to implicate falsely, the persons belonging to the Telugu Desam Party. The Trial Court also held that the offence was not established as also the medical evidence was not consistent with the oral evidence on record. The Trial Court also pointed out that the prosecution had failed to explain the injuries on the persons of the accused and as such the oral evidence, more particularly of PW-1 to PW-5, who were the Congress Party workers and who were inimical against the accused, could not be believed. A Criminal Appeal was filed before the Andhra Pradesh High Court against this judgment vide Criminal Appeal No. 1769/ 2004. However, the High Court while confirmed the judgment in the case of other accused persons, appellant herein (A-1) was, however, held guilty of hurling the bomb on Pilli Pedda

Yesanna (deceased) and was held guilty of offence punishable under Section 302, IPC. It is this judgment which has fallen for our consideration in the present appeal.

6. Assailing the judgment, Shri V. Kanakraj, Learned Senior Counsel, appearing on behalf of the appellant pointed out that there was no effort on part of the High Court while considering the judgment of acquittal by the Trial Court to meet the findings of facts given by the Trial Court. The Learned Senior Counsel further pointed out that the whole effort on the part of the prosecution witness was on implicating the appellant (A-1), as he was the leader of Telugu Desam Party and it is out of fierce political rivalry that an FIR was given as late as after about 3 hours of the incident, though the same had occurred at 7 A.M. and there was hardly any distance between the place of the incident and the Police Station. The Learned Senior Counsel further urged that the parrot-like evidence of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5), which was discarded by the Trial Court, giving various reasons, was wrongly accepted by the High Court, though all the witnesses were fierce political opponents of the appellant herein. It was also pointed out that T.N. Satyanarayana Reddy (PW-9), who was the Constable for *Bandobast* duties, remained a mute spectator and did not even bother to inform the Police, which was his bounden duty. It was pointed out that though the claim of the prosecution was that Chandra Sekhar Reddy (PW-7) took the injured of the Congress Party in his tractor to the Government Hospital at Proddatur immediately, as per version of Y. Chinna Narayana Reddy (PW-1), they reached only at 10 A.M. and it is after their reaching the Hospital that S. Ramakrishna Reddy (PW-15), Taluk Circle Inspector and E.V. Rami Reddy (PW-14), Head Constable came there and sent them to the Doctor for treatment and thereafter, his statement was recorded by E.V. Rami Reddy (PW-14), Head Constable, in presence of Circle Inspector of Police (PW-15). The Learned Senior Counsel further invited our

attention to the fact that there was no justification in delay in lodging the FIR, particularly when the injured witnesses had reached Proddatur from Sankarpuram by a tractor and the distance being hardly 9 or 10 K.Ms. between the two places. The Learned Senior Counsel, therefore, pointed out that the registration of the FIR at 11.30 A.M. was itself a very suspicious circumstance. The Learned Senior Counsel further stated that at the time of filing of the FIR, or as the case may be, recording the statement of the witnesses, admittedly, the leaders of the Congress Party, more particularly, the local member of the Legislative Assembly Varadarajulu Reddy was present and, therefore, it was obvious that the appellant herein was framed deliberately, he being the local leader and that was the reason why Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) were giving a parrot-like version that it was he who threw the bomb at Pilli Pedda Yesanna (deceased). Our attention was also invited to the other intrinsic material on record that very strangely, where the bomb was alleged to have exploded, there was absolutely no evidence of any explosive material or the ingredients of the bomb, whereas, such ingredients were found in an entirely different field, which would go to show that the prosecution had also changed the spot deliberately. The Learned Senior Counsel also pointed out the various discrepancies as regards the filing of the FIR by comparing the evidence of the eye-witnesses with the evidence of the Police witnesses. It was pointed out that the High Court had not considered any of these materials while upsetting the verdict of acquittal and, therefore, the judgment of the High court was liable to be set aside.

7. As against this, Shri I. Venkat Narayan, Learned Senior Counsel, appearing on behalf of the State, supported the impugned judgment of the High Court and pointed out that the eye-witnesses, particularly those who were the injured witnesses, were, in one tone, speaking about the active role played by the appellant herein, who was undoubtedly a leader

and, therefore, the High Court was right in relying on the eye-witnesses' account and upsetting the finding of the Trial Court. Shri Venkat Narayan also urged that the eye-witnesses, more particularly, Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) were disbelieved by the Trial Court for the fanciful reasons, which was the perverse appreciation of the evidence by the Trial Court. The Learned Senior Counsel further urged that even the time was mixed up because in the Post Mortem report, the undigested food was found and there was a very vital omission on the part of P. Jayamma, the wife of Pilli Pedda Yesanna (deceased), who was examined as PW-6 about the deceased having taken food in the morning before he left for the coolie work to the land of Ramireddy Ramasubba Reddy. We will have to, therefore, examine the judgment of the Trial Court in light of the evidence led by the prosecution.

8. Considering the evidence of Y. Chinna Narayana Reddy (PW-1), who was injured, it must be noted that this is not a bomb injury. His version is that he was assaulted by Yeddula Prabhakar Reddy (A-14) with Eetakodavallu on his head and by Yeddula Sankar Reddy (A-8) with spear stick on his right leg below the knee on his right little toe. There are two injuries on this witness as per the evidence of Dr. K. Venkata Narayana (PW-11), the Medical Officer, as also on the basis of Exhibit P-5, which was a Wound Certificate of Y. Chinna Narayana Reddy (PW-1). However, it is obvious from Exhibit P-1, as also the evidence that Y. Chinna Narayana Reddy (PW-1) had received the injury on account of an axe. There was no mention of the spear stick in the medical certificate. The witness had stated before the Police that he was beaten by Eetakodavallu, therefore, there is a contradiction in his evidence about the weapon, with which he was beaten. Eetakodavallu is a hunting sickle, which is entirely different from the axe. Dr. K. Venkata Narayana (PW-11), in his evidence, admitted that the injury on his knee could be caused by a fall and that there was no injury

on the right toe of the injured. Therefore, there was no consistency in between the evidence of this witness and that of Dr. K. Venkata Narayana (PW-11), the medical witness.

9. So far as evidence of K. Sudhakar Reddy (PW-2) is concerned, he deposed that the appellant hurled a bomb on the dorsum of his right hand and that Yeddula Manohar Reddy (A-7) beat him with a spear stick and Mopuru Ramanjaneyula Reddy (A-4) hurled a bomb at him and he received a splinter injury on his left ankle. These injuries were found by Dr. K. Venkata Narayana (PW-11), who certified them vide Exhibit P-4. However, this witness never stated as to who had caused him injury on his head.

10. As regards G. Raghurami Reddy (PW-3), he claimed that he suffered a splinter injury on account of the bomb hurled by Yeddula Maruthi Prasad Reddy (A-5). R. Venkata Subba Reddy (PW-4) also suggested that he received a splinter injury on his back with a bomb hurled by Yedula Nagamuni Reddy (A-3). Dr. K. Venkata Narayana (PW-11) also found a lacerated injury on the right side of his chest. K. Gopal Yadav (PW-5) also had suffered a splinter injury from a bomb hurled by Bodella Malikarjuna Reddy (A-2). The Trial Court, therefore, rightly came to the conclusion that excepting the splinter injury received by injured witnesses on account of the bomb being hurled, other injuries were never corroborated by the medical evidence on record.

11. It has also come on record that Yeddula Sankar Reddy (A-8), Yeddula Prabhakar Reddy (A-14) and one Yeddula Venkateswara Reddy also received injuries in the same incident, whose wound certificates are marked as D-6 to D-8 respectively. This was corroborated by the evidence of T.N. Satyanarayana Reddy (PW-9), the *Bandobast* Constable also who claimed that he was informed by the Congress Party workers that three Telugu Desam Party workers had received injuries in the incident. The medical certificates, as well as the evidence of Dr. K. Venkata Narayana (PW-11) shows that these

were the grievous injuries and were not superficial or minor injuries. As compared to the injuries of G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5), the injuries suffered by K. Sudhakar Reddy (PW-2) were more serious. It was an admitted position that these injuries were never explained by the prosecution. As held in *Ram Sunder Yadav & Ors. Vs. State of Bihar* [1998 (7) SCC 365], this Court has held that though in all the cases, the prosecution was not obliged to explain the injuries, the prosecution has to, however, explain the injuries on the accused, where the evidence consists of interested and inimical witnesses and where defence alleges a version which competes in probability with that of the prosecution. Therefore, the Trial Court came to the conclusion that the injuries on Yeddula Sankar Reddy (A-8) and Yeddula Prabhakar Reddy (A-14) were not explained by the prosecution. It is on this basis that the Trial Court entertained a doubt about the version of the prosecution. This suspicion about the credibility of the prosecution witnesses became all the more serious on the basis of the evidence of Y. Chinna Narayana Reddy (PW-1) that they came to the Hospital by 9.30 or 10 A.M. and after some time, S. Ramakrishna Reddy (PW-15), Circle Inspector and E.V. Rami Reddy (PW-14), Head Constable came there and took them to the Doctor for treatment and then the statement of Y. Chinna Narayana Reddy (PW-1) was recorded by the Head Constable, while Exhibit P-1 (Complaint given by PW-1) suggests that it was recorded at 10.35 A.M. This was also fortified by the endorsements of Dr. K. Venkata Narayana (PW-11). The evidence of E.V. Rami Reddy (PW-14), Head Constable is that he along with S. Ramakrishna Reddy (PW-15), Circle Inspector came to the Government Hospital at 10 A.M. and found six injured persons in the Hospital and then the injured were interrogated and the requisition was given to the Medical Officer for treatment. It is admitted by E.V. Rami Reddy (PW-14) that when he and S. Ramakrishna Reddy (PW-15), Circle Inspector reached the Government Hospital, M.L.A. Varadarajula Reddy had already come to the Hospital and the

legal advisors on behalf of the Congress Party were also found there. It was then that S. Ramakrishna Reddy (PW-15), Circle Inspector inquired the names of the accused, place of the incident, the injures and the nature of the weapons from them and issued a requisition to the Medical Officer. In his evidence, S. Ramakrishna Reddy (PW-15), Circle Inspector admitted that he had come to know that M.L.A. Varadarajula Reddy had visited the Hospital, but could not say the purpose for which he had come there. The Trial Court then noted the admission on the part of this witness that he noted the names of the assailants, the weapons used by them and the place of the injuries in the requisition (Exhibit P-10). However, when we see Copy of requisition (Exhibit P-10), the same was received by the duty Doctor at 9.30 A.M. on 15.12.1998. Even Dr. K. Venkata Narayana (PW-11) admitted in the evidence that he received that requisition at 9.30 A.M. on that day and the names of the injured were noted on the right side. The Trial Court has, therefore, rightly held that the information had already reached the Police Inspector even before 9.30 A.M., as it is only after the information was received by him about the injured etc. that he (the Inspector) sent the requisition (Exhibit P-10) to the Police and, therefore, the Complaint (Exhibit P-1), which was supposed to be an FIR was hit by Section 162 of the Code of Criminal Procedure (Cr.P.C.), as the information was already collected by S. Ramakrishna Reddy (PW-15), Circle Inspector much prior to 9.30 A.M. and, therefore, it is the requisition (Exhibit P-10), which should become an FIR and not the Complaint (Exhibit P-1). The Trial Court, therefore, expressed its suspicion about the Complaint (Exhibit P-1), on which heavy reliance is being placed by the prosecution.

12. The Trial Court then also relied on the decisions in *The State of Uttar Pradesh Vs. Sahai & Ors.* [1981 Crl. L.J. 1034], *V. Satyamaiah & Ors. Vs. State of A.P.* [1978(1) A.P.L.J. 83], *Raghunath and Ram Kishan & Ors. Vs. State of Haryana & Ors.* [2003 Crl. L.J. 401] and *Mool Chand Vs. Jagdish Singh Bedi & Ors.* [1992 Crl. L.J. 1539], wherein it was held that it

was unusual for a factionist to take advantage of every situation and occurrence and there is incurable tendency in the factionists to rope in the innocent members of the opposite faction alongwith the guilty and twist and manipulate the facts with regard to the mode and manner of the occurrence so as to make their case appear true with the innocent members of the opposite faction also as participants in the occurrence. The Trial Court, therefore, went on to scrutinize the evidence of the eye-witnesses Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) with greater care. It was observed that S. Ramakrishna Reddy (PW-15), Circle Inspector admitted in his Cross-Examination that he received a telephone information about the commission of offence at 9 A.M. from Sankarpuram Village that a person had died. He stated that he had not made any entry in the General Diary and that he went to the party people of the appellant. On this basis of the evidence, the Trial Court found that even the evidence of the Investigation Officer (PW-15) was an improved version. On examination of the evidence of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5), the Trial Court found that Pilli Pedda Yesanna (deceased) was not a leader, he was a mere coolie. The deceased was also found wearing a sweater, which was not possible unless he was a watchman to the field throughout the night. The Trial Court, therefore, expressed a doubt and in our opinion, rightly that Chandra Sekhar Reddy (PW-7) and Y. Chinna Narayana Reddy (PW-1), who had contested election against the appellant herein being present on the scene, the appellant would chose to throw bomb at an insignificant coolie like Pilli Pedda Yesanna (deceased), leaving Chandra Sekhar Reddy (PW-7) and Y. Chinna Narayana Reddy (PW-1), who had not claimed that it was the appellant who threw the bomb at them. The Trial Court also expressed its doubts on the basis of sketch of scene of offence (Exhibit P-21), which shows no traces of explosion of any explosive substance at the scene of

offence. The Trial Court also expressed doubts about the evidence of S. Ramakrishna Reddy (PW-15) on account of his not having shown in the sketch, the places, where the explosion took place, which were four in number, according to the witness. While appreciating the evidence of the so-called eye-witnesses, it is deduced by the Trial Court that in all probability, there were 10 bombs in the hands of the appellant (A-1), Bodella Malikarjuna Reddy (A-2), Yedula Nagamuni Reddy (A-3), Mopuru Ramanjaneyula Reddy (A-4) and Yeddula Maruthi Prasad Reddy (A-5) and out of these, 6 exploded and 4 of them caused splinter injury to each one of the injured. It was found that this evidence of the witness was not corroborated by T.N. Satyanarayana Reddy (PW-9), the Police Constable, who visited the scene of offence immediately at that time. Though he was declared hostile, the Trial Court has relied on his evidence to the effect that immediately after receiving the sounds of explosion, he came there running. The Trial Court, therefore, deduced that the bombs were thrown by both the groups, more particularly because the injuries on Yeddula Sankar Reddy (A-8) and Yeddula Prabhakar Reddy (A-14), which had remained unexplained, were far from serious and were caused because of the explosion of the bombs. On this, the Trial Court deduced the theory of free fight between both the groups, both armed with explosive bombs. The Trial Court, therefore, held that the evidence of T.N. Satyanarayana Reddy (PW-9), the Constable did not corroborate the evidence of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5).

13. This well considered judgment of the Trial Court has been upset by the High Court and in its judgment, the High Court relied on the Exhibit P-1 [Complaint given by Y. Chinna Narayana Reddy (PW-1)]. Very significantly, barring the evidence of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5), there is

hardly any consideration in the High Court's judgment, more particularly of the mix up of timings as regards the Complaint (Exhibit P-1), on which heavy reliance was placed by the High Court. We have seen the Complaint (Exhibit P-1) very carefully, where it is specifically alleged that the Telugu Desam Party was led by the appellant herein. It is reported that both the parties, on 13.12.1998, had fought in connection with using the road and the witness (PW-1) himself and his party people were accused in that case and were absconding. It is then suggested on 16.12.1998, in the morning at 7.30, he (PW-1) and the other persons went to cart the paddy hay of Ramireddy Ramasubba Reddy and while they were bundling the hay, the 16 accused persons came there and the appellant (A-1), Bodella Malikarjuna Reddy (A-2), Yedula Nagamuni Reddy (A-3), Mopuru Ramanjaneyula Reddy (A-4) and Yeddula Maruthi Prasad Reddy (A-5) were holding bombs in their two hands, Yeddula Ramachandra Reddy (A-6) was holding a gun and other persons were holding hunting sickles and spears and the appellant raised loud cries shouting not to leave anybody there and kill all of them. It is also reported that it was the appellant (A-1), who hurled a bomb on Pilli Pedda Yesanna (deceased). The said bomb exploded and Pilli Pedda Yesanna (deceased) fell down and died on the spot; then the others also started hurling the bombs. Y. Chinna Narayana Reddy (PW-1) then refers to his being hacked by other accused persons with a hunting sickle and on the right knee with the spear. He then refers to an injury caused on his little finger because of the spear. He then refers to the police firing a gun. After that he refers that they all (injured) came to the Government Hospital and were being treated. There is an endorsement that this statement has been given at 10.35 A.M., while it was dispatched to the Court at 1.04 P.M. Significantly enough, there is also a report given by Yeddula Prabhakar Reddy (A-14) on the same day at 7.45 A.M., wherein the hurling of the bomb is attributed to the complainant party.

