ABBAS AHMAD CHOUDHARY
v.
STATE OF ASSAM
(Criminal Appeal No. 951 of 2004)

NOVEMBER 25, 2009

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860:

ss. 376/34 and 336/34 – Evidence of prosecutrix – Out of three accused two convicted and sentenced as the third remained absconding – Appeal of convicts dismissed by High Court – HELD: In a matter of rape, though statement of prosecutrix must be given primary consideration, but at the same time the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully – Prosecutrix in her earlier statement has not attributed the offences of rape and kidnapping to one of the appellants – Therefore, in the light of contradictions, some doubt is created with regard to his involvement – He is accordingly acquitted – As regards the other appellant, statements of the prosecutrix and other witnesses are categoric – Prosecutrix clearly stated that she had been kidnapped and raped by this accused and the absconding accused – His appeal is, therefore, dismissed – Evidence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.951 of 2004.

From the Judgment & Order dated 26.3.2004 of the High Court of Gauhati in Criminal Appeal No. 199 of 2003.

WITH

Crl. A. No. 477 of 2005.

* Judgment Recd. on 10.2.2010

Shakeel Ahmed, Surya Kant and Ng. Jr. Luwang (for Corporate Law Group) for the appearing parties.

The following Order of the Court was delivered

ORDER

1. These two appeals by way of special leave arise out of the judgment of the High Court of Gauhati dated 26th March, 2004 whereby the two appellants have been convicted and sentenced to various terms of imprisonment and fine for offences punishable under Sections 376/34 and 336/34 of the Indian Penal Code.

2. The facts of the case are as under:-

2.1. At about 8:00p.m., on the 15th September, 1997, the accused-appellants Md. Mizazul Haq and Abbas Ahmad Choudhury and one Ranju Das (absconder) took up the prosecutrix and drove her in a Maruti vehicle to the Jalalpur Tea Estate after gagging her mouth. She was also raped by the three of them whereas the absconder also removed a sum of Rs. 40/- from her. An FIR was lodged at 10:30a.m. on 16th September, 1997, by P.W. 7 Safaruddin, the maternal uncle of the victim and a case was duly registered. On the completion of the investigation the appellants were charged fro the aforementioned offences and as they denied the charges, they were brought to trial. The trial court relying on the evidence of P.W. 6 prosecutrix as also the medical evidence of P.W. 8 and the statements of P.W. 5 - Constable Ranjit Dutta who had apprehended the appellants and the prosecutrix on the evening of 15th September, 1997 and taken them to the police station as also the Investigating Officer Dhiresh Chadnra Nath - P.W. 9 convicted the appellants as already indicated above. The argument raised on behalf of the appellants that the prosecutrix was about 16 years of age was repelled on the basis of the statement of P.W. 8 - Dr. Homeshwar Sharma who deposed that she was between 13 and 15 years of age on the date of her medical examination i.e. 17th September, 1997. The additional fact urged on behalf of the appellants that the medical examination had not revealed any trace of recent sexual inter course to corroborate the allegation of rape was also repelled by observing that the said medical examination had been carried out after 48 hours or so of the rape and the signs thereof would have disappeared by the passage of time. The matter was thereafter taken in appeal before the High Court by the two appellants. The appeal too was dismissed as indicated above. It is in this situation that the matter is before us.

3. We have heard Mr. Shakeel Ahmed for the appellant - Abbas Ahmad Choudhary and Mr. Surya Kant, the learned Amicus Curiae for the co-accused Md. Mizazul Haq. We are of the opinion that the statements of the prosecutrix - P.W. 6, the constable - P.W. 5 and the Investigating Officer - P.W. 9 are categoric insofar as the presence of Md. Mizazul Haq is concerned. Even in her statement recorded under Section 164 of the Cr.P.C. by the Magistrate on 17th September, 1997, the prosecutrix had clearly stated that she had been kidnapped and then raped by Md. Mizazul Haq and the absconding accused Ranju Das, and it was while they were returning to the village from Jalalpur Tea Estate that they had been joined by Abbas Ahmad Choudhary and he had merely held her hand while she was raped second time as well by the other two.