14. Once we see the evidence of Y. Chinna Narayana

Reddy (PW-1) in the light of evidence of E.V. Rami Reddy (PW-14), Head Constable and of S. Ramakrishna Reddy (PW-15), Taluk Circle Inspector, the falsity of the evidence of this witness becomes clear. Though in his Examination-in-Chief, he claimed that all of them along with the woman folk were taken in the tractor of Chandra Sekhar Reddy (PW-7) to the Government Hospital, that claim appears to be incorrect. In his Examination-in-Chief, E.V. Rami Reddy (PW-14), Head Constable, who claimed to have gone to the Hospital, admits that S. Ramakrishna Reddy (PW-15), Taluk Circle Inspector asked him to accompany him at 9 A.M. to Sankarpuram and the Sub-Inspector also accompanied him. According to him, the requisition (Exhibit P-10) was prepared at 9 A.M. and was sent to the Doctor, who received it at 9.30 A.M. He, in fact, denied that he went to the Hospital at 10 A.M. As compare to this, the evidence of Ramakrishna Reddy (PW-15), Circle Inspector suggests that he alongwith other staff and E.V. Rami Reddy (PW-14) proceeded to Sankarpuram since he received an anonymous call at 9 A.M. about the incident. He then suggests that on the way, near one Village Pedda Settypalli, at about 9.15 A.M., he received the information that the injured were taken to the Hospital and, therefore, he sent his Sub-Inspector and the staff to go to the scene of offence and he alongwith V. Rami Reddy (PW-14), Head Constable, returned to Government Hospital at about 10 A.M. and it was then that V. Rami Reddy (PW-14) recorded the statement of Y. Chinna Narayana Reddy (PW-1) in the Government Hospital. It is, therefore, obvious that these two police witnesses are contradicting each other in the matter of the timings and also the timing of the Complaint (Exhibit P-1). On this backdrop, when we see the evidence of Dr. K. Venkata Narayana (PW-11), the Medical Officer, it is seen that at 9.30 A.M. itself, the Doctor examined K. Sudhakar Reddy (PW-2) on the requisition of SHO (Rural), who was accompanied by Police Constable 674, who was none else, but V. Rami Reddy (PW-14). This requisition is said to have been sent by PW-14 and PW-15. S. Ramakrishna Reddy (PW-15) has given a graphic

description and timings as to when he examined all the injured witnesses. Now, if K. Sudhakar Reddy (PW-2) was available at 9.30 A.M. itself and a requisition was already prepared even before 9.30 A.M., there is no question of Y. Chinna Narayana Reddy (PW-1) registering the FIR at 10.35 A.M. V. Rami Reddy (PW-14) has also admitted that even by the time they reached the Hospital, M.L.A. Varadarajula Reddy was stated to have come to the Hospital and the legal advisors were also found in the Hospital. All this creates a big suspicion about the Complaint (Exhibit P-1), as also evidence of Y. Chinna Narayana Reddy (PW-1). Shri Kanakraj, Learned Senior Counsel appearing on behalf of the appellants pointed out that this very vital aspect has not at all been considered by the High Court. Once it is proved that the FIR itself was given with the consultation of the legal advisors and in the guidance of the local Member of Legislative Assembly who was inimical towards the appellant herein on account of the party factions, the whole story and more particularly, the part played by Y. Chinna Narayana Reddy (PW-1) becomes suspicious.

15. Considering evidence of Chandra Sekhar Reddy (PW-7) that they had started from the Village at about 8.10 or 8.20 A.M. and that they were traveling in a tractor, it cannot be said that they would reach only at 10.35 A.M. We have seen the evidence of K. Sudhakar Reddy (PW-2) as also the other witnesses like G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5). The evidence of all these witnesses is full of contradictions and omissions. Most of these witnesses figured of the accused in the counter case. Therefore, their evidence was bound to be appreciated little carefully. We are not satisfied with the judgment of the High Court and more particularly, the appreciation of the evidence, mainly of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5). The High Court does not seem to have exercised the caution that it was expected to, more particularly, in view of the fierce enmity

between the accused party and the complainant party. On the other hand, the appreciation of the evidence by the Trial Court appears to be more satisfactory to us. We are, therefore, not in a position to accept the evidence of these eye-witnesses, particularly against the appellant herein.

16. The High Court also has nowhere considered the other circumstance that there was no explosive substance found at the place where allegedly the bombs were exploded. On the other hand, they were found somewhere else. That is clear from the evidence of Ramakrishna Reddy (PW-15), Circle Inspector. Even the High Court has noted this in the following words:-

> "In the absence of any traces of bomb blast on the ground, there is a doubt whether they received injuries on account of throwing of one bomb against the deceased or due to explosion of any other bomb. Though the presence of PW-1 to PW-5 is helpful regarding the overtacts attributed to A-1 in attacking the deceased, there is a doubt regarding the culprit who hurled bombs against the witnesses at the time of incident."

This shows that the role of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) and more particularly, their evidence regarding the overtact attributed to the appellant herein was not above suspicion. We are also surprised that insofar as Bodella Malikarjuna Reddy (A-2), Yedula Nagamuni Reddy (A-3), Yeddula Maruthi Prasad Reddy (A-5), Yeddula Manohar Reddy (A-7) and Yeddula Prabhakar Reddy (A-14) are concerned, the High Court chose to disbelieve the evidence of Y. Chinna Narayana Reddy (PW-1), K. Sudhakar Reddy (PW-2), G. Raghurami Reddy (PW-3), R. Venkata Subba Reddy (PW-4) and K. Gopal Yadav (PW-5) on the ground that there was no corroboration to the evidence of each witness about the injuries received by the respective accused person. The High Court expressed the view that the prosecution witness might have

received splinter injuries while running away from the scene and it was not possible for them to observe as to which accused hurled bombs against each of them. Once the benefit of such kiosk has been given to the other accused against whom the appeal was filed by the State, in our opinion, the same advantage should have been given even to the appellant herein, more particularly because he was admittedly a leader and the version against him was absolutely parrot-like. We are, therefore, not convinced about the correctness of the judgment of the High Court. The High Court has not exercised the caution that was expected to while dealing with the judgment of acquittal by the Trial Court. It has also left out of consideration the important findings regarding the FIR and the other important circumstance that before the FIR was given, the lawyers/legal advisors had already reached the place alongwith their leader, who was a Member of Legislative Assembly. The High Court has also not further considered the contradictions between the evidence of Y. Chinna Narayana Reddy (PW-1), Dr. K. Venkata Narayana (PW-11), the Medical Officer, E.V. Rami Reddy (PW-14), Head Constable and S. Ramakrishna Reddy (PW-15), Circle Inspector *inter se*.

17. For all the above reasons, we feel that the High Court was not justified in interfering with the well considered judgment of the Trial Court. We, therefore, allowing the appeal, set aside the judgment of the High Court and restore that of the Trial Court. The appellant is reported to be undergoing the punishment; he shall be forthwith released unless required in any other matter.

N.J. Appeal allowed.

HARINARAYAN G. BAJAJ
v.
STATE OF MAHARASHTRA & ORS.
(Criminal Appeal No. 28 of 2010)

JANUARY 6, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Code of Criminal Procedure, 1973 – s. 319(4)(a) and (b); 244 – Criminal proceedings – New accused joined to the proceedings after charges framed against the original accused – Right of newly added accused for initiation of proceedings qua him from the stage of s. 244 and right to cross-examine the witnesses before framing of charges – Held: The whole inquiry in respect of the newly added accused should commence afresh from the stage of s. 244 – Such accused had the right to cross-examine the witnesses.

Words and Phrases: 'Commence afresh' and 'Proceedings' – Meaning of, in the context of s. 319(4)(a) Cr.P.C.

In a criminal proceeding u/s. 406 r/w s. 114 IPC, after the charges were framed against respondent Nos. 2 to 4, appellant filed an application u/s. 319 Cr.P.C., requesting to array respondent No. 5 as a co-accused. The application was allowed. Respondent No. 5 filed an application seeking to commence the proceedings qua him, from the stage of inquiry i.e. from the stage of s. 244 Cr.P.C. and to allow cross-examination of prosecution witnesses at the stage of evidence before charge. Application was allowed. Trial court also split the trial of respondent No. 5 from the trial of respondent Nos. 2 to 4. The order as regards splitting of trial was quashed by High Court. Appellant's application, seeking quashing of

the order, whereby trial court had ordered de novo proceedings as against respondent No. 5 from the stage of inquiry, was rejected by High Court.

Dismissing the appeal, the Court

HELD: 1.1. Section 319 Cr.P.C. suggests that there is no escape from commencing the proceedings afresh and also that the witnesses have to be re-heard. Clause (a) of Section 319 (4) is the basic provision and the use of the words 'proceedings' and the term 'commence afresh' has its own significance. If the plea that the newly joined accused has no right of cross-examination is accepted, it would mean that on being joined under Section 319 (1) Cr.P.C., the only step that would be required would be framing of charge against him. In that event, there would be a complete denial to such accused of an important right of cross-examination of the witnesses before the framing of the charge and it would only mean that such accused would remain a mute spectator till the framing of the charge. [Para 11] [179-E-H]

1.2. The Court would also give a meaningful interpretation to the word *'proceedings'* which has been deliberately used by the Legislature. The Legislature does not use the word *'trial'* which essentially begins after framing of the charge. If the legislature had intended that the newly joined accused should not get the right of cross-examining the witnesses examined before framing of the charge, it might have used the word 'trial'. The deliberate use of the word *'proceedings'* would then include not only the trial but also the inquiry which commences with Section 244 Cr.P.C. and ends with the framing of the charge under Section 246 Cr.P.C. [Para 12] [180-A-C]

1.3. The terminology *'commence afresh'* has also its

own force. It indicates that the whole inquiry which commences from Section 244 Cr.P.C. must begin afresh. The interpretation given to the word *'proceedings'* by the Court, is buttressed by the language of Section 319(b) Cr.P.C. The plain language takes back the whole proceedings to the stage of taking cognizance. Therefore, the language of Section 319 Cr.P.C. itself pushes the proceedings back to the stage of inquiry, once the order under Section 319 (1) Cr.P.C. is passed by the Court and a new accused is joined therein. [Para 12] [180-C-E]

1.4. If the interpretation that Section 319(4) does not require de novo inquiry, is to be accepted then a complainant, wherein it is a case of multiple accused, may mischievously join only few of them and after getting the charge framed, make an application under Section 319 Cr.P.C. to join some other accused persons who would then have no right of cross-examination of the witnesses and who would be required to be the mute spectators to the charge being framed against which they could have successfully resisted by cross-examining the witnesses. [Para 13] [180-E-G]

1.5. Before summoning the accused under Section 319(1) Cr.P.C., there is no requirement of allowing such accused person to cross-examine the witnesses. That stage comes only after an accused is summoned under sub-Section (1). Therefore, it would be a case where the newly added accused who has not had the advantage of hearing the evidence would be put to prejudice because firstly, he has not heard the evidence and secondly, he cannot even cross-examine those witnesses in the warrant trial based on a private complaint. [Para 14] [180-G-H; 181-A-B]

2.1. Right to cross-examine the witnesses who are examined before framing of the charge is a very precious

right because it is only by cross-examination that the accused can show to the court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him. [Para 16] [181-D-F]

Ajoy Kumar Ghose v. State of Jharkhand **2009 (4) SCR 515, relied on.**

2.2. Under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319, Cr. P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence. [Para 17] [182-B-C]

Shashi Kant Singh v. Tarkeshwar Singh and Anr. **2002 (5) SCC 738, relied on.**

Rakesh v. State of Haryana **2001 (6) SCC 248, distinguished.**

R.S. Nayak v. A.R. Antulay **1986 (2) SCC 716;** *Michael Machado v. Central Bureau of Investigation* **2000 (3) SCC 263;** *Ram Gopal and Anr. v. State* **1999 CrLJ 1865, referred to.**

Case Law Reference:

2009 (4) SCR 515	**Relied on.**	**Para 16**
2002 (5) SCC 738	**Relied on.**	**Para 17**

2001 (6) SCC 248	**Distinguished.**	**Para 19**
1999 Crl. L.J. 1865	**Referred to.**	**Para 20**
1986 (2) SCC 716	**Referred to.**	**Para 21**
2000 (3) SCC 262	**Referred to.**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 28 of 2010.

From the Judgment & Order dated 5.6.2008 of the High Court of Bombay in Criminal Application No. 1455 of 2008.

Shekhar Naphade, Gaurav Goel (for E.C. Agrawala), Sanjay V. Kharde, Asha G. Nair, A.H.H. Ponda, Girish B. Kedia, Rakhi Ray, S.S. Ray, Bina Gupta for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

2. Interpretation of Section 319 of the Code of Criminal Procedure (hereinafter called "Cr.P.C." for short) and, more particularly, Sub-Section (4) thereof has fallen for consideration in this appeal.

3. *The factual scenario:* A complaint was filed against three accused persons, being respondent Nos. 2, 3 and 4 herein for offence under Section 406 read with Section 114 of the Indian Penal Code (for short 'IPC') in the Court of the Metropolitan Magistrate. We need not go into the facts stated in the said complaint in view of the narrow question which falls for consideration in this appeal. The Trial Court took the cognizance of the offences on 03.04.1998 and issued process against respondent Nos. 2 to 4. The Trial Court proceeded to examine the witnesses before framing the charge. Number of revisions including the discharge application were filed by the accused and the trial went on up to 15.09.2005 when the

Bombay High Court expedited the trial. On 13.06.2006, the cross-examination of the first witness of the prosecution at the stage of evidence before charge was completed by the Advocate of the accused persons. This cross-examination ran into 115 pages. Since the matter could not be finished up to the date fixed by the Bombay High Court, it was extended up to 30.06.2006 for completion of trial. The time was further extended till December, 2006 and further up to 31.05.2007. In the meantime, the second witness was cross-examined which cross-examination consisted of 148 pages. Likewise, third witness of the prosecution was also examined on 11.05.2007. The Trial Court discharged Shri Pramod Banka and Smt. Rani V. Agrawal and framed charges against the third respondent herein. The time was again extended by the High Court till 31.12.2007. This was challenged by way of the revision by the appellant, which was allowed. The third respondent also filed a revision which was dismissed by the High Court and the High Court directed the Trial Court to frame charge against respondent No. 2 to 4 also under the provisions of Sections 403, 409 read with Section 34, IPC. Ultimately, the charges came to be framed against respondent Nos. 2 to 4 on 28.11.2007.

4. At this stage, on 15.12.2007, the appellant herein filed an application under Section 319 Cr.P.C. requesting to array respondent No.5 herein as a co-accused in the said proceedings. On 31.12.2007, this application was allowed and the summons was issued to the 5th respondent, Creative Garments Ltd. a company incorporated under the Companies Act through its Managing Director.

5. On 03.01.2008, the 5th respondent preferred an application to the Trial Court to commence the proceedings qua the 5th respondent from the stage of inquiry i.e. from the stage of Section 244, Cr.P.C. and to allow the cross-examination of the witnesses of the prosecution at the stage of evidence before charge. On 22.02.2008, this application came to be allowed.

However, the Trial Court split the trial of respondent No.5 and the other respondent Nos. 2 to 4. Respondent Nos. 2 to 4 challenged the order dated 22.02.2008 splitting the trial. That order was quashed by the High Court by an order dated 31.03.2008. Further, an application came to be made by respondents on 15.04.2008 seeking the clarification of the High Court's order which clarification was given by the High Court on 23.04.2008 holding that the order was restricted only to the aspect of splitting of trial and not to any other matter.

6. The appellant also filed a criminal application on 30.04.2008 seeking the quashing of the order dated 22.02.2008 by which the Trial Court had ordered the *de novo* proceedings as against respondent No.5 from the stage of inquiry. Further, a direction was sought to straightaway frame charge against respondent No.5 for the same offence with which respondent Nos. 2 to 4 were charged. The High Court, however, rejected this application by the complainant (appellant herein) and held that there could be no dispute that the Court must commence *de novo* proceedings against respondent No. 5 and it further observed that mere delay which might be caused to the complaint would be of no consequence.

7. Shri Naphade, learned Senior Counsel appearing on behalf of the complainant-appellant urges that the High Court has erred in confirming the order of the Trial Court permitting the *de novo* proceedings against respondent No.5 in the sense that it allowed the further cross-examination of the witnesses who were already examined before framing the charge. Contention by learned Senior Counsel is that there would be no question of such a permission of the cross-examination of the witnesses who were examined before framing of the charge since firstly, the charge against the other accused persons has already been framed and secondly, there is no such right of cross-examination under Section 244, 245 and 246, Cr.P.C. The Counsel argues that the term '*evidence*' as mentioned in Section 244, Cr.P.C. does not necessarily include the cross-

examination of the witnesses who were examined at that stage. The further contention of the counsel is that Section 319 (4), Cr.P.C. does not require a *de novo* inquiry as has been ordered by the Trial Court and affirmed by the High Court. Reliance was placed on *Rakesh v. State of Haryana* [2001 (6) SCC 248], *Ram Gopal & Anr. V. State of U.P.* [1999 Crl. L.J. 1865] and *Michael Machado v. Central Bureau of Investigation* [2000 (3) SCC 262].

8. As against this, Shri Ponda, learned Counsel appearing on behalf of the respondent accused urged that the analysis of Section 319 Cr.P.C. itself would show that there has to be *de novo* inquiry in the sense that the newly joined accused in such a trial must be given a right to cross-examine the witnesses who were examined prior to the framing of charge. He pointed out that if the interpretation as canvassed by the appellant is given, then there is a likelihood of the complainant taking advantage of his own wrong and such an interpretation would give rise to a mischief.

9. Learned counsel pointed out that the rulings pointed out by the appellant were not applicable to the controversy. Learned Counsel also urged that the use of the word '*evidence'* in Sections 244, 245, 246, Cr.P.C. supports that the accused under those Sections have the right of cross-examination and, more particularly, if such a right is not spelt out from the language, then it would only mean that the accused in the warrant trial based on the complaint case would have to helplessly watch the charge being framed. This is all the more true, according to learned Counsel, in a case where accused has been joined under Section 319, Cr.P.C. On these rival contentions, it is to be seen whether the Trial Court and the High Court were right in ordering a *de novo* inquiry.

10. The relevant part of Section 319, Cr.P.C. is as under 319 (1):

"(1) Where, in the course of any inquiry into, or trial of,

an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) XXX XXX

(3) XXX XXX

(4) Where the Court proceeds against such person under sub-Section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard.

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which an inquiry or trial was commenced."

11. Even a glance at this Section suggests that there is no escape from commencing the proceedings afresh and also that the witnesses have to be re-heard. Clause (a) is the basic provision and the use of the words '*proceedings*' and the term '*commence afresh*' has its own significance. If we accept the contention of Shri Naphade that the newly joined accused has no right of cross-examination, it would mean that on being joined under Section 319 (1), Cr.P.C., the only step that would be required would be framing of charge against him. In that, there would be a complete denial to such accused of an important right of cross-examination of the witnesses before the framing of the charge. It would only then mean that such accused would remain a mute spectator till the framing of the charge.

12. We would also give a meaningful interpretation to the word '*proceedings*' which has been deliberately used by the Legislature. The Legislature does not use the word '*trial*' which essentially begins after framing of the charge. If the Legislature had intended that the newly joined accused should not get the right of cross-examining the witnesses examined before framing of the charge, it might have used the word '*trial*'. The deliberate use of the word '*proceedings*' would then include not only the trial but also the inquiry which commences with Section 244, Cr.P.C. and ends with the framing of the charge under Section 246, Cr.P.C. The terminology '*commence afresh*' has also its own force. It indicates that the whole inquiry which commences from Section 244 Cr.P.C. must begin afresh. The interpretation that we give to the words '*proceedings*' is buttressed by the language of 319 (b), Cr.P.C. The plain language takes back the whole proceedings to the stage of taking cognizance. If we accept the contention of the appellant herein, then sub-clause (b) would be rendered otiose. We have, therefore, no doubt that the language of Section 319, Cr.P.C. itself pushes the proceedings back to the stage of inquiry, once the order under Section 319 (1) Cr. P.C. is passed by the Court and a new accused is joined therein.

13. There is one more angle and that is the angle of mischief. If the interpretation given by the appellant is to be accepted then a complainant, wherein it is a case of multiple accused, may mischievously join only few of them and after getting the charge framed, make an application under Section 319, Cr.P.C. to join some other accused persons who would then have no right of cross-examination of the witnesses and who would be required to be the mute spectators to the charge being framed against which they could have successfully resisted by cross-examining the witnesses.

14. There is one more aspect that before summoning the accused under Section 319 (1), Cr.P.C. there is no requirement of allowing such accused person to cross-examine the

witnesses. That stage comes only after an accused is summoned under sub-Section (1). Therefore, it would be a case where the newly added accused who has not had the advantage of hearing the evidence would be put to prejudice because firstly, he has not heard the evidence and secondly, he cannot even cross-examine those witnesses in the warrant trial based on a private complaint.

15. This brings us to the question argued by Shri Naphade on the basic right of cross-examination to the accused in the proceedings under Section 244, Cr.P.C. In fact, in view of our interpretation of Section 319(4), it is really not necessary to go into that question. However, since the Learned Senior Counsel argues that there is no right at all to give opportunity of cross-examination to any accused whether brought before the Court initially or by way of Section 319(1), we proceed to consider the question.

16. This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him. In *Ajoy Kumar Ghose v. State of Jharkhand* [Criminal Appeal No. 485 of 2009], one of us (V.S. Sirpurkar, J.) held that there is a right to the accused to cross-examine the witnesses examined before framing the charge and that the said right is extremely important. It is observed in para 25:

> "the right of cross-examination is a very salutary right and the accused would have to be given an opportunity to

> cross-examine the witnesses who have been offered at the stage of Section 244 (1) Cr.P.C."

17. Therefore, the situation is clear that under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319, Cr. P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence. This Court has already held so in *Shashi Kant Singh v. Tarkeshwar Singh & Anr.* [2002 (5) SCC 738].

18. Though a feeble attempt was made to argue that in that ruling the Supreme Court had expressed, '*in short there has to be a de novo trial against him. The provision of de novo trial is mandatory'* and therefore, it is only a '*trial*' which has to be ordered and not the '*proceedings*'. The argument is absolutely incorrect because in *Shashi Kant Singh'*case (cited supra), the Court was dealing with a warrant trial case, not based on a private complaint and, therefore, the Supreme Court used the words *de novo* trial. The High court has correctly appreciated this provision.

19. This takes us to the rulings cited which we must consider. In *Rakesh v. State of Haryana* this Court framed the question in paragraph 3 in the following words:

> "Whether the statement of a prosecution witness without the said witness having been cross-examined constitutes "evidence" within the meaning of Section 319, Cr.P.C."

It is in that behalf that the Court expressed:-

> "….the contention that the term 'evidence' as used in Section 319 Criminal Procedure Code would mean evidence which is tested by cross examination cannot be accepted"

The Court, however, immediately expressed that the question of discharging the evidence by cross-examination would arise only after the addition of the accused and that there was no question of cross-examining the witnesses prior to adding such person as accused. It was further said that the Section does not contemplate an additional stage of first summoning the person and giving him the opportunity to cross-examine the witness who has deposed against him and thereby testing whether such person to be added as accused or not. Once the Sessions Court records the statement of the witnesses, it would be part of the evidence. Therefore, it was in different factual situation that this Court had made those observations. We do not think that such observations can be taken advantage of. This is apart from the fact that the Court has specifically held that the interpretation of the evidence was only for the purpose of Section 319, Cr.P.C.

20. To the similar effect was the ruling relied upon by the appellant in *Ram Gopal & Anr. v. State* [1999 CrLJ 1865]. In fact *Ram Gopal's* case is also restricted to the interpretation of the word 'evidence' as is used under Section 319, Cr.P.C. Though there are some other observations in respect of Section 244, Cr. P.C., we do not think that the observations in paragraph 29 are correct. In fact the observations in paragraph 35 therein clarified the ratio of that decision. In that view, that judgment will be of no help.

21. Our attention was also invited to *R.S. Nayak v. A.R. Antulay* [1986 (2) SCC 716] paragraphs 45 and 46. We do not think that there is any need on our part to comment on this case, more particularly, to assess the scope of Sections 244 and 245, Cr. P.C. because if Section 319 (4) Cr.P.C. is interpreted in the manner that we have interpreted it, there would not necessity of going into the scope of Section 244, Cr.P.C. as because of that interpretation all the proceedings would be relegated back and start afresh whereby there would be clear scope and right for the newly added accused to hear the

evidence of witnesses examined before framing of charge and to cross-examine them.

22. A reference was also made to *Michael Machado v. Central Bureau of Investigation* [2000 (3) SCC 262]. However, in our opinion *Michael Machado's* case is not an authority on the true scope of Section 319 (4) Cr.P.C.

23. Shri Naphade also tried to suggest by taking us to the old Section 252, Cr.P.C. to suggest that there is no right of cross-examination. As we have already clarified, once we interpret the provisions of Section 319 (4), Cr.P.C. to mean that the proceedings have to go back and have to be commenced afresh and the witnesses have also to be re-heard, then the right of cross-examination would be innate and under the circumstances there would be no necessity of specifically commenting upon the scope of Section 244, Cr.P.C.

24. In view of what we have held, we find that the High Court's judgment confirming the Trial Court's judgment is correct and we see no reason to interfere with the same. The appeal has no merits and is, therefore, dismissed.

K.K.T. Appeal dismissed.

INDRESH KUMAR
v.
RAM PHAL AND ORS.
(Criminal Appeal Nos.125-126 of 2003)

JANUARY 6, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Appeal against acquittal: Conviction of appellant by trial court – Other six co-accused acquitted – High Court acquitted appellant – Revision against the acquittal of other co-accused, dismissed – On appeal against acquittal, held: High Court did not consider the evidence of witnesses in proper perspective – Revision against acquittal of other co-accused, dismissed without giving reasons – Matter remanded to High Court for consideration afresh – Penal Code, 1860 – ss.218, 342, 323.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 125-126 of 2003.

From the Judgment & Order dated 17.7.2002 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 196-SB of 2001 and Criminal Revision No. 1018 of 2001.

Sushil Kumar, Navin Chawla, Rakesh Pandey, Sanjay Jain, Manjit Singh (for Kamal Mohan Gupta), K.C. Rajput (for I.M. Nanavati Associates) for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. These appeals questions the judgment of the High Court whereby the High Court allowed the appeal filed by one Ramphal (respondent No. 1 herein), an Inspector of Police and acquitted him of the offence punishable under Section 218, IPC. He was also acquitted of the other

offences punishable under Sections 342 and 323, IPC. He was convicted by the Court of Additional Sessions Judge, Kaithal wherein as many as seven persons were tried for these offences. His other six co-accused were, however, acquitted by the Trial Court while Inspector Ramphal who is now arrayed as the first respondent, was convicted. This judgment was challenged by him before the High Court. The acquittal of Ramphal from other offences as also the total acquittal of other six accused persons came to be challenged by Indresh Kumar, the original complainant and the appellant herein by way of a criminal revision. The High Court in its common judgment has allowed the appeal filed by the respondent No. 1 herein and has awarded him the verdict of total acquittal. At the same time, the revision filed by appellant Indresh Kumar was dismissed. Appellant Indresh Kumar now has come up before us challenging the acquittal of all the accused persons including Ramphal (respondent No. 1-accused) who was acquitted by the High Court.

2. This case has a long history as well as political overtones. The appellant-complainant Indresh Kumar who was originally examined as PW-8 came to know about the illegal detention of his father Chaman Lal Saraf and his two brothers by the Police of Kaithal. He was ordinarily residing in Jammu where he was working as a full time preacher of an organisation, namely, Rashtriya Swamsewak Sangh. On coming to know about the illegal detention he reached Kaithal on 25.06.1992 and went to the city Police Station, Kaithal where Ramphal (respondent No. 1-accused) was the Station House Officer. He had gone there along with two of his friends. On being asked about the illegal detention of his father and the brothers, Ramphal not only took him in custody but he was beaten up with stick not only by Ramphal but by other Police Officials also (the other six accused persons) on the asking of Ramphal. He was then taken from place to place in a Police jeep. On the next day, after the medical examination, he was produced before the Executive Magistrate where he learnt that

a total false case under Section 107/151 Cr.P.C. was registered against him on the allegations that he had fought and created ruckus at the residence of one Anil Kumar S/o Prem Chand. He was initially directed to submit a bond of his good behaviour, however, later on the Magistrate dropped the proceedings against him. Appellant Indresh Kumar then met the Superintendent of Police and Deputy Commissioner, Kaithal where he filed the complaint against Ramphal (respondent No.1-accused) and his co-accused. He, thereafter, returned to Jammu. However, he returned to Kaithal on 11.07.1992 and again got himself examined where on his radiological examination, a fracture was found on his left foot.

3. On demonstrations by a political party about the alleged police atrocities, the District and Sessions Judge, Kurukshetra was appointed as the inquiry officer to inquire into the offence on 10.07.1992. He submitted his report on 31.07.1992 wherein it was reported that Ramphal (respondent No.1-accused) and other co-accused were guilty of offences. On the basis of this report, a case was registered at the city Police Station, Kaithal in February, 1996. The case also got reinvestigated. Ultimately, all the accused persons were charged under Sections 367, 420, 468, 471, 218, IPC and 120B, IPC. The case was tried by the Additional Sessions Judge, Kaithal where as many as 22 witnesses came to be examined. However, the Trial Court acquitted six accused persons while convicting respondent Ramphal alone for the offence punishable under Sections 323, 218 and 342, IPC. We have already pointed out that Ramphal's appeal before the High Court was allowed and he was acquitted while the revision filed against his acquittal from the other offences and the total acquittal granted to other six accused persons was dismissed. That is how Indresh Kumar (appellant-complainant) is before us in this appeal.

4. On the basis of the evidence of Dr. B.B. Kakkar (PW-6) that he had examined Indresh Kumar on 26.06.1992 at 6.05 a.m. and issued medical report as Exhibit PD, the High Court

found that in the said medical report, it was mentioned that Indresh Kumar had suffered the injury to his right foot. Whereas when examined by Dr. S.K. Singhal (PW-7) on 11.07.1992 in the Civil Hospital, Kaithal, Dr. Singhal he had found fracture of fifth Metatorsal bone of the left foot of Indresh Kumar. From these, the High Court came to the conclusion that the prosecution had not given the truthful version of the story inasmuch as a fracture of right foot could not travel to the left foot within a period of 20 days. The High Court then found fault with the absence of application which Indresh Kumar had given before the Superintendent of Police, Kaithal on 26.06.1992 itself. It, therefore, came to the conclusion that it could not presume that Indresh Kumar had moved the police authorities on 26.06.1992 against the torture allegedly suffered by him at the hands of Ramphal. The High Court also noticed that one Anil Kumar s/o Prem Chand had moved an application on 25.06.1992 against Indresh Kumar, the photocopy of which was produced by accused as Exhibit-DA. From this, the High Court deduced that the story put forth by the Police that Ramphal (respondent No.1-accused) had gone to the residence of Prem Chand and had created a ruckus there and during that Ramphal (respondent No.1-accused) was injured at the hands of Anil Kumar due to which both Indresh Kumar (appellant herein) as well as Anil Kumar were produced before the Executive Magistrate in the morning, must be taken to be a true story. From this the High Court further deduced that Indresh Kumar might have felt insulted and in order to take revenge against Ramphal and other six co-accused persons, Indresh Kumar might have invented a false story. The High Court also viewed suspiciously that injured Indresh Kumar went to Jammu on 26.06.1992 itself without getting himself radiologically examined only to return from there on 11.07.1992 to get the confirmation about his fracture in the subsequent examination. It was held that Indresh Kumar got the wrong foot X-rayed. It was also held that the prosecution had not proved that Ramphal had forged the application on behalf of Anil Kumar and had registered a false case under Section 107/151 Cr.P.C. against Indresh

Kumar and it had further failed to produce Anil Kumar in order to rebut the contention of Ramphal that he had taken action against Indresh Kumar on the application moved by Anil Kumar. It was also held that prosecution had failed to prove that Ramphal had concocted a story in order to falsely implicate Indresh Kumar in a case under Section 107/151 Cr.P.C. relating to the earlier incident of beating the accused. The High Court also found fault with the late lodging of the First Information Report and that is how the High Court allowed the appeal and set aside the conviction and the sentence of Ramphal (respondent No.1 herein).

5. Very significantly there is not even one word about the six other accused persons whose acquittal was also challenged by the appellant Indresh Kumar by filing a separate revision against their acquittal. It is only in the operative part, the High Court mentions, 'the petition is dismissed. See detailed judgment in Criminal Appeal No. 196-SB/2001'. Very significantly not even one word has been mentioned by the High court in the said judgment.

6. On behalf of Indresh Kumar (appellant herein), Shri Navin Chawla, learned counsel appeared and pointed out as to how the whole judgment of the High Court was perverse. Shri Chawla produced before us, firstly, the photocopy of the document in the case which was allegedly initiated on the basis of the report by Anil Kumar against Indresh Kumar to the effect that he had come to his house and had fought with him wherein they had physical altercation. It is significant to note that on the basis of this report, the police allegedly came to the residence of Anil Kumar and arrested both Anil Kumar as well as appellant Indresh Kumar as per the version of Ramphal (respondent No.1-accused). It is then on that basis that they were produced in the morning after their medical examination before the Executive Magistrate dealing with the Chapter cases under Sections 107 and 151 Cr.P.C.

7. According to the police though the Magistrate had first

passed an order against Indresh Kumar, he later on dropped the proceedings. Shri Chawla pointed out to us on the basis of the photocopies of the documents, that before the Magistrate, Anil Kumar had given a statement that he was picked up at 3 a.m. in the night and was kept in the police custody and he also went out to ask in the Court as to why he was taken away. The argument is that this document, if accepted, would completely falsify the story of Ramphal (respondent No.1-accused) that he had picked up Indresh Kumar (appellant herein) and Anil Kumar and had arrested them. It is true that Ramphal (respondent No.1-accused) claims to have picked up Anil Kumar along with Indresh Kumar from the house. However, if Anil Kumar has disputed this very statement then the whole story put forth by Ramphal (respondent No.1-accused) that Indresh Kumar had gone to the house of Anil Kumar and had fought with him and it was during that physical altercation that Indresh Kumar got injured, becomes a suspected story according to the Counsel. Unfortunately, the High Court has not adverted to this aspect at all.

8. Shri Navin Chawla, learned counsel then produced before us the original certificate by which Indresh Kumar was referred to Dr. Kakkar and pointed out to us that in that certificate there is a clear cut overwriting and the words 'LT' have been changed by writing 'R' over the letter 'L'. Therefore, the original words suggesting that the fracture was on the left side left foot appears to have been changed by overwriting 'R' on the letter 'L'. Dr. Kakkar who was examined as PW-6, in his evidence undoubtedly relied on this medical certificate and was cross-examined on this aspect. The following admissions in the evidence were noted:-

> "There is overwriting in injury No.1 regarding the foot of Indresh Kumar but I cannot say how it occurred. I cannot say whether that overwriting was done by me or someone else but the same does not contain initials".

9. The learned counsel for the appellant further argues, that

while the High Court discussed this aspect of the transfer of fracture from right foot to left foot, the High Court has not bothered to look into the evidence. We feel the High Court was bound to consider not only the overwriting over Exhibit PD but was also bound to take into consideration the evidence of Dr. B.B.Kakkar (PW-6). There is not even a mention of all these things in the High Court's order. Therefore, the basis of the High Court's order about the prosecution story being false in respect of the injury suffered by Indresh Kumar (appellant herein) is shattered, at least *prima facie*.

10. The Counsel further rightly contends that the High Court has also not considered the other evidence like the evidence of Raj Kumar, DSP who specifically deposed regarding the documents in the case before the Executive Magistrate and there is no mention in the whole order regarding the way in which and the reason for which the proceedings against Indresh Kumar were dropped. It is also seen from the High Court's order that on this subject, the evidence of Jagbir Singh (PW-19), Assistant in the office of Inspector General of Police Rohtak has also not been taken into consideration which is rather surprising. The High Court was bound to consider the correctness of the story given by the accused that Indresh Kumar and Anil Kumar were arrested at the house of Anil Kumar and the injury suffered by Indresh Kumar was due to physical altercation.

11. Not only was the evidence of Jaswant Singh (PW-20) totally left out of consideration which was very relevant to test the story of the appellant about the incident on 26.06.1992, the High Court has also not bothered to consider the evidence of Triloki Nath (PW-21), who specifically spoke and proved the hand writing and signature of Anil Kumar on the document wherein Anil Kumar had specifically complained that he was picked up at 3 O'clock in the night. He did not know as to why he was arrested. The whole basis of the High Court's order was the falsity regarding the foot on which Indresh Kumar suffered

fracture as also the correctness of the version of Ramphal (respondent No.1-accused) that there was an altercation between Anil Kumar and Indresh Kumar on 26.06.1992 and in that altercation, he suffered injuries.

12. Once it is found that the High Court has not taken into consideration any of these vital pieces of evidence, it becomes difficult to uphold the order of the High Court. This is apart from the fact that the High Court has not uttered one word about the criminal revision which was filed by Indresh Kumar against the other six-accused persons also vide Criminal Revision No. 1018 of 2001, except dismissing the same.