4. Mr. Surya Kant's argument is that the prosecutrix had changed her story time and again and had substantially made her statement in Court which belied her truthfulness is not acceptable for the reason that as far as Mizazul Haq, appellant, is concerned she had been consistent in her statements that he along with Ranju Das had raped her. Equally, we are of the opinion that in the light of the fact that the prosecutrix was 13-15 years of age at the time of the incident, the consent, if any, can be inferred from the circumstances, would become meaningless.

5. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first

be borne in mind that in hery statement recorded on 17th September, 1997, the prosecutrix had not attributed any rape to Abbas Ahmad Choudhary. Likewise, she had stated that he was not one of those who kidnapped her and taken to Jalalpur Tea Estate and on the other hand she categorically stated that while she along with Mizazul Haq and Ranju Das were returning to the village that he had joined them somewhere along the way but had still not committed rape on her. It is true that in her statement in court she has attributed rape to Abbas Ahmad Choudhary as well, but in the light of the aforesaid contradictions some doubt is created with regard to his involvement. Some corraboration of rape could have been found if Abbas Ahmad Choudhary too had been apprehended and taken to the police station by P.W. 5 -Ranjit Dutta the Constable. The Constable, however, made a statement which was corraborated by the Investigating Officer that only two of the appellants Ranju Das and Md. Mizalul Haq along with the prosecutrix had been brought to the police station as Abbas Ahmad Choudhary had run away while en route to the police station. Resultantly, an inference can be rightly drawn that Abbas Ahmad Choudhary was perhaps not in the car when the complainant and two of the appellants had been apprehended by Constable Ranjit Dutta. We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.

6. The appeal filed by Abbas Ahmad Choudhary is allowed. We order his acquittal. The appeal filed by Mizazul Haq is dismissed.

R.P. Appeals disposed of.

MOHD. LAIQUIDDIN AND ANR.
v.
KAMALA DEVI MISRA (DEAD) BY LRS. AND ORS.
(Civil Appeal Nos. 6933-34 of 2002)

JANUARY 5, 2010

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

Indian Partnership Act, 1932:

ss.42 and 4 – Deemed dissolution of firm – Two partners – Death of one partner – LRs of deceased partner not interested in continuing the firm or in constituting a fresh firm – Effect of – Held: Since there were only two partners constituting the partnership firm, on death of one of them, there was deemed dissolution of the firm, despite existence of a clause in the partnership deed which said otherwise – A partnership is a contract between partners – There cannot be any contract unilaterally without acceptance by the other partner – LRs of the deceased partner could not be asked to continue the partnership, as there was no legal obligation upon them to do so, as partnership is not a matter of heritable status but purely one of contract, which is also clear from definition of partnership under s.4.

ss.14 and 48 – Property of firm – Partnership firm, constituted for construction of a cinema theatre, consisted of two partners – While the first partner offered her land for construction of cinema theatre, the second partner constructed cinema theatre and other allied constructions by procuring funds – Deemed dissolution of the firm in view of death of the first partner – Distribution of residual property amongst the partners – Held: On facts, there was no intention from either partner to treat the land, building, structures etc. as properties of the firm – As the partnership got dissolved on death of a partner, it would be reasonable to allow both the

parties to take their respective properties – First partner entitled to exclusive possession of the land while second partner entitled to take away the movables and recover the value of buildings and structure embedded to the land.

Appeal – Second appeal – New plea – Question of law, based on pleadings and evidence on record, not raised before lower courts – Held: Such question of law can be permitted for the first time before the High Court.

Constitution of India, 1950 – Article 136 – Powers under – Not to be exercised, until grave injustice is shown to be caused to the aggrieved party by way of the impugned order.

The partnership firm in question, constituted for construction of a cinema theatre, consisted of two partners. One of the partners filed suit for dissolution of the partnership firm alleging that the other partner mismanaged the business of the firm, manipulated the account books and stopped payment of the minimum guarantee profit, as envisaged under the partnership deed, to the plaintiff-partner.

In terms of the partnership deed, the plaintiff-partner offered her land for construction of the cinema theatre, while the defendant-partner constructed the cinema theatre and other allied constructions by procuring necessary funds.

During pendency of the suit, the plaintiff-partner died and her legal representatives, i.e. the appellants, were brought on record. The trial court held that there was deemed dissolution of the partnership firm due to death of the plaintiff-partner, and since the appellants were not agreeable to enter into partnership with the defendant-partner, they were entitled for rendition of accounts and to be handed over the entire cinema theatre with allied structures as per the deed of partnership. Meanwhile the

defendant-partner also died, and his legal representatives, i.e. the respondents were brought on record before the First Appellate Court, which confirmed the decree passed by the trial court.

The respondents filed appeal before the High Court, which also held that the partnership firm stood dissolved on account of death of one of the partners, but permitted the respondents to take away the movables from the cinema theatre and recover the value of the building and structures embedded to the land. On a combined reading of the terms of the partnership deed, the High Court held that the land and the cinema were not the properties of the firm but were properties of the respective parties, and thus the appellants were entitled to exclusive possession of the land and the respondents were entitled to take away the projectors and other machineries, the furnitures and all other items, which can be safely removed from their place and that the appellants should pay the respondents the value of the remaining portions of the structures which could not be removed without any damage, after proper valuation of the same.

In appeal to this Court, the questions which arose for consideration were: 1) whether the High Court erred in permitting the respondents in raising a question for the first time in second appeal, which was not in the pleadings before the Trial Court or the First Appellate Court; 2) whether the High Court erred in holding that there had been dissolution of the partnership firm on account of death of a partner and 3) whether the High Court also erred in permitting the Respondents to remove the movables from the cinema theatre.

Dismissing the appeals, the Court

HELD: 1. The contention that the High Court erred

in permitting the respondents to raise a new plea for the first time in the second appeal has no substance. The new plea which was allegedly raised before the High Court for the first time was that all assets of the firm including the land and building is to be dealt with under Section 48 of the Partnership Act, 1932 and the proceeds is to be disbursed to the two partners in accordance with the respective shares as per the partnership deed. The High Court had dismissed this plea. The Respondents did not appeal against the said finding of the High Court. That apart, when a question of law is raised on the basis of the pleadings and evidence on record which might not have been raised before the courts below, it is difficult to hold that such question of law cannot be permitted for the first time before the High Court. Therefore, one fails to see how the Appellants are aggrieved by this finding of the High Court even assuming the High Court had formulated a new question of law, which was not raised before the Courts below. There is thus no scope for exercise of powers by this Court under Article 136 of the Constitution. [Paras 17 and 19] [889-G-H; 890-A-C; 891-A-B]

Santakumari & Ors. v. Lakshmi Amma Janaki Amma (D) By Lrs. & Ors. **(2000) 7 SCC 60, relied on.**

Hardayal Gir v. Sohna Ram **1970 (3) SCC 635 and** *Chandra Singh v. State of Rajasthan* **(2003) 6 SCC 545, referred to.**

2.1. Dissolution of a partnership firm on account of death of one of the partners is subject to the contract entered into by the parties. Though Clause 22 of the Partnership deed herein reads that "the partnership deed shall be in force for a period of 42 years certain from this date and the death of any partner shall not have the effect of dissolving the firm", this clause clearly states that death of any partner shall not have the effect of

dissolving the firm. However, in the facts and circumstances of the case, absolute effect to this clause cannot be given. [Paras 22 and 23] [892-A-D]

2.2. When there are only two partners constituting the partnership firm, on the death of one of them, the firm is deemed to be dissolved despite the existence of a clause which says otherwise. A partnership is a contract between the partners. There cannot be any contract unilaterally without the acceptance by the other partner. The appellants, the legal representatives of the deceased partner were not at all interested in continuing the firm or constitute a fresh firm and they cannot be asked to continue the partnership, as there is no legal obligation upon them to do so as partnership is not a matter of heritable status but purely one of contract, which is also clear from the definition of partnership under Section 4 of the Partnership Act, 1932. Therefore, the trial court was justified in holding that the firm dissolved by virtue of death of one of the partners and the first appellate court as well as the High Court have taken the correct view in upholding the same. [Para 26] [893-D-F]