13. However, Shri Chawla stated that it was not possible for the High Court to convert the acquittal against Ramphal (respondent No.1-accused) in a criminal revision. He, therefore, did not pursue the matter against the six accused persons who were acquitted by the Trial Court and whose acquittal was challenged by the appellant in a criminal revision in the High Court. However, the High Court ought to have given some reasons regarding the acquittal of those six persons before dismissing the criminal revision.

14. Shri Sushil Kumar, learned Counsel for the respondents tried to support the acquittal order pointing out that Ramphal (respondent No.1-accused) is now retired. He also pointed out that once there was an acquittal of all the accused from the charge of criminal conspiracy then there would be no question of proceeding even against the present accused Ramphal. The contention is clearly incorrect for the simple reason that individual role of Ramphal is being highlighted by the prosecution and not his role as a conspirator. Therefore, even if the charge of conspiracy failed and, if the individual act is established, the accused would still be guilty. It was also suggested that the possible view of acquittal was taken by High Court and, therefore, we should not interfere with the acquittal.

15. We cannot come to the definite conclusion that the High

Court has taken possible view as the High Court has not considered the evidence which it was bound to consider. In that view, we would remand the matter back to the High Court for fresh consideration. We, however, make it clear that since the learned Counsel for the appellant was not interested in proceeding against the other six accused for the obvious difficulties, the High Court will do well in considering only the case against accused Ramphal without being influenced by any of our observations against the other co-accused persons. The High Court shall be free to consider the matter afresh. The appeals, therefore, succeed. The judgment of the High Court is set aside in terms stated above.

D.G. Appeals allowed.

DAYA SINGH & ANR.
v.
GURDEV SINGH (DEAD) BY L.RS. & ORS.
(Civil Appeal No. 5339 of 2002)

JANUARY 07, 2010

[TARUN CHATTERJEE AND AFTAB ALAM, JJ]

Limitation Act, 1963:

Schedule – Article 58 – Suit for declaration – Dismissed by courts below holding the same as barred by limitation on the ground that it was filed after 18 years of the compromise – HELD: Question of filing of suit before the right accrued to plaintiffs by compromise could not arise until and unless infringement of that right was noticed by one of the parties – Right to sue accrued a week prior to filing of the suit when a clear and unequivocal threat to infringe that right by defendants was given as they refused to admit the claim of plaintiffs – Therefore, the suit cannot be held to be barred by limitation – Judgment of High Court set aside and matter remitted to it for decision on merits expeditiously – Cause of action.

A compromise relating to shares in the suit property was entered into between the plaintiff-appellants and the predecessors-in-interest of the defendant-respondents on 26.10.1972. The plaintiffs filed a suit on 21.8.1990 for declaration that they were in possession as owner of 1/9th share and in joint possession of half of the 2/3rd share of the land along with the respondents and the entries in the revenue record of rights should be corrected. The trial court dismissed the suit accepting the defendants' plea that the suit having been filed after 18 years of the compromise, was barred by limitation in view of Article 58 of the Schedule to the Limitation Act, 1963 whereunder

the suit should have been filed within three years of the compromise. The plaintiffs having remained unsuccessful in the first appeal as also in the second appeal, filed the appeal.

Allowing the appeal, the Court

HELD:1.1. In the instant case, the right to sue accrued when a clear and unequivocal threat to infringe that right by the defendants was given, as they refused to admit the claim of the appellants, only seven days before filing of the suit. Therefore, as noted in paragraph 16 of the plaint, the suit was filed within three years from the date of infringement and, as such, the suit cannot be held to be barred by limitation. [Para 10] [202-E]

Mt.Bolo vs. Mt. Koklan and others **AIR 1930 PC 270, relied on.**

C. Mohammad Yunus vs. Syed Unnissa and others **1962 SCR 67 = AIR 1961 SC 808, referred to.**

1.2. The courts below including the High Court had proceeded entirely on a wrong footing that the cause of action arose on the date of entering into the compromise and, therefore, the suit was barred by limitation. Whether or not the compromise decree was acted upon and whether delivery of possession had taken place has to be decided by the trial court before it could come to a proper conclusion that the suit was barred by limitation. [Para 10] [202-E-G]

1.3. The question of filing the suit before the right accrued to the plaintiffs by compromise could not arise until and unless infringement of that right was noticed by one of the parties. The High Court fell in grave error in holding that the suit was barred by time, and ignored to appreciate that the right of the appellants to have the

revenue record corrected arose when the appellants came to know about the wrong entry and the respondents failed to join the appellants in getting it corrected. The High Court was not justified in holding that mere existence of a wrong entry in the revenue records does not, in law, gave rise to a cause of action within the meaning of Article 58 of the Schedule to the Act. [Para 10] [202-H; 203-A-C]

1.4. The impugned judgment of the High Court on the question that the suit was barred by limitation cannot be sustained. Therefore, the judgment of the High Court is set aside and the matter remitted back to it for decision on merits expeditiously. [Para 11] [203-C-D]

Case Law Reference:

AIR 1930 PC 270	**relied on**	**para 7**
1962 SCR 67	**referred to**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5339 of 2002.

From the Judgment & Order dated 10.9.2001 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 3416 of 1997.

D.K. Agrawal, Sudhir Kumar Gupta, Anurag Pandey, R.P. Singh, Miihhir Kumar Chaudhary for the Appellants.

Geetanjali Mohan, Vivek Sharma, R.C. Gubrele for the Respondents.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. This appeal is directed against the final judgment and order dated 10th of September, 2001 of a learned Judge of the Punjab and Haryana High Court dismissing a second appeal being Regular Second Appeal

No.3416 of 1997, inter alia, on the ground that the suit for declaration and injunction filed on 21st of August, 1990 was barred by limitation under Article 58 of the Limitation Act, 1963 (in short 'the Act') which could only be filed within three years from the date when the cause of action arose.

2. Therefore, the only question that needs to be decided in this appeal by us is : whether the suit for declaration and injunction could be held to be barred by limitation as the same was filed after 18 years of the alleged compromise between the parties. For the purpose of deciding this question on limitation, as noted hereinabove, which was only urged by the learned counsel for the appellants before us and the High Court also decided the second appeal on this question of limitation, we need to state the facts which would be relevant for the purpose of deciding the question of limitation only. The facts are as follows:

3. The plaintiffs/appellants were the owners and in joint possession of 1/9th share in the entire land measuring about 286 Kanals and 5 Marlas of Khewat No.359 Khatoni No.702-710 situated in village Sukhchain falling under Sirsa Tehsil. Two other individuals named Jang Singh and Jangir Singh were the owners of 2/3rd share in the said total land. The appellants and the two individuals were co-owners in the said total land. These two individuals, namely, Jang Singh and Jangir Singh had sold their entire 2/3rd share to the respondents on 7th of June, 1965 for a sale consideration of Rs.33,500/-. The said share of land was already under mortgage with the respondents. In 1965, the respondents got their names mutated in the relevant record of rights as owners of the area purchased by them as indicated in the aforesaid sale deed. The appellants filed a pre-emption suit being Pre-emption Suit No.377 of 1966 in the Court of the Subordinate Judge, Class II, Sirsa against the respondents for possession of 2/3rd share sold to them and got it decreed in their favour by the trial court by a judgment and decree dated 30th of November, 1967.

4. The respondents appealed against the aforesaid decision before the Appellate Court, namely, District Judge, Hissar who dismissed their appeal on 15th of June, 1968. Feeling aggrieved against the aforesaid concurrent judgments of the courts below, a second appeal was filed before the Punjab and Haryana High Court which was dismissed on 26th of May, 1972. Subsequent to the dismissal of the second appeal, the appellants and the respondents compromised their dispute and such compromise was reduced into writing on 26th of October, 1972. According to this compromise, the appellants were entitled to retain half of the 2/3rd share of the land in dispute and the respondents were to retain the other half. The respondents admitted in their compromise deed that the appellants had taken possession of their share of land. When this compromise was presented before the Division Bench of the High Court of Punjab and Haryana in Letters Patent Appeal which came to be registered as LPA No.86 of 1973, the Division Bench of the High Court disposed of the said Letters Patent Appeal in terms of the said compromise petition. From the records, it would also be evident that the report of the Kanoongo dated 16th of January, 1976 and the Roznamcha No.252 dated 14th of April, 1996 recorded that the possession of 95 Kanals and 8 ½ Marlas had been delivered to the appellants. After such compromise was effected, the appellants thereafter filed a suit for declaration that they were in possession as owner of 1/9th share and in joint possession of half of 2/3rd share (thus totaling of 4/9th shares) of land measuring 286 Kanals and 5 Marlas of Khewat No.359 Khatoni No.702-710 along with respondents and the entries in the revenue record of rights should only be corrected in the Court of the Senior Subordinate Judge, Sirsa. In paragraphs 15 and 16 of the plaint of this suit which concerned the question of limitation, the plaintiffs/appellants had averred as follows :

> "15. That the defendants were approached and requested to admit the claim of the plaintiffs and to get the revenue entries corrected accordingly in their favour, the

defendants have refused to do so, hence this suit.

16. That the cause of action for this suit first arose on 26.10.1972 when the parties filed a compromise in the Hon'ble High Court and then on 14.4.76 when the plaintiffs were delivered possession of 1/3 share of land in the khewat at the spot and now about a week back when the plaintiffs have for the first time come to know about the wrong entries in the revenue records and now when the defendants have refused to admit the claim of the plaintiffs."

On the basis of the averments made as noted herein above, the plaintiffs/appellants filed the aforesaid suit for the following reliefs:

"(a) That the plaintiffs are the joints owners in possession, in equal share of 1/3rd share in land measuring 286 kanal 5 marlas comprised in khewat No.359, Khatoni NO.702 to 710, all land as per jamabandi for the year 1985-86, situated in the area of village Sukhchain, Tehsil and Distt.Sirsa and that the revenue records showing the defendants to be the owners of 12/18th share of 2/3rd share in the aforesaid land is wrong and is hence liable to be corrected in favour of the plaintiffs, and

(b) That the defendants are the owners of only 1/3rd share in the aforesaid khewat, and

(c) That the plaintiffs who are already the owners of 2/18th share of 1/9th share in the khewat have thus become the total owners of 4/9th share in the entire khewat No.359 and that the plaintiffs are entitled to get the mutation of change of ownership sanctioned accordingly in their favour, may please be passed in favour of the plaintiffs and against the defendants with cost of this suit."

5. The respondents entered appearance and filed written statement denying the material allegations made in the plaint.

Leaving aside the other facts in the present case, we may state here that a specific defence taken by the respondents in their written statement was to the effect that the suit was barred by limitation in view of Article 58 of the Act because the suit having been filed after about 18 years of entering into the compromise by the parties in the High Court in the Letters Patent Appeal, must be filed within three years from the date of entering into the alleged compromise by the parties. Accordingly, the respondents alleged that the suit must be dismissed on the ground of limitation. We make it clear that since the only question involved in this appeal is relating to the question of limitation, we have not considered the other aspects of the matter in this judgment. After the parties had entered appearance and led evidence in support of their respective cases also on the point of limitation, the trial court held, *inter alia*, that the suit was barred by limitation in view of Article 58 of the Act as the cause of action arose in 1972 i.e. on the date of compromise entered into by the parties. Accordingly, the suit was dismissed by the trial court also on the ground of limitation. Feeling aggrieved, the plaintiffs/appellants filed an appeal before the Additional District Judge, Hissar who also dismissed the appeal of the appellants, *inter alia,* holding that the suit was barred by limitation. Consequent thereupon, the appellants approached the High Court in second appeal and the High Court also dismissed the appeal holding that under Article 58 of the Act a declaratory suit must be filed within three years of arising the cause of action for filing the suit. The High Court held in the impugned judgment that the cause of action arose when the parties had entered into the compromise, that is, on 26th of October, 1972 and, therefore, the suit having been filed on 21st of August, 1990 was barred by time since it was filed after 18 years from the date of the said compromise.

6. The appellants still feeling aggrieved by the impugned judgment of the High Court have filed the instant Special leave petition and on grant of leave the appeal was heard in the presence of the learned counsel for the parties.

7. As noted herein earlier, the only question, therefore, to be decided is whether the mere existence of an adverse entry in the revenue records had given rise to cause of action as contemplated under Article 58 or it had accrued when the right was infringed or threatened to be infringed. Let us, therefore, consider whether the suit was barred by limitation in view of Article 58 of the Act in the background of the facts stated in the plaint itself. Part III of the schedule which has prescribed the period of limitation relates to suits concerning declarations. Article 58 of the Act clearly says that to obtain any other declaration, the limitation would be three years from the date when the right to sue first accrues. In support of the contention that the suit was filed within the period of limitation, the learned senior counsel appearing for the plaintiffs/appellants before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned senior counsel strongly relied on a decision of the Privy Council reported in AIR 1930 PC 270 [*Mt.Bolo vs. Mt. Koklan and others*]. In this decision their Lordships of the Privy Council observed as follows :-

> "There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

8. A similar view was reiterated in the case of *C.Mohammad Yunus vs. Syed Unnissa and others* [AIR 1961 SC 808] in which this Court observed :

> "the period of 6 years prescribed by Article 120 has to be computed from the date when the right to sue accrued and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."

9. In the case of *C. Mohammad Yunus* (supra), this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is atleast a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry into the revenue record cannot give rise to cause of action.

10. Keeping these principles in mind, let us consider the admitted facts of the case. In para 16 of the plaint, it has been clearly averred that the right to sue accrued when such right was infringed by the defendants about a week back when the plaintiffs had for the first time come to know about the wrong entries in the record of rights and when the defendants had refused to admit the claim of the plaintiffs. Admittedly, the suit was filed on 21st of August, 1990. According to the averments made by the plaintiffs in their plaint, as noted hereinabove, if this statement is accepted, the question of holding that the suit was barred by limitation could not arise at all. Accordingly, we are of the view that the right to sue accrues when a clear and unequivocal threat to infringe that right by the defendants when they refused to admit the claim of the appellants, i.e. only seven days before filing of the suit. Therefore, we are of the view that within three years from the date of infringement as noted in Paragraph 16 of the plaint, the suit was filed. Therefore, the suit which was filed for declaration on 21st of August, 1990, in our view, cannot be held to be barred by limitation. Therefore, the courts below including the High Court had proceeded entirely on a wrong footing that the cause of action arose on the date of entering into the compromise and, therefore, the suit was barred by limitation, whether or not the compromise decree was acted upon and whether delivery of possession had taken place has to be decided by the trial court before it could come to a proper conclusion that the suit was barred by limitation. In this view of the matter, we do not find any ground to agree with the findings of the High Court that the suit was barred by time because of its filing after 18 years of entering into the compromise. The question of filing the suit before the right

accrued to them by compromise could not arise until and unless infringement of that right was noticed by one of the parties. The High Court in the impugned judgment, in our view, had fallen in grave error in holding that the suit was barred by time and had ignored to appreciate that the rights of the appellants to have the revenue record accrued first arose in 1990 when the appellants came to know about the wrong entry and the respondents failed to join the appellants in getting it corrected. In our view, the High Court was not justified in holding that mere existence of a wrong entry in the revenue records does not, in law, give rise to a cause of action within the meaning of Article 58 of the Act. No other point was urged before us by the learned counsel for the parties.

11. In view of our discussions made herein above, the impugned judgment of the High Court on the question that the suit was barred by limitation cannot be sustained. Therefore, the judgment of the High Court is set aside and the matter may be remitted back to the High Court for decision on merits. The High Court is requested to dispose of the second appeal at an early date preferably within six months from the date of supply of a copy of this order to it.

12. Accordingly, the impugned order of the High Court is set aside. The appeal is allowed to the extent indicated above. There will be no order as to costs.

R.P. Appeal allowed.

TAMEESHWAR VAISHNAV
v.
RAMVISHAL GUPTA
(Criminal Appeal No. 46 of 2010)

JANUARY 8, 2010

[ALTAMAS KABIR AND G.S. SINGHVI, JJ.]

Negotiable Instruments Act, 1881 – ss.138(b) and 142 – Notice u/s 138(b) – Receipt of, by drawer of cheque – Drawee of cheque failing to take action within stipulated time u/s 138 – Entitlement of the drawee of cheque to issue Second Notice in respect of same cheque and to file complaint u/s 138 – Held: Not entitled – Cause of action for a complaint u/s 138 arises only once, with the issuance of notice after dishonour of cheque and receipt thereof.

The question for consideration in the present appeals was, whether after the notice u/s 138(b) of Negotiable Instruments Act, 1881 is received by the drawer of the cheque, the payee/holder of the cheque having failed to take action on the basis of the notice within the period prescribed u/s 138, is entitled to send a fresh notice in respect of the same cheque and file complaint u/s 138.

Allowing the appeals, the Court

HELD: 1.1. A cheque may be presented several times within the period of its validity, but the cause of action for a complaint under Section 138 of the Act arises but once, with the issuance of notice after dishonour of the cheque and the receipt thereof by the drawer. [Para 15] [209-F-H]

Prem Chand Vijay Kumar vs. Yashpal Singh and Anr. **(2005) 4 SCC 417, relied on.**

S.L. Constructions vs. Alapati Srinivasa Rao **(2009) 1 SCC 500, distinguished.**

1.2. In the facts of the instant case, the complaints were filed beyond the period of limitation and the Magistrate erred in taking cognizance on the complaints filed on the basis of the second notices. [Para 17] [210-E-F]

Case Law Reference:

(2005) 4 SCC 417	**Relied on**	**Para 15**
(2009) 1 SCC 500	**Distinguished**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 46 of 2010.

From the Judgment & Order dated 27.3.2008 of the High Court of Chattisgarh at Bilaspur in Criminal Misc. Petition No. 178 of 2007.

WITH

Crl. Appeal No. 47 of 2010.

Dr. Rajesh Pandey, Mahesh Pandey, Mridula Ray Bharadwaj for the Appellant.

V. Sridhar Reddy, A.S. Rao, Ram Swarup Sharma for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Delay of 31 days and 39 days in re-filing the Special Leave Petitions is condoned.

2. Leave granted.

3. The short point for decision in these Appeals is whether after the notice issued under clause (b) of Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act"), is received by the drawer of the cheque, the payee or holder of the cheque, who does not take any action on the

basis of such notice within the period prescribed under Section 138 of the Act, is entitled to send a fresh notice in respect of the same cheque and, thereafter, proceed to file a complaint under Section 138 of the Act.