Smt. S. Parvathammal v. CIT **1987 Income Tax Reports 161, approved.**

3. As to the issue related to removing the movables from the Cinema and allowing the Respondents to recover the value of the building and structures embedded to the land, from the appellants, it is true that there was no intention from either of the parties to treat these properties as the properties of the firm. A careful perusal of Clause 24 of the Partnership Deed clearly indicates that the land as well as the building with the fixtures etc., to be vested with the plaintiff-partner (since deceased), after the expiry of term of 42 years. It is also true that directing the delivery of the entire property to the

appellants would cause prejudice to the rights of the Respondents and would put him to loss. As the partnership got dissolved on the death of the plaintiff-partner, it would be reasonable to allow both the parties to take their respective properties. The appellants are entitled to the exclusive possession of the land and the respondents are entitled to take away the movables from the property and recover the value of the buildings and structure embedded to the land. It has to be assessed by the technically qualified person. The appellants are liable to pay the value of the remaining structures after adjusting the amount if any due to the appellants. [Paras 27 and 41] [893-G; 897-H; 898-A-D]

Arjun Kanoji Tankar v. Santaram Kanoji Tankar **(1969) 3 SCC 555;** *Arm Group Enterprises Ltd. v. Waldorf Restaurant* **(2003) 6 SCC 432;** *Commissioner of Income Tax, Madhya Pradesh v. Dewas Cine Corporation* **(1968) 2 SCR 173;** *Narayanappa v. Krishtappa* **(1966) 3 SCR 400;** *Malabar Fisheries Co. Calicut v. CIT* **(1979) 4 SCC 766 and** *S.V. Chandra Pandian v. S.V. Sivalinga Nadar* **(1993) 1 SCC 589, referred to.**

Mills v. Clarke **1953 (1) AER 779, referred to.**

Halsbury's Law of England, **4th Edition, referred to.**

Case Law Reference:

AIR 1978 AP 257	referred to	Para 4
1970 (3) SCC 635	referred to	Para 18
(2003) 6 SCC 545	referred to	Para 19
(2000) 7 SCC 60	relied on	Para 19
1987 ITR 161	approved	Para 25
(1969) 3 SCC 555	referred to	Para 31

(2003) 6 SCC 432	**referred to**	**Para 32**
1953 (1) AER 779	**referred to**	**Para 34**
(1968) 2 SCR 173	**referred to**	**Para 36**
(1966) 3 SCR 400	**referred to**	**Para 38**
(1979) 4 SCC 766	**referred to**	**Para 39**
(1993) 1 SCC 589	**referred to**	**Para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.6933-6934 of 2002.

From the Judgment & Order dated 9.4.2002 of the High Court of Judicature, Andhra Pradesh at Hyderabad in A.S. Nos. 1048 & 1050 of 2001.

WITH

C.A. Nos. 4411-4412 of 2002.

Dr. K. Parasaran, Rakesh Dwivedi, R.F. Nariman, A.D.N. Rao, A. Subba Rao, Roy Abraham, Kishore Rai, Seema Jain, Anant Prakash, Shantanu Krishna, Mukti Choudhary, Preetika Dwivedi, Rahul Dua, Himinder Lal for the appearing parties.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. These four appeals are directed against the judgment and order dated 9th of April, 2002 passed in second appeal Nos. 1048 & 1050 of 2001 of the High Court of Andhra Pradesh at Hyderabad, by which the High Court had partly allowed the appeals and modified the order dated 17th of October, 2001 of the First Appellate Court, which affirmed the order of the Trial Court decreeing the suit for dissolution of partnership firm and other relief filed by the appellants who are appellants in C.A.Nos.6933-34 of 2002.

2. It may be mentioned that during the pendency of the suit,

the original plaintiff died and her legal representatives were substituted as plaintiffs before the trial court. The original defendant also died before the filing of the first appeal, and his legal representatives were brought on record as Appellant Nos. 2 to 6 before the first Appellate Court. For the sake of convenience, the Plaintiffs would be referred to as the 'Appellants' and the Defendants would be referred to as 'the Respondents'.

3. The case made out by the original plaintiff (since deceased) in her plaint was as follows:

Shri Jai Narayan Mishra, original defendant (since deceased) made a proposal to constitute a firm for construction of a cinema theatre on the land of the original plaintiff (since deceased) and on acceptance of the said proposal by her, they executed a deed of partnership dated 26th of June, 1977. Clause 4 of the partnership deed envisaged that the plaintiff's share in the profits would be 2 annas in a rupee. The original plaintiff (since deceased) was receiving Rs. 2,000/- per month from the original defendant (since deceased) in pursuance of Clause 13, which guaranteed that the minimum profit of Rs. 2,000/- per month would be paid to her. The defendant never disclosed to the plaintiff as to what amount was due to her on settling the annual accounts of the firm. The defendant never furnished the statement of accounts to the plaintiff. He never disclosed the amount of profit payable to her towards her two anna share in the business. The defendant mismanaged the business of the firm and manipulated the account books. There was mutual irretrievable distrust between the plaintiff and the defendant and hence it was impossible to get along with the defendant in the business of the firm. The defendant stopped payment of the minimum guarantee profit to the plaintiff with a motive to strain her financial resources. The gravity of distrust assumed such proportions that the plaintiff could not continue as a partner in the firm. The defendant is also guilty of non-furnishing of annual accounts to the plaintiff and hence the suit.

The original defendant (since deceased) entered appearance and contested the suit by filing a written statement. In the written statement, it was, inter alia, alleged as follows:-

> "The value of the land given by the plaintiff for construction of the cinema theatre was only Rs. 70/- per sq.yard in the year 1977. The defendant invested more than Rs. 25 lakhs for the construction of the theatre. He has been maintaining accounts day-to-day in respect of the business of cinema-theatre and no transaction relating to the said business had been concealed from the plaintiff. An extent of 1000 sq.yds. had been acquired by the Government for widening the road out of the total extent of 6808 sq. mts. of the site given by the plaintiff for construction of the cinema theatre and only the remaining land was available for the business of cinema-theatre. The duration of the partnership as per Clause 2 of the partnership deed was 42 years but subsequently it was agreed to give option to the defendant for another period of 20 years. The terms and conditions of the partnership deed were onerous to the defendant. Irrespective of whether the business made profit or not the plaintiff was guaranteed a minimum income of Rs. 2,000/- per month whereas the plaintiff suffered no loss on account of the business running losses. The defendant had been maintaining regular accounts of the firm and after the scrutiny and approval of the plaintiff those accounts were submitted to the Income Tax Department. At the instance of the second son and the General Power of Attorney (GPA) holder of the plaintiff, the defendant stopped payment of minimum profit of Rs. 2,000/-per month to the plaintiff till the clearance of the amount due to Income Tax Department. The defendant had always been ready and willing to pay the amount due to the plaintiff as and when the plaintiff obtained clearance from the Income Tax Department. The plaintiff never whispered any doubt about the correctness of the accounts. The Plaintiff No.2 who is the GPA holder of the original plaintiff (since deceased) had been acting in a highly irresponsible manner detrimental to the interest of the parties. The alleged gravity of distrust is a result of the willful actions on part of the G.P.A holder of the plaintiff who sought to take advantage of the deteriorating mental and physical condition of the plaintiff. The plaintiff had not issued any notice alleging any contravention of the terms and conditions of the partnership deed and the business was made for a specific period subject to the option of the defendant. The present suit was frivolous and misconceived and therefore was liable to be dismissed with costs."

4. By the judgment and order dated 18th of January, 1999, the VIIth Senior Civil Judge, City Civil Court, Hyderabad, decreed the suit and passed a preliminary decree of dissolution and for rendition of accounts. The defendant was further directed to hand over the entire property with allied structure and other materials to the plaintiff.

The trial court framed the following issues for trial:

(a) Whether the plaintiffs are entitled for dissolution of the partnership firm as prayed for?

(b) To what relief ?