4. In S.L.P.(Crl.) No.6676 of 2008 arising out of Criminal Case No.399 of 2006 pending before the Additional Chief Judicial Magistrate, Khairagarh, the Respondent had filed a complaint under Section 138 of the Act, for dishonour of a cheque dated 16th March, 2006, bearing No.0864961 for Rs.40,000/- drawn on the Bank of Maharashtra, Khairagarh Branch, in favour of the Respondent. S.L.P. (Crl.) No.6593 of 2008 is directed against the judgment of the High Court dated 27th March, 2008, in Crl. Revision No.130 of 2006 arising out of Criminal Case No.339 of 2006 pending with the Additional Chief Judicial Magistrate, Khairagarh, in respect of a similar cheque dated 20th March, 2006, bearing No.0864962 amounting to Rs.40,000/- drawn on the Bank of Maharashtra, Khairagarh Branch, in favour of the Respondent. As stated hereinabove, both the said cheques were dishonoured on the ground of insufficient funds. The cheque issued on 20th March, 2006, bearing No.0864962 was dishonoured on 22nd March, 2006, on the ground of insufficient funds. Similarly, cheque bearing No.0864961 dated 16th March, 2006, was dishonoured on 16th March, 2006. Consequently, the Respondent issued notices as contemplated under Clause (b) of the proviso to Section 138 of the Act asking the Appellant to make payment of the cheque amounts within 15 days. Although, the notice was duly served upon the Appellant, the Respondent did not take any steps to file the complaint within the period prescribed in Section 142 of the Act. On the other hand, the Respondent sent a second notice to the Appellant in respect of the two cheques on 7th June, 2006, and, ultimately, when no response was received to the same, he filed two separate complaints before the learned Additional Chief Judicial Magistrate, Khairagarh, District Rajanandgaon, Chhattisgarh, on which process was issued by the learned

Magistrate after recording the statement of the respondent-complainant.

5. Against such order issuing process on both the complaints, the Appellant filed Criminal Revision Nos.130 and 131 of 2006 in the Court of the Additional Sessions Judge, Khairagarh, District Rajanandgaon, on 21st November, 2006. On 19th March, 2007, the learned Additional District Judge, Khairagarh, dismissed both the Revision Applications holding that the grounds raised therein could be decided after evidence was led by the parties.

6. On 15th May, 2007, the Appellant filed Crl. Misc. Petition Nos.177 of 2007 and 178 of 2007 before the Chhattisgarh High Court under Section 482 Cr.P.C. for quashing the order passed by the Additional Sessions Judge, Khairagarh, on 19th March, 2007. The High Court ultimately dismissed both the Petitions by the orders impugned in these Appeals.

7. On behalf of the Appellant, it was contended that the learned Magistrate had erred in taking cognizance on the complaints filed by the Respondent, since the complaints stood barred under the provisions of the proviso to Section 138 of the Act. It was urged that when the complainant- respondent did not take any action on the basis of the first notice issued on 30th March, 2006, a second notice in regard to the self-same cheque was barred under the proviso to Section 138 of the Act. In support of his said submission, the learned counsel firstly referred to and relied on the decision of this Court in *Sadanandan Bhadran vs. Madhavan Sunil Kumar* [(1998) 6 SCC 514], wherein this Court held that the cause of action to file complaint on non-payment despite issue of notice, arises but once. Another cause of action would not arise on repeated dishonour on re-presentation. Learned counsel pointed out that this Court also held that while the payee was free to present the cheque repeatedly within its validity period, once notice had been issued and payments not received within 15 days of the receipt of the notice, the payee has to avail the very cause of

action arising thereupon and file the complaint. Dishonour of the cheque on each re-presentation does not give rise to a fresh cause of action. Taking note of the amendment to Section 142(b) of the Act, this Court also held that the complaint would have to be filed within one month from the day immediately following the day on which the period of 15 days from the date of receipt of the first notice by the drawer expires.

8. Learned counsel then referred to another decision of this Court in *Prem Chand Vijay Kumar vs. Yashpal Singh & Anr.* [(2005) 4 SCC 417], wherein the view expressed in *Sadanandan Bhadran's* case (supra) was reiterated. Learned counsel submitted that in view of the aforesaid decisions of this Court which authoritatively explained that cause of action arises only once on the issuance of notice upon dishonour of the cheque and receipt thereof by the accused, the learned Magistrate had erred in law in taking cognizance on the basis of the second notice whereas the cause of action had arisen under the first notice dated 30th March, 2006, which clearly indicates that the complaint filed on 10th July, 2006, was well outside the period of limitation prescribed in the proviso to Section 138 of the Act. Learned counsel submitted that the subsequent order passed by the High Court affirming the order of the Magistrate issuing process suffers from the same vice and both the orders were, therefore, liable to be set aside.

10. The submissions made on behalf of the Appellant were vehemently opposed on behalf of the Respondent on the ground that having regard to the assurance given by the Appellant to the Respondent and the request made to present the cheque for the second time, even after issuance of the first notice, it must be held that the delay, if any, in filing the complaint had been condoned by the learned Magistrate in keeping with the proviso to Section 142(b) of the Act.

11. Learned counsel submitted that the decisions cited on behalf of the Appellant had been subsequently considered by this Court in *S.L. Constructions vs. Alapati Srinivasa Rao*

[(2009) 1 SCC 500], in which the decisions of this Court in *Sadanandan Bhadran's* case (supra) and *Prem Chand Vijay Kumar's* case (supra), had been noted and considered.

12. Learned counsel submitted that in view of the promise held out by the Appellant and his request to present the cheque for the second time, the Respondent had refrained from taking any action on the basis of the first notice which was the cause of the delay in making the complaint. Upon issuance of process, it must be held that the Court was satisfied that there was sufficient cause for making the complaint after the prescribed period.

13. Learned counsel urged that having regard to the above, no interference was called for with the order of the learned Magistrate taking cognizance or the order of the High Court affirming the said order.

14. We have given our anxious thought to the submissions made on behalf of the respective parties, having regard to the apparently different views expressed in *Sadanandan Bhadran's* case (supra), *Prem Chand Vijay Kumar's* case (supra) and the latest decision in *S.L. Construction's* case (supra).

15. On careful scrutiny of the decision in *S.L. Construction's* case (supra), it would appear that the facts on the basis of which the said decision was rendered, were different from a case of mere presentation and dishonour of the cheque after issuance of notice under the proviso to Section 138 of the Act. While the decision in *Sadanandan Bhadran's* case (supra), clearly spells out that a cheque may be presented several times within the period of its validity, the cause of action for a complaint under Section 138 of the Act arises but once, with the issuance of notice after dishonour of the cheque and the receipt thereof by the drawer. The same view has been reiterated in *Prem Chand Vijay Kumar's* case (supra). The only distinguishing feature of the decision in *S.L. Construction's* case (supra) is that of the three notices issued, the first two

never reached the addressee. It is only after the third notice was received that the cause of action arose for filing the complaint. In effect, the cause of action for filing the complaint in the said case did not arise with the issuance of the first two notices since the same were never received by the addressee.

16. The provisions of Section 138 and clauses (a), (b) and (c) to the proviso thereof indicate that a cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. Clause (b) indicates that the payee or the holder in due course of the cheque, has to make demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and clause (c) provides that if the drawer of the cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of receipt of the said notice, the payee or the holder of the cheque may file a complaint under Section 142 of the Act in the manner prescribed.

17. In the instant case, it is clear that the first notices were received by the Appellant on 14th June, 2006, whereas the complaints were filed on 10th July, 2006. It must, therefore, be held that the complaints were filed beyond the period of limitation and the learned Magistrate erred in taking cognizance on the complaints filed on the basis of the second notices issued on 7th June, 2006. Similarly, the High Court was also wrong in affirming the order of the learned Magistrate.

18. The Appeals must, therefore, succeed and are, accordingly, allowed. The orders of the learned Magistrate dated 13th July, 2006 and 17th July, 2006, respectively, taking cognizance on the Criminal Complaint Nos.339 and 399 of 2006 along with the orders of the High Court impugned in these appeals, are set aside.

K.K.T. Appeals allowed.

COMMISSIONER OF CENTRAL EXCISE
v.
M/S. INTERNATIONAL AUTO LIMITED
(Civil Appeal No. 225 of 2010)

JANUARY 8, 2010

[S.H. KAPADIA AND AFTAB ALAM, JJ.]

Central Excise Act, 1944:

ss. 11-A,(2B), Explanation(2) and 11AB – Differential duty – Interest on – HELD: From the Scheme of ss.11A(2B) and 11AB, it becomes clear that interest is levied for loss of revenue on any count – Differential price signifies that value, which is the function of the price, on the date of removal/ clearance of the goods was not correct – That it was understated – Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance and, therefore, enhanced duty is payable – This enhanced duty is on the corrected value of the goods on the date of removal – When the differential duty is paid after the date of clearance, it indicates short payment/ short levy on the date of removal – Therefore, interest, which is for loss of revenue, becomes leviable u/s 11AB.

Commissioner of Central Excise, Pune vs. SKF India Limited **(2009) 239 ELT 385, relied on.**

M.R.F. Limited vs. Collector of Central Excise, Madras **(1997) 92 ELT 309, held inapplicable.**

Case Law Reference:

(1997) 92 ELT 309	**held inapplicable**	**para 6**
(2009) 239 ELT 385	**relied on**	**para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 225 of 2010.

From the Judgment & Order dated 10.9.2008 of the High Court of Judicature at Bombay in Central Excise Appeal No. 127 of 2008.

G.E. Vahanvati, S.G., Chinmoy Pradip Sharma, T.V. Ratnam, B.K. Parasad, Anil Katiyar for the Appellant.

P.C. Jain, Sandeep Jain, Rajesh Kumar, Krishna Kumar R. S., K.S. Mahadevan for the Respondent.

The following Order of the Court was delivered

ORDER

Delay condoned.

Leave granted.

In this case, Department seeks to recover interest on differential duty, paid by the assessee, under Section 11AB of the Central Excise Act, 1944, which is disputed by the assessee.

During the relevant Assessment Years, assessee supplied auto parts to their customers [manufacturers of motor vehicles], such as Tata Motors, Mahindra and Mahindra and Piaggio Vehicles Private Limited – who determined the prices of auto parts having regard to the cost of raw material, manufacturing cost, profit margin, etc. and placed orders with the assessee. In case of Tata Motors, orders were placed through internet under a software system known as “SRM”.

Since price difference arose between the price on the date of removal and the enhanced price at which the goods stood ultimately sold, the Department issued a show-cause notice proposing to levy interest on the differential duty, paid by the

assessee, under Section 11AB of the Central Excise Act, 1944 ['Act', for short].

The case of the assessee, before us, was that such interest was not leviable under Section 11AB of the Act, particularly in view of the fact that prices indicated in the purchase orders were final during the period of supply of goods. According to the assessee, in the present case, the Department has accepted the position that the prices in the purchase orders were final. Further, according to the assessee herein, there was no price variation clause in the purchase orders, therefore, there was no scope for increase in prices subsequently and that too, retrospectively. In short, according to the assessee, prices indicated in the purchase orders were final and not liable to change at the time of removal of goods. It was submitted that, in the circumstances, the present case was not a case of short-levy or non-levy of the goods removed by the assessee calling for recovery under Section 11A of the Act, hence, this was not a case for charging of interest under Section 11AB of the Act. Learned counsel appearing on behalf of the assessee submitted that this case is squarely covered by the judgement of three learned Judges of this Court in the case of *M.R.F. Limited vs. Collector of Central Excise, Madras,* reported in [1997] 92 E.L.T.309.

We find no merit in the submissions advanced on behalf of the assessee. The controversy arising in this civil appeal is squarely covered by the judgement of this Court in the case of *Commissioner of Central Excise, Pune vs. SKF India Limited,* reported in [2009] 239 E.L.T.385. We quote hereinbelow relevant observations made in the case of *SKF India Limited* [supra], which reads as follows:

> "9. Section 11A puts the cases of non-levy or short levy, non-payment or short payment or erroneous refund of duty in two categories. One in which the non-payment or short payment etc. of duty is for a reason other than deceit; the

> default is due to oversight or some mistake and it is not intentional. The second in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty"; that is to say, it is intentional, deliberate and/or by deceitful means. Naturally, the cases falling in the two groups lead to different consequences and are dealt with differently. Section 11A, however allow the assessees in default in both kinds of cases to make amends, subject of course to certain terms and conditions. The cases where the non-payment or short payment etc. of duty is by reason of fraud collusion etc. are dealt with under sub-section (1A) of section 11A and the cases where the non-payment or short payment of duty is not intentional under sub-section (2B).
>
> 10. Sub-section (2B) of section 11A provides that the assessee in default may, before the notice issued under sub-section (1) is served on him, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and inform the Central Excise Officer in writing about the payment made by him and in that event he would not be given the demand notice under sub-section (1). But Explanation 2 to the sub-section makes it expressly clear that such payment would not be exempt from interest chargeable under section 11AB, that is, for the period from the first date of the month succeeding the month in which the duty ought to have been paid till the date of payment of the duty. What is stated in Explanation 2 to sub-section (2B) is reiterated in section 11AB that states where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who has paid the duty under sub-section (2B) of section 11A, shall, in addition to the duty, be liable to pay interest.....It is thus to be seen

that unlike penalty that is attracted to the category of cases in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty", under the scheme of the four sections (11A, 11AA, 11AB & 11AC) interest is leviable on delayed or deferred payment of duty for whatever reasons.

11. The payment of differential duty by the assessee at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices clearly falls under the provision of sub-section (2B) of section 11A of the Act.

12. The Bombay High Court, Aurangabad Bench, in its decision in *The Commissioner of Central Excise, Aurangabad* vs. *M/s Rucha Engineering Pvt. Ltd.*, (First Appeal No.42 of 2007) that was relied upon by the Tribunal for dismissing the Revenue's appeal took the view that there would be no application of section 11A (2B) or section 11AB where differential duty was paid by the assessee as soon as it came to learn about the upward revision of prices of goods sold earlier. In *M/s Rucha Engineering* the High Court observed as follows:

> It is evident that the section (11AB) comes into play if the duty paid/levied is short. Both, the Commissioner (Appeals) and the CESTAT have observed that the Assessee paid the duty on its own accord immediately when the revised rates became known to them from their customers. The differential duty was due at that time i.e. when the revised rates applicable with retrospective effect were learnt by the Assessee, which was much after the clearance of the goods and therefore, question of payment of interest does not arise as the duty

> was paid as soon as it was learnt that it was payable. Finding that provisions of section 11A (2) and 11A (2B) were not applicable as the situation occurred in the instant case was quite different, section 11AB (1) was not at all applicable, and therefore, the Assessee was not required to pay interest.'

13. It further held that a case of this nature would not fall in the category where duty of excise was not paid or short-paid.

14. We are unable to subscribe to the view taken by the High Court. It is to be noted that the assessee was able to demand from its customers the balance of the higher prices by virtue of retrospective revision of the prices. It, therefore, follows that at the time of sale the goods carried a higher value and those were cleared on short payment of duty. The differential duty was paid only later when the assessee issued supplementary invoices to its customers demanding the balance amounts. Seen thus it was clearly a case of short payment of duty though indeed completely unintended and without any element of deceit etc. The payment of differential duty thus clearly came under sub-section (2B) of section 11A and attracted levy of interest under section 11AB of the Act."

Section 11A of the Act deals with recovery of duty not levied or not paid or short-levied or short-paid. The said section, which stood inserted by Act 25 of 1978, underwent a sea-change when Parliament inserted major changes in that section *vide* Act 14 of 2001 [with effect from 11st May, 2001] and Act 32 of 2003 [with effect from 14th May, 2003]. It needs to be mentioned that simultaneously Act 14 of 2001 also made changes to Section 11AB of the Act. In the case of *S.K.F. India Limited* [supra], it has been, inter alia, held, as can be seen from the above-quoted paragraphs, that sub-section 2(B) of Section 11A provides that the assessee in default may make

payment of the unpaid duty *on the basis of his own ascertainment* or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the Demand Notice under Section 11A(1) of the Act. However, Explanation (2) to the sub-section makes it clear that such payment would not be exempt from interest chargeable under Section 11AB of the Act. What is stated in Explanation (2) to sub-section 2(B) is reiterated in Section 11AB of the Act, which deals with interest on delayed payment of duty. From the Scheme of Section 11A(2B) and Section 11AB of the Act, it becomes clear that interest is levied for loss of revenue on any count. In the present case, one fact remains undisputed, namely, accrual of price differential. What does differential price signify? It signifies that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence, enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. When the differential duty is paid after the date of clearance, it indicates short-payment/short-levy on the date of removal, hence, interest which is for loss of revenue, becomes leviable under Section 11AB of the Act. In our view, with the entire change in the Scheme of recovery of duty under the Act, particularly after insertion of Act 14 of 2001 and Act 32 of 2003, the judgement of this Court in the case of *M.R.F. Limited* [supra] would not apply. That judgement was on interpretation of Section 11B of the Act, which concerns claim for refund of duty by the assessee. That judgement was in the context of the price list approved on 14th May, 1983. In that case, assessee had made a claim for refund of excise duty on the differential between the price on the date of removal and the reduced price at which tyres were sold. The price was approved by the Government. In that case, the assessee submitted that its price list was approved by the Government on 14th May, 1983, but subsequent thereto, on account of consumer resistance, the Government of India directed the

assessee to roll back the prices to pre-14th May, 1983 level and on that account, price differential arose on the basis of which the assessee claimed refund of excise duty which stood rejected by this Court on the ground that once the assessee had cleared the goods on classification, the assessee became liable to payment of duty on the date of removal and subsequent reduction in the prices for whatever reason cannot be made a matter of concern to the Department insofar as the liability to pay excise duty was concerned. In the present case, we are concerned with the imposition of interest which, as stated above, is charged to compensate the Department for loss of revenue. Be that as it may, as stated above, the Scheme of Section 11A of the Act has since undergone substantial change and, in the circumstances, in our view, the judgement of this Court in the case of *M.R.F. Limited* [supra] has no application to the facts of this case. In our view, the judgement of this Court in the case of *SKF India Limited* [supra] is squarely applicable to the facts of this case.

Accordingly, civil appeal is allowed with no order as to costs.

R.P. Appeal allowed.

M/S. MANDVI CO-OP BANK LTD.
v.
NIMESH B. THAKORE
(Criminal Appeal No. 72 of 2010)

JANUARY 11, 2010

[TARUN CHATTERJEE AND AFTAB ALAM, JJ.]

Negotiable Instruments Act, 1881:

ss.145(1) and (2) – Affidavit of a deponent is in the nature of examination-in-Chief – On being summoned under s.145(2), complainant or his witness whose evidence is given on affidavit is not required to depose in examination-in-chief all over again – Evidence Act, 1872 – s.165.

ss.145(1) and (2) – Applicability to the proceedings pending on 6.2.2003, the date on which these sections were inserted in the Act – Held: Applicable as these provisions are procedural and not substantive in nature.

s.145(1) – Right of accused to give evidence on affidavit – Held: s.145(1) confers right on the complainant to give evidence on affidavit – It does not speak of similar right being conferred on the accused – On facts, High Court erred in holding that not mentioning the accused along with the complainant in sub-section (1) of s.145 was merely an omission by the legislature that it could fill up – Interpretation of Statutes.

s.145(2) and s.296(2) CrPC – The two sections whether identical – Held: The two sections are not identical – s.296(2) deals with evidence of formal nature and is a part of elaborate procedure of regular trial under the Code while the object of s.145(2), is to design a much simpler and swifter trial procedure departing from time consuming trial procedure of

the Code – Code of Criminal Procedure, 1973 – s.296(2).

Interpretation of Statutes:

It is not permissible for the Court to make additions in the law and to read into it something that is just not there – Negotiable Instruments Act, 1881 – s.145(1).

The questions which arose for consideration in these appeals were whether the right of the accused under Section 145(2) of Negotiable Instruments Act, 1881 is limited to cross-examination of complainant or his witness giving evidence on affidavit or is it open to the accused to insist that notwithstanding the evidence earlier given on affidavit, on coming to the court the complainant or his witness ought to first give deposition in examination-in-chief before being cross-examined by him; whether the provisions of sub-sections (1) and (2) of Section 145 of the Act would apply to proceedings that were pending on February 6, 2003, the date on which those provisions were inserted in the Act; and whether the right to give evidence on affidavit as provided to the complainant under section 145(1) of the Act is also available to the accused.

Disposing of the appeals, the Court

HELD: 1.1. The provisions of the newly inserted Chapter XVII in the Negotiable Instruments Act, 1881, with effect from April 1, 1989, brought in a veritable deluge of cases in the criminal court system. In the metropolitan cities and the commercial centres of the country, it almost appeared that the main function of the Magistrate's court was to recover monies on behalf of parties on the wrong end of the commercial transactions that had gone sour. Complaints under section 138 of the Act came to be filed in such large numbers that it became impossible for the courts to handle them within a reasonable time and it also

had a highly adverse effect on the court's normal work in ordinary criminal matters. A remedial measure was urgently required and the legislature took action by introducing further amendments in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. The 2002 amendment inserted in the Act for the first time sections 143 to 147 besides bringing about a number of changes in the existing provisions of sections 138 to 142. Section 143 gave to the court the power to try cases summarily; section 144 provided for the mode of service of summons; section 145 made it possible for the complainant to give his evidence on affidavit; section 146 provided that the bank's slip would be prima facie evidence of certain facts and section 147 made the offences under the Act compoundable. [Para 13] [234-C-H]

1.2. The provisions of sections 143, 144, 145 and 147 expressly departed from and overrode the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of section 146 similarly depart from the principles of the Indian Evidence Act. The procedure of summary trials is adopted under section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process. Even while following the procedure of summary trials, the non-obstante clause and the expression "as far as possible" used in section 143 coupled with the non-obstante clause in section 145 allows for the evidence of the complainant to be given on affidavit, that is, in the absence of the accused. But the affidavit of the complainant (or any of his witnesses) may be read in evidence "subject to all just exceptions". In other words, anything inadmissible in evidence, e.g., irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit. Section 146, making a major

departure from the principles of the Evidence Act provides that the bank's slip or memo with the official mark showing that the cheque was dishonoured would by itself give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved. [Para 16] [240-A-H; 241-A-B]

1.3. Sections 143 to 147 were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial. The claim of the accused that on being summoned under section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made to depose in examination-in-chief all over again plainly appears to be a demand for meaningless duplication, apparently aimed at delaying the trial. In the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of section 145(1) without having any discretion in the matter. It is clear that Section 137 of the Evidence Act does not define "examine" to mean and include the three kinds of examination of a witness; it simply defines "examination-in-chief", "cross-examination" and "re-examination". What section 145(2) of the Act says is simply that the court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused, the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146. The scheme of sections

143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode. [Paras 20 and 22] [243-C-F; 245-B-H; 246-A-C]

Dental Council of India vs. Hari Prakash and Ors., **(2001) 8 SCC 61 and** *Nathi Devi vs. Radha Devi,* **(2005) 2 SCC 271;** *Raghunath Rai Bareja vs. Punjab National Bank***, (2007) 2 SCC 230, referred to.**

1.4. The submission that since section 145(2) is identical to section 296(2) Cr.P.C., it should be interpreted in light of the legislative history of section 296(2) is without merit. Moreover, the crucial difference between section 296(2) Cr.P.C. and section 145(2) of the Act is that the former deals with the evidence of a formal nature

whereas under the latter provision, all evidences including substantive evidence may be given on affidavit. Section 296 is part of the elaborate procedure of a regular trial under the Code while the whole object of section 145(2) of the Act is to design a much simpler and swifter trial procedure departing from the elaborate and time consuming trial procedure of the Code. Hence, notwithstanding the apparent verbal similarity between section 145(2) of the Act and section 296(2) Cr.P.C., it would be completely wrong to interpret the true scope and meaning of the one in the light of the other. [Paras 24 and 25] [246-G-H; 247-C-F]

State of Punjab v. Naib Din **(2001) 8 SCC 578, distinguished.**

1.5. The evidence given on affidavit by the complainant is "subject to all just exceptions". This simply means that the evidence given on affidavit must be admissible and it must not include inadmissible materials such as facts not relevant to the issue or any hearsay statements. In case the complainant's affidavits contain statements that are not admissible in evidence it is always open to the accused to point those out to the court and the court would then surely deal with the objections in accordance with law. There is no merit in submission that when the complainant gives his evidence on affidavit, then the documents produced along with the affidavit(s) are not proved automatically and unless the accused admits those documents under section 294 Cr.P.C. the documents must be proved by oral testimony. In case, however, the accused raises any objections with regard to the validity or sufficiency of proof of the documents submitted along with the affidavit and if the objections are sustained by the court it is always open to the prosecution to have the concerned witness summoned and get the lacuna in the proof of the documents corrected. [Paras 26 and 27] [248-A-F]

2. The provisions of Sections 143 to 147 do not take away any substantive rights of the accused. Those provisions are not substantive but procedural in nature and would, therefore, undoubtedly, apply to the cases that were pending on the date the provisions came into force. [Para 28] [248-F-G]

Gurbachan Singh v. Satpal Singh and Ors. **1990 (1) SCC 445, relied on.**

3. On a bare reading of Section 143, it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in section 145(1)……", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the

accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well. It is not permissible for the court to make additions in the law and to read into it something that is just not there. [Paras 32 and 33] [251-A-H; 252-A-B]

Union of India and Anr. v. Deoki Nandan Aggarwal **1992 Supp. (1) SCC 323;** *Raghunath Rai Bareja and Anr. v. Punjab National Bank and Ors.,* **(2007) 2 SCC 230;** *Duport Steels Ltd. vs. Sirs,* **1980 1 All ER 534, relied on.**

Case Law Reference:

(2001) 8 SCC 61	**referred to**	**Para 21**
(2005) 2 SCC 271	**referred to**	**Para 21**
(2007) 2 SCC 230	**referred to**	**Para 21**
(2001) 8 SCC 578	**distinguished**	**Para 23**
1990 (1) SCC 445	**relied on**	**Para 23**
1992 Supp. 1 SCC 323	**relied on**	**Para 33**
(2007) 2 SCC 230	**relied on**	**Para 34**
1980 1 All ER 534	**relied on**	**Para 35**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 72 of 2010.

From the Judgment & Order dated 14.7.2006 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 2302 of 2005.

WITH

Crl. A. No. 73, 74, 75, 76, 77 and 78 of 2010.

Ranjit Kumar, Bhargava V. Desai, Rahul Gupta, Reema

Sharma, Jatin Zaveri, Gagan Chhabra, Dr. Vipin Gupta, Siddharth Bhatnagar, Pawan Kumar Bansal, T. Mahipal, Jay Savla, Anmol Doijode, Manju Sharma, V.B. Joshi, Kailash Pandey, Pragya S. Baghel, Ravi Naik, Manik Karanjawala, Sonia Nigam, Rachna Gupta, Niraj Sharma and Ravindra Keshavrao Adsure for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted

2. In these appeals we are required to consider the special provisions laid down by section 145 of the Negotiable Instruments Act, 1881 ('the Act', hereinafter) for a dishonoured cheque trial and to consider how far certain assertions made by the accused are in accordance with the provisions contained in the two sub-sections of that section.

3. The High Court had before it a large number of writ petitions and applications under section 482 of the Code of Criminal Procedure. Most of those petitions were filed on behalf of the accused but a few were also at the instance of the complainants. On the basis of the grievances made and reliefs prayed for in those petitions the High Court framed the following two questions as arising for its consideration:

> "(A) Whether sub-section (2) of section 145 of the Negotiable Instruments Act, 1881, (for short, "the Act") confers an unfettered right on the complainant and the accused to apply to the court seeking direction to give oral examination-in-chief of a person giving evidence on affidavit, even in respect of the facts stated therein and that if such a right is exercised, whether the court is obliged to examine such a person in spite of the mandate of section 145(1) of the Act?
>
> (B) Whether the provisions of section 145 of the Act, as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, (for short "the amending Act of 2002") are applicable to the complaints under section 138 of the Act pending on the date on which the amendment came into force? In other words, do the amended provisions of section 145(1) and (2) of the Act operate retrospectively? "

4. Answering the questions after a detailed and careful consideration of all the relevant provisions and earlier decisions of courts, the High Court held that the person (complainant or his witness) giving evidence on affidavit may be summoned by the court for putting questions as envisaged under section 165 of the Evidence Act (vide paragraph 24 of the judgment). He would also be summoned on an application made by the accused but the right of the accused is limited to cross-examination of the witness. In terms of section 145(2) the accused can undoubtedly cross-examine a person whose evidence is given on affidavit but the accused cannot insist that the witness, on coming to court, should first depose in examination-in-chief even in respect of matters which are already stated by him on affidavit (vide paragraph 25 of the judgment). The High Court further explained that for the prosecution the occasion to summon any of its witnesses who have given their evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". This right of the prosecution, the High Court observed, was not in dispute before it. The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode (vide paragraph 26 of the judgment).

5. The High Court then considered the claim of the

accused that any evidence in defence, like the complainant's evidence, may also be given on affidavit. It upheld the claim observing as follows:

> "….Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code…….I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."

6. Coming then to the question (B), the High Court had no difficulty in holding that the provisions of sub-sections (1) and (2) of section 145 were not substantive but only procedural in nature and, therefore, those provisions would be applicable to the cases pending on the date they came into force.

7. Apart from considering the two questions the High Court also laid down, on the request of the parties, a number of guidelines (vide sub-paragraphs (a) to (r) of paragraph 45 of the judgment) in regard to the procedure that the trial court, the complainant and the accused should follow in a dishonoured cheque trial on a complaint made under section 138 of the Act. We may have to refer to some of those guidelines later, at an appropriate place in this judgment.

8. The High Court judgment has given rise to these seven appeals, in which the following three issues arise for consideration by this court:

1. The extent of the right of the accused under section 145(2) of the Act: whether the right of the accused is limited to cross-examination of any person giving evidence on affidavit or is it open to the accused to insist that notwithstanding the evidence earlier given on affidavit, on coming to the court the complainant or his witness should first give deposition in examination-in-chief before being cross-examined by him? (appeals arising from SLP (Crl.) No.4760/2006, SLP (Crl.) No.5689/2006, SLP (Crl.) No.1106/2007, SLP (Crl.) No.6442/2007, SLP (Crl.) No.6443/2007, SLP (Crl.) No.6703/2007)

2. Whether the provisions of sub-sections (1) and (2) of section 145 of the Act would apply to proceedings that were pending on February 6, 2003, the date on which those provisions were inserted in the Act? (appeal arising from SLP (Crl.) No.4760/2006).

3. Whether the right to give evidence on affidavit as provided to the complainant under section 145(1) of the Act is also available to the accused? (appeal arising from SLP (Crl.) No.3915/2006)

9. For a proper appreciation of the issues it would be necessary to examine the relevant legal provisions and to ascertain the object and reasons for which those provisions were brought into existence by making amendments in the Negotiable Instruments Act, 1881. The Negotiable Instruments Act was amended first by the *Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988* and a second time by the *Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002.* The first amendment inserted Chapter XVII in the Act, comprising sections 138 to 143. Section 138 made, for the first time in the legislative history of the country, the issuance of a cheque by any person in discharge of any debt or liability owed by him to its holder, that was not honoured by the banker because of insufficiency of funds in the account, a penal offence for the drawer that would make him liable to punishment with

imprisonment that might extend to one year (now, two years after the second amendment with effect from February 6, 2003) or with fine that might extend to twice the amount of the cheque or both; the four clauses of the proviso then laid down the preconditions to attract the section, as safeguards for the honest drawer. Section 139 created a presumption (rebuttable!) that the cheque was issued by the drawer in discharge of any debt or liability owed by him to its holder. Section 140 provided that it would not be open to the accused in a prosecution under section 138 to take the plea that when he issued the cheque he had no reason to believe that on presentation, the cheque may be dishonoured for the reasons stated in that section. Section 141 dealt with offences by companies. Section 142 laid down the conditions subject to which alone the court would take cognizance of any offence punishable under section 138 of the Act.

10. The statement of objects and reasons appended to the bill explaining the provisions of the new chapter stated as follows:

> "This clause [clause (4) of the Bill] inserts a new Chapter XVII in the Negotiable Instruments Act, 1881. The provisions contained in the new Chapter provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

> The provisions have also been made that to constitute the said offence-
>
> (a) such cheque should have been presented to the bank within a period of six months of the date of its drawal or within the period of its validity, whichever is earlier; and
>
> (b) the payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within fifteen days of the receipt of the information by him from the bank regarding the return of the cheque unpaid; and
>
> (c) the drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of the receipt of the said notice.
>
> It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of such cheque received the cheque in the discharge of a liability. Defences which may or may not be allowed in any prosecution for such offence have also been provided to make the provisions effective. Usual provision relating to offences by companies has also been included in the said new Chapter. In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the proposed new Chapter. Such safeguards are-
>
> (a) that no court shall take cognizance of such offence except on a complaint, in writing, made by the payee or the holder in due course of the cheque;
>
> (b) that such complaint is made within one month of the date on which the cause of action arises; and
>
> (c) that no court inferior to that of a Metropolitan Magistrate

or a Judicial Magistrate or a Judicial Magistrate of the first class shall try any such offence."

11. The speech of the Minister of Finance on December 2, 1988 in course of the debate on the Bill in the Lok Sabha tells us that Chapter XVII was inserted in the Act, in light of the Report submitted in the year 1975 by the Committee on Banking Laws headed by Dr. Rajamannar. It appears that in course of the debate some members had expressed the view that the provisions of Chapter XVII sought to be inserted in the Act, contained very abnormal, rather very dangerous provisions, in that a kind of civil liability is supposed to be converted into a kind of criminal act which would have far reaching consequences. Dispelling the apprehensions of those members the Minister pointed out that the proposed amendments were along the same lines as the law prevailing in other countries such as the UK, the USA, Belgium, Portugal, Argentina, etc. Further, in regard to the object of the provisions, the Minister stated as follows:

"In fact, *the whole purpose of bringing about this provision is to make the drawing of cheque a regular mode of payment.* Unfortunately, today if a cheque is given to a party, they will not consider it a sufficient means of payment, they will insist that unless the cheque is encashed, they will not take that as a kind of payment made."

(emphasis added)

12. The Minister then elaborated on the safeguards provided in the law to save an honest drawer from coming under the rigours of the section due to any *bona fide* mistake and finally went on to say as follows:

"But in spite of time for payment and all other provisions that are made, if the party is not able to make good the amount of money which he owes to a particular party and in spite of the notice also he does not act, the conclusion

is inescapable that he will be prosecuted, legal action will have to be taken. It is for the court to take a decision, whether he be imprisoned for one year, or double the amount that would be paid as fine or both things will have to be taken together. Ultimately, it is for the court to take a decision. But these are the provisions which have been provided for so that the parties drawing the cheques are careful enough to see that there are enough resources available in their bank account and if a cheque is drawn, it will not be returned."

(emphasis added)

13. The provisions of the newly inserted Chapter XVII, on coming into force with effect from April 1, 1989, brought in a veritable deluge of cases in the criminal court system. In the metropolitan cities and the commercial centres of the country, it almost appeared that the main function of the Magistrate's court was to recover monies on behalf of parties on the wrong end of the commercial transactions that had gone sour. Complaints under section 138 of the Act came to be filed in such large numbers that it became impossible for the courts to handle them within a reasonable time and it also had a highly adverse effect on the court's normal work in ordinary criminal matters. A remedial measure was urgently required and the legislature took action by introducing further amendments in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. The 2002 amendment inserted in the Act for the first time sections 143 to 147 besides bringing about a number of changes in the existing provisions of sections 138 to 142. Section 143 gave to the court the power to try cases summarily; section 144 provided for the mode of service of summons; section 145 made it possible for the complainant to give his evidence on affidavit; section 146 provided that the bank's slip would be *prima facie* evidence of certain facts and section 147 made the offences under the Act compoundable.