5. After examining the oral and documentary evidence adduced by both the parties, and after verifying the relevant provisions of the Partnership Act the Trial Court, inter alia, arrived at the following findings:

"The Partnership firm stood dissolved by the death of the original plaintiff (since deceased) on 17th of May, 1996. Since there was no mutual confidence between the parties and as there had been severe disputes since 1988, carrying on the business of the firm became practically impossible. It was further held that since the legal representatives of the original plaintiff (since deceased), the appellants before us, were not agreeable to enter into partnership with the defendant and in view of the dissolution of the partnership due to the death of the original plaintiff, the necessary consequence was rendering of accounts and complying with the other terms of the partnership deed. It was ultimately held that there was deemed dissolution of the partnership firm with effect from 17th of May, 1996 due to the death of the original plaintiff (since deceased) and consequently the appellants, her legal representatives, were entitled for rendition of accounts and to be handed over the entire cinema theatre with allied structures as per Clause 24 of the deed of partnership within three months from the date of the judgment. But the Trial Court recorded a finding that there was no mismanagement by the defendant as alleged in the plaint."

6. As noted herein earlier, after the suit was decreed and before an appeal was preferred from the same, the defendant in the said suit died and his legal representatives were brought on record before the First Appellate Court.

7. Feeling aggrieved by the order of the VIIth Senior Civil Judge, City Civil Court, Hyderabad, the respondents, the legal representatives of the defendant, preferred an appeal before the XIIIth Addl. Chief Judge, (Fast Track Court), City Civil Court, Hyderabad. The appellants also filed cross objections praying that it should be held there was dissolution of the firm on account of mismanagement. The First Appellate Court, by an order dated 17th of October, 2001, dismissed the appeal confirming the judgment and decree of the trial court and allowed the cross objections filed by the Appellants. The issue framed by the First Appellate Court was as follows:

(a) Whether the plaintiffs are entitled for the dissolution of partnership firm?

8. The Appellate Court, on the question of dissolution of the partnership firm, concurred with the findings of the Trial Court, holding that since there were only two partners in the

partnership firm and as one of the partner died there was no scope and possibility to continue the partnership firm. The appellate court further held that the Respondents could not rely upon clause 24 of the Partnership Deed which stipulated that after the expiry of 42 years the land as well as the building with the fixtures etc., would be vested with the original plaintiff (since deceased).

9. On the question of mismanagement of the accounts of the firm, the Appellate Court had allowed the cross objections preferred by the appellants. The respondents did not disclose the accounts and they were ignorant of the amounts and the profits to which appellants were entitled to. The respondents also did not produce the corresponding ledger and cash books. In the light of these findings it was held that the management of the account was not proper.

10. Aggrieved by the order of the First Appellate Court dated 17th of October, 2001, the Respondents took an appeal before the High Court of Andhra Pradesh at Hyderabad. The High Court, by its judgment and order dated 9th of April, 2006, allowed the appeal in part and substantially modified the judgment and decree of the trial court.

11. The issues that were raised for consideration of the High Court were as follows:

(1) Whether the partnership firm stood dissolved by virtue of Section 42 (c) of the Indian Partnership Act on account of the death of the plaintiff No.1 ?

(2) Whether there was mismanagement of the business of the partnership firm by the defendant No.1 as he failed to maintain proper accounts?

(3) Whether the partnership can be treated as a license as contended by the defendant-appellants ?

(4) Whether the land given by the plaintiff No.1 and the

theatre constructed by the defendant No.1 was the properties of the firm liable to be shared as per the shares of the respective partners?

(5) Whether the Courts below were justified in directing delivery of the land along with the structures, machineries and equipments to the plaintiff on account of the dissolution of the partnership firm?

(6) Whether the plaintiff was entitled for rendition of accounts from the date of commencement of the firm till the date of dissolution?

12. The findings of the High Court as to these issues raised were as follows.

(1) As to the point of the dissolution of the firm, the respondents submitted that since the parties agreed that in spite of the death of any of the partners, the firms shall continue for 42 years irrespective of the death of the original plaintiff (since deceased) in respect of the partnership deed after examining the relevant provision of the Partnership Act, the Court concurred with the findings of the Trial Court and the First Appellate Court. To reach this conclusion, the High Court had placed reliance on the following decisions of this Court, namely, *CIT v. Suraj Bhan Omprakash,* [1986 ITR 833] and *Smt. S. Parvathammal v. CIT,* [1987 ITR 161].