14. The statement of objects and reasons appended to the bill stated as follows:

"The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely, sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, *the procedure prescribed for the courts to deal with such matters has been found to be cumbersome*. *The courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.*

2. A large number of cases are reported to be pending under sections 138 to 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act pending in various courts, a Working Group was constituted to review section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.

3. The recommendations of the Working Group along with other representations from various institutions and organisations were examined by the Government in consultation with the Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill, 2001 was introduced in the Lok Sabha on 24th July, 2001. The Bill was referred to Standing Committee on Finance which made certain

recommendations in its report submitted to Lok Sabha in November, 2001.

4. Keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act,1881, namely:—

(i) to increase the punishment as prescribed under the Act from one year to two years;

(ii) to increase the period for issue of notice by the payee to the drawer from 15 days to 30 days;

(iii) to provide discretion to the court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act;

(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant;

(v) to prescribe procedure for servicing of summons to the accused or witness by the court through speed post or empanelled private couriers;

(vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;

(vii) to make the offences under the Act compoundable;

(viii) to exempt those directors from prosecution under section 141 of the Act who are nominated as directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government, or the State Government, as the case may be;

(ix) to provide that the Magistrate trying an offence shall

have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees;

(x) to make the Information Technology Act, 2000 applicable to the Negotiable Instruments Act,1881 in relation to electronic cheques and truncated cheques subject to such modifications and amendments as the Central Government, in consultation with the Reserve Bank of India, considers necessary for carrying out the purposes of the Act, by notification in the Official Gazette; and

(xi) to amend definitions of "bankers' books" and "certified copy" given in the Bankers' Books Evidence Act,1891.

5. *The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques,* enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Negotiable Instruments Act, 1881.

6. The Bill seeks to achieve the above objects."

(emphasis added)

15. Though, in these appeals, we are mainly concerned with the provisions of section 145, it would be useful here to take a look at all the five sections introduced by the 2002 amendment.

"143. Power of court to try cases summarily.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the

provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees;

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

144. Mode of service of summons.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally

works; for gain, by speed post or by such courier services as are approved by a Court of Session.

(2) Where an acknowledgment purporting to be signed by the

accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the court issuing the summons may declare that the summons has been duly served.

145. Evidence on affidavit.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

146. Bank's slip prima facie evidence of certain facts.

The court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

147. Offences to be compoundable.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

16. It may be noted that the provisions of sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of section 146 similarly depart from the principles of the Indian Evidence Act. Section 143 makes it possible for the complaints under section 138 of the Act to be tried in the summary manner, except, of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily. It is, however, significant that the procedure of summary trials is adopted under section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process. Even while following the procedure of summary trials, the *non-obstante* clause and the expression "as far as possible" used in section 143 coupled with the *non-obstante* clause in section 145 allow for the evidence of the complainant to be given on affidavit, that is, in the absence of the accused. This would have been impermissible (even in a summary trial under the Code of Criminal Procedure) in view of sections 251 and 254 and especially section 273 of the Code. The accused, however, is fully protected, as under sub-section (2) of section 145 he has the absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination. Sub-section (3) of section 143 mandates that the trial would proceed, as far as practicable, on a day-to-day basis and sub-section (4) of the section requires the Magistrate to make the endeavour to conclude the trial within six months from the date of filing of the complaint. Section 144 makes the process of service of summons simpler and cuts down the long time ordinarily consumed in service of summons in a regular civil suit or a criminal trial. Section 145 with its *non-obstante* clause, as noted above, makes it possible for the evidence of the complainant to be taken in the absence of the accused. But the affidavit of the complainant (or any of his

witnesses) may be read in evidence "subject to all just exceptions". In other words, anything inadmissible in evidence, e.g., irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit. Section 146, making a major departure from the principles of the Evidence Act provides that the bank's slip or memo with the official mark showing that the cheque was dishonoured would by itself give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved. Section 147 makes the offences punishable under the Act, compoundable.

17. It is not difficult to see that sections 142 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial.

18. Here we must take notice of the fact that cases under section 138 of the Act have been coming in such great multitude that even the introduction of such radical measures to make the trial procedure simplified and speedy has been of little help and cases of dishonoured cheques continue to pile up giving rise to an unbearable burden on the criminal court system. The Law Commission in its report number 213 sent to the Union Minister for Law and Justice on November 24, 2008 advocated the setting up of Fast Track Magisterial courts for dealing with the huge pendency of dishonoured cheque cases. In paragraph 1.5 of the report it was stated as follows:

> "1.5. Over 38 lac cheque bouncing cases are pending in various courts in the country. There are 7,66,974 cases pending in criminal courts in Delhi at the Magisterial level

> as on 1st June, 2008. Out of this huge workload, a substantial portion is of cases under section 138 of the Negotiable Instruments Act which alone count for 5,14,433 cases (cheque bouncing). According to Gujarat High Court sources, there are approximately two lac cheque bouncing cases all over t he State, with the majority of them (84,000 cases) in Ahmedabad, followed by Surat, Vadodara and Rajkot. 73,000 cases were filed under section 138 of the Negotiable Instruments Act (cheque bouncing) on a single day by a private telecom company before a Bangalore court, informed the Chief Justice of India, K. G. Balakrishnan, urging the Government to appoint more judges to deal with 1.8 crore pending cases in the country. The number of complaints which are pending in Bombay courts[1] seriously cast shadow on the credibility of our trade, commerce and business. Immediate steps have to be taken by all concerned to ensure restoration of the credibility of trade, commerce and business."

19. The situation arising from the mounting arrears is so grave that in the 'Vision Statement' presented by the Union Minister for Law and Justice to the Chief Justice of India in course of the National Consultation for strengthening the Judiciary towards reducing pendency and delays held on October 24, 2009, cases of dishonoured cheques were cited among one of the major bottlenecks in the criminal justice system. In paragraph 2 under the heading 'the Action Plan' it was stated as follows:

> "2. *Identification of Bottlenecks: Clearing the System*
>
> 1. Studies have shown that cases under certain statutes and area of law are choking dockets of

1. on the date of the report, there were 5,91,818 cases pending in sub-ordinate courts of State of Maharashtra 1,57,191 cases pending in the sub-ordinate courts of State of Karnataka, 1,10,311 cases pending in the sub-ordinate courts of State of Kerala and 5,14,433 cases in the sub-ordinate courts of the State of Delhi under Section 138 of the Negotiable Instrument Act.

magisterial and specialised courts, and the same need to be identified.

2. Bottlenecks shall be identified as follows:

(a) Matrimonial cases.

(b) Cases under section 498A of the Indian Penal Code, 1860.

(c) Cases under section 143 of the Negotiable Instrument Act, 1881.

(d) to (i) xxxxxxxxxx

20. Once it is realized that sections 143 to 147 were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial and once it is seen that even the special procedure failed to effectively and expeditiously handle the vast multitude of cases coming to the court, the claim of the accused that on being summoned under section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made to depose in examination-in-chief all over again plainly appears to be a demand for meaningless duplication, apparently aimed at delaying the trial.

21. Nevertheless, the submissions made on behalf of the parties must be taken note of and properly dealt with. Mr Ranjit Kumar, learned Senior Advocate, appearing for the appellant in appeal arising from SLP (Crl.) No. 4760/2006 pointed out that sub-section (2) of section 145 uses both the words, "may" (with reference to the court) and "shall" (with reference to the prosecution or the accused). It was, therefore, beyond doubt that in the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of section 145(1) without having any

discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination-in-chief and be required to verbally state what is already said in the affidavit. Mr. Ranjit Kumar referred to section 137 of the Indian Evidence Act, that defines "examination-in-chief", "cross-examination" and "re-examination" and on that basis sought to argue that the word "examine" occurring in section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word "shall" with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. In support of the submission he relied upon decisions of this court in *Dental Council of India vs. Hari Prakash and Ors.*, (2001) 8 SCC 61 and *Nathi Devi vs. Radha Devi*, (2005) 2 SCC 271. Mr. Siddharth Bhatnagar, learned counsel for the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 also joined Mr. Ranjit Kumar in the submission based on literal interpretation. He also submitted that ordinarily the rule of literal construction should not be departed from, particularly when the words of the statute are clear and unambiguous. He relied upon the decision in *Raghunath Rai Bareja vs. Punjab National Bank*, (2007) 2 SCC 230.

22. We are completely unable to appreciate the submission. The plea for a literal interpretation of section 145(2) is based on the unfounded assumption that the language of the section clearly says that the person giving his evidence on affidavit, on being summoned at the instance of the accused must start his deposition in court with examination-in-chief. We find nothing in section 145(2) to suggest that. We may also make it clear that section 137 of the Evidence Act *does not define "examine" to mean and include* the three kinds of examination of a witness; it simply defines "examination-in-chief", "cross-examination" and "re-examination". What section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146. The scheme of sections 143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise

in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode. This appears to us as the simple answer to the above question and the correct legal position. Any other meaning given to sub-section (2) of section 145, as suggested by Mr. Ranjit Kumar would make the provision of section 145(1) nugatory and would completely defeat the very scheme of trial as designed under sections 143 to 147.

23. Mr. Ranjit Kumar next submitted that section 145(2) was identical to section 296(2) of the Code of Criminal Procedure and this court, in its decision in *State of Punjab vs. Naib Din*, (2001) 8 SCC 578 dealing with section 296(2) of the Code made the following observation:

> "8. ....If any party to a *lis* wishes to examine the deponent of the affidavit it is open to him to make an application before the court that he requires the deponent to be examined or cross-examined in court. This is provided in sub-section (2) of section 296 of the Code. When any such application is made it is the duty of the court to call such person to the court for the purpose of being examined."

24. Mr. Siddharth Bhatnagar representing the appellant in the appeal arising from SLP (Crl.) No.1106/2007 also joined Mr. Ranjit Kumar in the submission based on section 296(2) of Code. Mr. Bhatnagar submitted that since section 145(2) is identical to section 296(2) of the Code, it should be interpreted in light of the legislative history of section 296(2) and he tried to take us into the details of the legislative history of section

296 of the Code.

25. In our view the submission is wholly without merit. Neither section 296(2) of the Code nor the decision in *Naib Din* has any relevance or application to the trial concerning a dishonoured cheque under sections 143 to 146 of the Act. The decision in *Naib Din* was rendered in a totally different context and the issue before the court was not, whether on being summoned on the application made by the accused, the person giving evidence on affidavit must begin his deposition with examination-in-chief. The appellants are reading into the passage from the decision in *Naib Din* something that was not said by the court. Moreover, the crucial difference between section 296(2) of the Code and section 145(2) of the Act is that the former deals with the evidence of a *formal nature* whereas under the latter provision, all evidences including substantive evidence may be given on affidavit. Section 296 is part of the elaborate procedure of a regular trial under the Code while the whole object of section 145(2) of the Act is to design a much simpler and swifter trial procedure departing from the elaborate and time consuming trial procedure of the Code. Hence, notwithstanding the apparent verbal similarity between section 145(2) of the Act and section 296(2) of the Code, it would be completely wrong to interpret the true scope and meaning of the one in the light of the other. Neither the legislative history of 296(2) nor any decision on that section can persuade us to hold that under section 145(2) of the Act, on being summoned at the instance of the accused the complainant or any of his witnesses should be first made to depose in examination-in-chief before cross-examination.

26. Mr. Ranjit Kumar next submitted that in giving evidence on affidavit, the deponent (the complainant or any of his witnesses) can introduce hearsay or irrelevant facts in evidence to which the accused could have objected if the deposition was made in court as examination-in-chief. Hence, the accused must have the right to call the complainant (or his witness giving

evidence on affidavit) into the witness box for examination-in-chief so as to get the inadmissible parts in the affidavit excluded from his evidence. Once again the submission is devoid of merit. It is noted above that the evidence given on affidavit by the complainant is "subject to all just exceptions". This simply means that the evidence given on affidavit must be admissible and it must not include inadmissible materials such as facts not relevant to the issue or any hearsay statements. In case the complainant's affidavits contain statements that are not admissible in evidence it is always open to the accused to point those out to the court and the court would then surely deal with the objections in accordance with law.

27. Mr. Ranjit Kumar lastly submitted that when the complainant gives his evidence on affidavit, then the documents produced along with the affidavit(s) are not proved automatically and unless the accused admits those documents under section 294 of the Code of Criminal Procedure the documents must be proved by oral testimony. We find no substance in this submission either and we see no reason why the affidavits should not also contain the formal proof of the enclosed documents. In case, however, the accused raises any objections with regard to the validity or sufficiency of proof of the documents submitted along with the affidavit and if the objections are sustained by the court it is always open to the prosecution to have the concerned witness summoned and get the *lacuna* in the proof of the documents corrected.

28. Mr. Ranjit Kumar also made a feeble attempt to contend that the provisions of sections 143 to 147 inserted in the Act with effect from February 6, 2003 would operate prospectively and would not apply to cases that were pending on that date. The High Court has considered the issue in great detail and has rightly taken the view that the provisions of sections 143 to 147 do not take away any substantive rights of the accused. Those provisions are not substantive but procedural in nature and would, therefore, undoubtedly, apply

to the cases that were pending on the date the provisions came into force. We are fully in agreement and in order to buttress the view taken by the High Court we will only refer to a decision of this court.

29. In *Gurbachan Singh vs. Satpal Singh and Ors.*, 1990 (1) SCC 445, the court was called upon to consider whether section 113A of the Evidence Act that created a presumption as to abetment of a suicide by a married woman would operate retrospectively or prospectively. The court held:

> "37. The provisions of the said section do not create any new offence and as such it does not create any substantial right but it is *merely a matter of procedure of evidence and as such it is retrospective* and will be applicable to this case. It is profitable to refer in this connection to *Halsbury's Laws of England,* Fourth Edition, Volume 44 page 570 wherein it has been stated that:
>
> > "The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implications, it appears that this was the intention of the legislature…"
>
> 38. It has also been stated in the said volume of *Halsbury's Laws of England* at page 574 that:
>
> "The presumption against retrospection does not apply to legislation concerned merely with *matters of procedure or of evidence*; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.""
>
> (emphasis added)

30. Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter. In paragraph 29 of the judgment, the High Court observed as follows:

> "It is true that section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word 'accused' with the word 'complainant' in sub-section (1) of section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India…."

Then in paragraph 31 of the judgment it observed:

> "…. Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code…..I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."

31. On this issue, we are afraid that the High Court

overreached itself and took a course that amounts to taking-over the legislative functions.

32. On a bare reading of section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and *did not provide for the accused to similarly do so.* But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word 'accused' with the word 'complainant' in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in section 145(1)……", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well.

33. Coming back to the fist error in the High Court's reasoning, in the guise of interpretation it is not permissible for the court to make additions in the law and to read into it something that is just ,not there. In *Union of India and Anr. vs. Deoki Nandan Aggarwal,* 1992 Supp. (1) SCC 323, this court sounded the note of caution against the court usurping the role of legislator in the guise of interpretation. The court observed:

> "14. …it is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught the legislative judgment is subversive of the constitutional harmony and comity of instrumentalities…."

34. In *Raghunath Rai Bareja and Anr. vs. Punjab National Bank and Ors.,* (2007) 2 SCC 230 while observing that it is the task of the elected representatives of the people to legislate and not that of the Judge even if it results in hardship or inconvenience, Supreme Court quoted in affirmation, the observation of Justice Frankfurter of the US Supreme Court which is as follows:

> "41. As stated by Justice Frankfurter of the US Supreme Court (see "*Of Law and Men: Papers and addresses of Felix Frankfurter*")

> "Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislator. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished there bretheren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

35. In *Duport Steels Ltd. vs. Sirs*, [1980] 1 All ER 529, 534, Lord Scarman expounded the legal position in the following words:

> "But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law. The judge's duty is to interpret and to apply the law not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing construction are possible. But our law require the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute."

36. In light of the above we have no hesitation in holding that the High Court was in error in taking the view, that on a request made by the accused the magistrate may allow him to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of paragraph 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915/2006 is allowed.

37. All the remaining six appeals are dismissed.

38. There shall be no order as to costs.

D.G. Appeals disposed of.

NAVIN JINDAL

v.

ASSTT. COMMISSIONER OF INCOME TAX

(Civil Appeal No.634 of 2006)

JANUARY 11, 2010

[S.H. KAPADIA, H.L. DATTU AND DEEPAK VERMA, JJ.]

Income Tax Act, 1961:

s. 48 – 'Capital gains' – Offer made to assessee-shareholder to subscribe to Partly Convertible Debentures (PCDs) at par on Rights Basis – Assessee renouncing the right – Loss due to diminution in value of original equity shares on renunciation of right to subscribe to additional shares/debentures – HELD: Rightly shown by assessee as 'short-term loss' – Revenue erred in treating the same as 'long-term loss'.

The assessee in Civil Appeal No.634 of 2006 held 1500 equity shares of a Company. The Company, in January 1992 announced issue of 12.5% equity share secured PCDs (Partly Convertible Debentures) of Rs.110/- for cash at par to shareholders on Rights Basis. The assessee received an offer to subscribe to 1875 PCDs on Rights Basis. He renounced his right to subscribe to PCDs in favour of another Company on 15th February, 1992 at the rate of Rs.30/- per Right. Accordingly, assessee received Rs.56,250/- for renunciation of right to subscribe to PCDs. Against this sale consideration, assessee suffered diminution in the value of the original 1500 equity shares at the rate of Rs.200/- per share, totalling to Rs.3,00,000/-. Consequently, the capital loss suffered by the assessee was Rs.2,43,750/-. The assessee showed the loss of Rs. 2,43,750/- as short term capital

loss whereas the Revenue treated it as long term capital loss and computed assessee's income accordingly. The other appeals were filed in similar circumstances.

The question for consideration before the Court was: whether the amount of Rs.2,43,750/- was a 'short term capital loss' as claimed by the assessee, or a 'long-term loss' as assessed by the Revenue?