(2) On the question of mismanagement of the firm, the High Court held that the First Appellate Court was right in holding that there was mismanagement on the grounds of (i) non production of the account books for the verification of the original plaintiff (since deceased); (ii) the non inclusion of the certain amounts received by way of income in the

accounts, (iii) the non submission of correct accounts to the income tax department and (iv) the failure of the original defendant(since deceased) apprising the original plaintiff(since deceased) about the profits and losses of the firm.

(3) The Respondents pleaded that in the event the court comes to a conclusion that the firm stood dissolved, the partnership deed was to be treated in the nature of license. The High Court held that the respondent could not deny their liability under the other terms of Partnership deed, at the same time, seeking benefit from the same. The respondents laid undue stress on Clause 20 of the partnership deed, which showed that the deed was one of partnership and that both parties had acted upon it. Once the issue of dissolution was already decided against him on the basis of Section 42 of the Act and also Clause 20, he could not urge the Court to construe the same as a license, since both these pleas were irreconcilable with each other.

(4) In relation to the question of property of the partnership firm, the Court examined Section 14 of the Partnership Act, 1932, the legal position and the terms of the contract between the parties. Section 14 defines what a property of the firm is. It is subject to the contract between the parties. According to this section, the property of the firm includes all properties and rights and interests in property originally brought into the stock of the firm or acquired by purchase or otherwise by or for the firm or for the purposes and in the course of the business of the firm and includes also the goodwill of the business. The general rule laid down in the section “subject to contract between the parties” makes it clear that the partners may agree between

themselves to change the general rule and such an agreement may be expressed or implied.

In the partnership deed, it was clearly mentioned that the "1st party" (original plaintiff) offered her land towards her two-anna share capital for the construction of cinema theatre and other allied constructions for running a cinema business. The "2nd party" (Original defendant) agreed to construct cinema theatre and other allied constructions by procuring the necessary funds. It was agreed that the 1st party would not be bound to contribute any amount towards such constructions. In the light of Section 14 of the Act and in the light of the decision of *Boda Narayana Murthy & Sons v. Valluri Venkata Suguna,* [AIR 1978 AP 257], the High Court held that the land and the cinema were not the properties of the firm and they were the properties of the respective parties.

(5) In relation to the question of directing delivery of the land along with the structures, machineries and equipments to the appellants on account of the dissolution of the partnership firm, the High Court came to a conclusion that the direction for delivery of the entire property to the Appellants would cause prejudice to the rights of the Respondents and would put them to loss. Since the partnership got dissolved on account of the death of the original plaintiff (since deceased), it would be just and reasonable if each party is directed to take their respective properties. But, in view of the embedding of the walls, the flooring, pillars etc., to the land of the original plaintiff (since deceased), it may not be possible for the Respondents to realize the value of the entire building. Further, the High Court held that the appellants were entitled to have

exclusive possession of the land and respondents were entitled to take away the projectors and the other machineries, the furnitures and all other items, which can be safely removed from their place and the Appellants should pay the Respondents the value of the remaining portions of the structures which could not be removed without any damage, after proper valuation of the same.

As the First Appellate court held that the management of the account of the firm was not proper, with which the High Court was also in agreement, the High Court noted that the amount, if any, due to the Appellants after rendition of the account of the firm shall be determined. It was observed that the trial court also asked for rendition of accounts on the dissolution of the firm.

(6) As for the rendition of accounts, the High Court concurred with the findings of the Courts below.

13. The High Court finally concluded that:

"The defendants are permitted to take away the machineries, the equipments, the furnitures and all other items including the material of the structure to the extent possible and deliver possession of the land with the remains of the structure which could not be removed on account of impossibility due to embedding of those structures to the land. The defendants are entitled to get the value of such remaining structures assessed through a qualified technical expert and are entitled to get the value of such structures from the plaintiffs after adjustment of the amount, if any, found due to the plaintiffs after finalisation of the accounts which are going to be rendered by them. If the amount due to the 1st plaintiff towards profit of the business to the extent of her share, is more than the value of the remaining structures, the plaintiffs are entitled to recover the same from the defendants."