Allowing the appeals, the Court

HELD: 1.1. The loss suffered by the assessee amounting to Rs.2,43,750/- was a short-term loss. The computation of income under the head 'capital gains' as submitted by the assesee is correct and the computation of income made by the Department is erroneous. [Para 14] [270-C-D]

1.2. The right to subscribe for additional offer of shares/debentures on Rights basis, on the strength of existing shareholding in the Company, comes into existence when the Company decides to come out with the Rights Offer. Prior to that, such right, though embedded in the original shareholding, remains inchoate. The same crystallizes only when the Rights Offer is announced by the Company. Therefore, in order to determine the nature of the gains/loss on renunciation of right to subscribe for additional shares/debentures, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of transfer (renunciation) of such right. The said right to subscribe for additional shares/debentures is a distinct, independent and separate right, capable of being transferred independently of the existing shareholding, on the strength of which such Rights are offered. [Para 8] [264-A-D]

1.3. For the purposes of s.48 of the Act, one must

keep in mind the important principle that chargeability and computation has to go hand in hand. Computation is an integral part of chargeability under the Act. It is for this reason that the right to subscribe for additional offer of shares/debentures comes into existence only when the Company decides to come out with the Rights Offer. It is only when that event takes place, that diminution in the value of the original shares held by the assessee takes place. One has to give weightage to the diminution in the value of the original shares which takes place when the Company decides to come out with the Rights Offer. [Para 9] [264-E-G]

Miss Dhun Dadabhoy Kapadia vs. Commissioner of Income-Tax, Bombay **(1967) 63 ITR 651, relied on.**

Case Law Reference:

(1967) 63 ITR 651	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 634 of 2006.

From the Judgment & Order dated 11.8.2005 of the High Court of Punjab & Haryana at Chandigarh in Income Tax Appeal No. 55 of 2002.

WITH

C.A. Nos. 635, 636, 637 and 639 of 2006.

Ajay Vohra, Kavita Jha, Sandeep S. Karhail, Manoj Swarup for the Appellant.

B.V. Bhattacharya, ASG, Arijit Prasad, Rahul Kaushik, Naresh Kaushik, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Heard learned counsel on both sides.

2. In this batch of civil appeals, the narrow issue which arises for determination is the nature of the loss suffered by the appellant(s) [assessee(s)] - whether Rs.2,43,750/- was a short-term capital loss, as contended on behalf of the assessee(s), or whether the said loss was a long-term loss, as contended on behalf of the Revenue?

3. In the lead matter, being Civil Appeal No.634 of 2006, we are concerned with Assessment Year 1992-1993 corresponding to the Financial Year ending 31st March, 1992.

4. The assessee was a shareholder in Jindal Iron and Steel Company Limited [`JISCO', for short]. The said Company announced in January, 1992, issue of 12.5% equity secured PCDs [Partly Convertible Debentures] of Rs.110/- for cash at par to shareholders on Rights Basis and employees on Equitable Basis. The Issue opened for subscription on 14th February, 1992, and closed on 12th March, 1992. As the assessee held 1500 equity shares of JISCO, assessee received an offer to subscribe to 1875 PCDs of JISCO on Rights Basis. Assessee renounced his right to subscribe to PCDs in favour of Colorado Trading Company on 15th February, 1992, at the rate of Rs.30/- per Right. Assessee received, accordingly, Rs.56,250/- for renunciation of right to subscribe to PCDs. Against the afore-stated sale consideration, assessee suffered diminution in the value of the original 1500 equity shares in the following manner: the cum-right price per share on 3rd January, 1992, was Rs.625/-, whereas ex-Rights price per share on 6th January, 1992, was Rs.425/-, resulting in a loss of Rs.200/- per share. Consequently, the capital loss suffered by the assessee was Rs.3,00,000/- [1500 x 200] as against the receipt of Rs.56,250/- on renunciation of 1875 PCDs.

5. To complete the chronology of events, on 7th August, 1991, assessee sold 8460 equity shares of JSL at Rs.240/- for the total consideration of Rs.20,30,400/-, whose cost of

acquisition was Rs.3,63,200/- and, consequently, the transaction resulted in a long-term gain for the assessee in the sum of Rs.16,67,200/-. Similarly, on 20th June, 1991, assessee sold 7000 equity shares of Saw Pipes Limited ("SPL", for short) at the rate of Rs.103/- each, for total consideration of Rs.7,21,000/- from which the assessee deducted Rs.70,000/- towards cost of acquisition, resulting in a long-term gain of Rs.6,51,000/-. In all, under the caption, "long-term gain" assessee earned Rs.23,18,200/- [Rs.16,67,200 + Rs.6,51,000]. These figures are not in dispute, though there is a small variation in arithmetical calculations made by the two sides, which is insignificant.

6. The quantum of loss is not in issue in these civil appeals. The only question which this Court has to decide is the nature of the loss. The Assessing Officer accepted the computation of loss on renunciation of right to subscribe to PCDs at Rs.2,43,750/- but treated the same as long-term capital loss. As a consequence, the Assessing Officer reduced the amount of long-term capital loss by the amount of statutory deduction under Section 48(2) of the Income Tax Act, 1961. It is this calculation which is the subject-matter of challenge by the assessee(s) in this batch of civil appeals.

7. To answer the above question, we need to quote hereinbelow the relevant provisions of the Income Tax Act, 1961, [`Act', for short] having a bearing on the issue in dispute:

> "2(29A).`Long-term capital asset' means a capital asset which is not a short-term capital asset.
>
> 2(42A). `Short-term capital asset' means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer.
>
> 45(1). Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 53, 54, 54B, 54D, 54E, 54F,

> 54G and 54H, be chargeable to income-tax under the head `Capital gains', and shall be deemed to be the income of the previous year in which the transfer took place.
>
> 48(1). The income chargeable under the head `Capital gains' shall be computed,--
>
> [a] by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:--
>
> [i] expenditure incurred wholly and exclusively in connection with such transfer;
>
> [ii] the cost of acquisition of the asset and the cost of any improvement thereto;
>
> Provided that in the case of an assessee, who is a non-resident Indian, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every re-investment thereafter in, and sale of, shares in, or debentures of, an Indian company.
>
> *Explanation:* For the purposes of this clause,--
>
> (i) `non-resident Indian' shall have the same meaning as in clause (e) of section 115C;

(ii) `foreign currency' and `Indian currency' shall have the meanings respectively assigned to them in section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973);

(iii) the conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;

[b] where the capital gain arises from the transfer of a long-term capital asset (hereafter in this section referred to, respectively, as long-term capital gain and long-term capital asset) by *making the further deductions specified in sub-section (2).*

(2) The deductions referred to in clause (b) of sub-section (1) are the following, namely:--

[a] where the amount of long-term capital gain arrived at after making the deductions under clause (a) of sub-section (1) does not exceed fifteen thousand rupees, the whole of such amount;

[b] in any other case, fifteen thousand rupees as increased by a sum equal to,--

(i) in respect of long-term capital gain so arrived at relating to capital assets, being buildings or lands or any rights in buildings or lands or gold, bullion or jewellery,--

(A) in the case of a company, ten per cent of the amount of such gain in excess of fifteen thousand rupees;

(B) in the case of any other assessee, fifty per cent of the amount of such gain in excess of fifteen thousand rupees;

(ia) in respect of long-term capital gain so arrived at relating to equity shares of venture capital undertakings,--

(A) in the case of a company, other than venture capital

company, thirty per cent of the amount of such gain in excess of fifteen thousand rupees;

(B) in the case of venture capital company, sixty per cent of the amount of such gain in excess of fifteen thousand rupees;

(C) in any other case, sixty per cent of the amount of such gain in excess of fifteen thousand rupees;

[ii] in respect of long-term capital gain so arrived at relating to capital assets other than capital assets referred to in sub-clauses (i) and

(ia),--

(A) in the case of a company, thirty per cent of the amount of such gain in excess of fifteen thousand rupees;

(B) in any other case, sixty per cent of the amount of such gain in excess of fifteen thousand rupees:

Provided that where the long-term capital gain relates to both categories of capital assets referred to in sub-clauses (i) and (ii), the deduction of fifteen thousand rupees shall be allowed in the following order, namely:--

[1] the deduction shall first be allowed against long-term capital gain relating to the assets mentioned in sub-clause (i);

[2] thereafter, the balance, if any, of the said fifteen thousand rupees shall be allowed as deduction against long-term capital gain relating to the assets mentioned in sub-clause (ii), and the provisions of sub-clause (ii) shall apply as if references to fifteen thousand rupees therein were references to the amount of deduction allowed in accordance with clauses (1) and (2) of this proviso:

Provided further that, in relation to the amount referred to

in clause (b) of sub-section (5) of section 45, the initial deduction of fifteen thousand rupees under clause (a) of this sub-section shall be reduced by the deduction already allowed under clause (a) of section 80T in the assessment for the assessment year commencing on the 1st day of April, 1987, or any earlier assessment year or, as the case may be, by the deduction allowed under clause (a) of this sub-section in relation to the amount of compensation or consideration referred to in clause (a) of sub-section (5) of section 45 and references to fifteen thousand rupees in clauses (a) and (b) of this sub-section shall be construed as references to such reduced amount, if any.

Explanation: For the purposes of this section,--

[a] `venture capital company' means such company as is engaged in providing finance to venture capital undertakings mainly by way of acquiring equity shares of such undertakings or, if the circumstances so require, by way of advancing loans to such undertakings, and is approved by the Central Government in this behalf;

[b] `venture capital undertaking' means such company as the prescribed authority may, having regard to the following factors, approve for the purposes of sub-clause (ia) of clause (b) of sub-section (2), namely;--

[1] the total investment in the company does not exceed ten crore rupees or such other higher amount as may be prescribed;

[2] the company does not have adequate financial resources to undertake projects for which it is otherwise professionally or technically equipped; and

[3] the company seeks to employ any technology which will result in significant improvement over the existing technology in India in any field and the investment in such technology involves high risk."

8. We find merit in this batch of civil appeals filed by the assessee(s). The right to subscribe for additional offer of shares/debentures on Rights basis, on the strength of existing shareholding in the Company, comes into existence when the Company decides to come out with the Rights Offer. Prior to that, such right, though embedded in the original shareholding, remains inchoate. The same crystallizes only when the Rights Offer is announced by the Company. Therefore, in order to determine the nature of the gains/loss on renunciation of right to subscribe for additional shares/debentures, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of transfer [renunciation] of such right. The said right to subscribe for additional shares/debentures is a distinct, independent and separate right, capable of being transferred independently of the existing shareholding, on the strength of which such Rights are offered.

9. For the purposes of Section 48 of the Act, one must keep in mind an important principle, namely, that chargeability and computation has to go hand in hand. In other words, computation is an integral part of chargeability under the Act. It is for this reason that we have opined that the right to subscribe for additional offer of shares/debentures comes into existence only when the Company decides to come out with the Rights Offer. It is only when that event takes place, that diminution in the value of the original shares held by the assessee takes place. One has to give weightage to the diminution in the value of the original shares which takes place when the Company decides to come out with the Rights Offer. For determining whether the gains/loss of renunciation of right to subscribe is a short-term or long-term gains/loss, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of renunciation [transfer] of such right.

10. Our view is based on the judgement of this Court in

the case of *Miss Dhun Dadabhoy Kapadia vs. Commissioner of Income-Tax, Bombay,* reported in [1967] 63 I.T.R. 651], which has taken the view that, for computing capital gains on renunciation of right to subscribe for additional shares, diminution in the value of original shares would be regarded as the cost of acquisition for such right [See pages 654-655 of the said judgement]. We quote hereinbelow the relevant portion of the said judgement which further indicates that the right to subscribe for new shares/debentures is a separate capital asset which comes into existence only when the Company passes Resolution for the issue of new shares:

> *"The capital asset which the appellant originally* possessed consisted of 710 ordinary shares of the company. There was already a provision that, if the company issued any new shares, every holder of old shares would be entitled to such number of ordinary shares as the board may, by resolution, decide. *This right was possessed by the appellant because of her ownership of the old 710 ordinary shares, and when the board of directors of the company passed a resolution for issue of new shares, this right of the appellant matured to the extent that she became entitled to receive 710 new shares. This right could be exercised by her by actually purchasing those shares at the prescribed rate, or by renouncing those shares in favour of another person and obtaining monetary gain in that transaction. At the time, therefore, when the appellant renounced her right to take these new shares, the capital asset which she actually possessed consisted of her old 710 shares plus this right to take 710 new shares.*
>
> ....
>
> In the alternative, the case can be examined in another aspect. At the time of the issue of new shares, the appellant possessed 710 old shares and she also got the right to obtain 710 new shares. When she sold this right to obtain 710 new shares and realised the sum of Rs.45,262.50P., she capitalised that right and converted it into money. The value of the right may be measured by setting off against the appreciation in the face value of the new shares the depreciation of the old shares and, consequently, to the extent of the depreciation in the value of her original shares, she must be deemed to have invested money in acquisition of this new right. A concomitant of the acquisition of the new right was the depreciation in the value of the old shares, and the depreciation may, in a commercial sense, be deemed to be the value of the right which she subsequently transferred. The capital gain made by her would, therefore, be represented only by the difference between the money realised on transfer of the right, and the amount which she lost in the form of depreciation of her original shares in order to acquire that right. Looked at in this manner also, it is clear that the net capital gain by her would be represented by the amount realised by her on transferring the right to receive new shares, after deducting therefrom the amount of depreciation in the value of her original shares, being the loss incurred by her in her capital asset in the transaction in which she acquired the right for which she realised the cash. This method of looking at the transaction also leads to the same conclusion which we have indicated in the preceding paragraph."
>
> [Emphasis supplied]

11. Section 48 deals with mode of computation of income chargeable under the head "Capital gains". Under that section, such income is required to be computed by deducting from the full value of the consideration received as a result of the transfer of the capital asset, the expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset. Under Section 48(1)(b) of the Act, it is further stipulated that where the capital gain arises from the

transfer of a long-term capital asset, then, in addition to the expenditure incurred in connection with the transfer and the cost of acquisition of the asset, a further deduction, as specified in Section 48(2) of the Act, which is similar to standard deduction, becomes necessary.

12. The basic controversy in this batch of civil appeals concerns the stage at which Section 48(2) of the Act becomes applicable. For that purpose, we annex hereinbelow a chart indicating Computation of Income under the head "Capital gains", as projected by the assessee on the one hand and as projected by the Assessing Officer on the other hand.

13. On analysis of the said chart, one finds that, according to the assessee, the net income chargeable to tax under the head "Capital gains" is Rs.6,77,530/-, whereas, according to the Assessing Officer, the net ˇincome is Rs.8,28,980/-. According to the assessee, the loss suffered by him, as indicated in the chart, is a short-term capital loss of Rs.2,43,750/-, which occurred to the assessee on sale of right to subscribe to PCDs. The long-term gain, which accrued to the assessee on sale of shares of JSL and SPL, came to Rs.23,18,200/- to which Section 48(2) is applied by the assessee. On application of Section 48(2), the standard deduction comes to Rs.13,96,920/- Accordingly, the long-term gain, as computed under Section 48, accruing to the assessee on sale of shares of JSL and SPL came to Rs.9,21,280/- from which the assessee deducts loss of Rs.2,43,750/- resulting in the net income of Rs.6,77,530/-. On the other hand, according to the Assessing Officer, there is no dispute regarding the long-term gains accruing to the assessee on sale of shares of JSL and SPL amounting to Rs.23,31,200/- [difference in the figures is insignificant]. From the said figure of Rs.23,31,200/-, the Assessing Officer deducts the loss of Rs.2,43,680/- as a long-term loss and applies Section 48(2) deduction to the figure of Rs.20,87,450/-. Consequently, the Assessing Officer works out

COMPUTATION OF INCOME UNDER THE HEAD "CAPITAL GAINS

		As per assessee				As per assessing officer	
Capital gains/Loss:							
a] Short Term:							
Amount of sale proceeds (renouncement of 1875 Right PCDs offer of JISCO from Colorade Trading Co. Ltd. on 15.2.92 @ 30/-.		56,250					
Less : being cost of acquisition of 1875 right PCD offer of JISCO being depleted in the value of existing share holdings of 1500 Equity shares as under:-							
Cum-right price per share on 3.1.92	625						
Less : Ex-right price per share on 6.1.92	425						
Difference	200						
1500 shares @ Rs.200/- per share i.e.1500 x 200	(A)	(-) 3,00,000		(-) 2,43,750	NIL		NIL

b] Long Term:						
I. On 8460 equity shares of JSL:						
sold on 7.8.91 @ Rs.240/- 20,30,400						
Less: Aggregate cost of acquisition 3,63,200	16,67,200					
II. On 7000 Equity shares of SAW PIPES LTD.						
Sold on 20.6.91 @ Rs.103/- each 7,21,000				16,80,200		
Less : Cost during 86-87 @ Rs.10/- each 70,000	6,51,000	23,18,200		6,51,000	23,31,200	
Less: Long term capital loss due depreciation in the value of 1500 original share of JISCO as a result of right issue of PCDs after adjusting the profit realized on a/c of discussed above		NIL	NIL		2,43,680	
Less : Deduction u/s 48(2):					20,87,450	
On Rs.15000/- @ 100%						
On Rs.2303200/- @ 60% (B)	15,000			15,000		
Net Income under the head "capital gains" (A) + (B)	1,381,920	13,96,920	9,21,280 6,77,530 ======	12,43,470	12,58,470	8,28,980 8,28,980 ======

the net income at Rs.8,28,980/- as against the figure of Rs.6,77,530/- worked out by the assessee. The above analysis shows the controversy between the parties. Assessee treats Rs.2,43,750/- as a short-term loss, and, therefore, he applies the standard deduction under Section 48(2) to the long-term gain of Rs.23,18,200/- from sale of shares of JSL and SPL, whereas the Assessing Officer applies Section 48(2) deduction to the figure of Rs.20,87,450/- which is arrived at on the basis that the loss suffered by the assessee of Rs.2,43,680/- was a long- term loss.

14. As stated above, we have opined that the loss suffered by the assessee amounting to Rs.2,43,750/- was a short-term loss. Therefore, in our view, the computation of income under the head "Capital gains", as projected in the chart submitted by the assessee and as computed by the assessee is correct. In other words, the computation of income under the head "Capital gains" submitted to this Court by the assessee is correct and the computation of income made by the Department is erroneous.

Accordingly, civil appeals filed by the assessees stand allowed with no order as to costs.

R.P. Appeals allowed.

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B

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A

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