14. Feeling aggrieved by the order of the High Court, the Appellants and Respondents filed the present special leave petitions, which on grant of leave, were heard in the presence of the learned counsel for the parties.

15. Before us the pivotal issues which were raised by the parties are as follows:

(a) Whether the High Court was justified in permitting the Respondents in raising a question for the first time in second appeal, which was not in the pleading before the Trial Court or the First Appellate Court?

(b) Whether the High Court was justified in holding that there had been dissolution of the partnership firm on account of death of a partner?

(c) Whether the High Court was justified in permitting the Respondents to remove the movables from the disputed property, contrary to the deed of partnership entered into between the original plaintiff and the original defendant?

16. We have heard the learned senior counsel for the parties and examined the impugned judgment and the materials on record.

17. As to the issue raised by the Appellants that the High Court was not justified in permitting the Respondents to raise a new plea for the first time in the second appeal, we may at the outset note that we do not find any substance in this contention raised by the learned counsel for the appellants. They contended that the High Court committed an error of law in considering a new ground of challenge without any plea or factual background neither before the Trial Court nor the first appellate court. The new plea which was allegedly raised

before the High Court for the first time was that all assets of the firm including the land and building shall be dealt with under Section 48 of the Act and the proceeds shall be disbursed to the two partners in accordance with the respective shares as per the partnership deed. The High Court as can be seen from the record had dismissed this plea. The Respondents have not appealed against the said finding of the High Court. That apart, when a question of law is raised on the basis of the pleadings and evidence on record which might not have been raised before the courts below, it is difficult to hold that such question of law cannot be permitted for the first time before the High Court. Therefore, we do not see how the Appellants are aggrieved by this finding of the High Court even assuming the High Court had formulated a new question of law, which was not raised before the Courts below.

18. In the case of *Hardayal Gir v. Sohna Ram,* [1970 (3) SCC 635], this Court had set aside the judgment of the High Court which allowed the plaintiff to raise a plea of misrepresentation, raised for the first time in the second appeal. In that case, however, the High Court held that the contract had become unenforceable on account of the plea of misrepresentation. Hence, the defendant in that case was indeed aggrieved as the High Court had allowed a plea which he could not have defended properly. In the case at hand, the plea in question, assuming it had been raised for the first time, had been rejected by the High Court, and there had been no appeal from the said finding.

19. The Respondents relied on the following decisions: *Chandra Singh v. State of Rajasthan* [(2003) 6 SCC 545], in which case this Court enunciated the principles governing the exercise of its jurisdiction under Article 136 of the Constitution of India; and *Santakumari & Ors. v. Lakshmi Amma Janaki Amma (D) By Lrs. & Ors.,* [(2000) 7 SCC 60] in which decision this Court, after examining the orders of the Courts below arrived at a conclusion that the Second Appellate Court had

not made out a new plea by merely interpreting the documents and by putting a form to the nature of transactions in question. In the light of our views expressed hereinabove on this issue, we do not find it necessary to further delve into this matter. Suffice it to say that as held in the case of *Santakumari* (supra), this Court would not exercise its powers under Article 136 of the Constitution, until grave injustice is shown to be caused to the party by way of the impugned order.

20. The sole issue raised by the Respondents in this appeal, who are the appellants in Appeal No. 4411-4412 /2002, is whether the finding of the Courts below that the Partnership firm stood dissolved on account of death of one of the partners was correct in the light of the express provisions of the Partnership Act, namely, Section 42 (c) of the same. Before we proceed to examine the correctness of this concurrent findings arrived at by the Courts below, it is necessary to examine the relevant provisions of the Partnership Act, 1923 and the relevant clauses of the partnership deed entered between the original plaintiff and the original defendant.

"Partnership" is defined under Section 4 of the Act which reads as under:

> *"Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all".*"

21. Section 42 of the Act reads as under:

> *"Dissolution on the happening of certain contingencies:— Subject to contract between the partners a firm is dissolved-*
>
> (a) if constituted for a fixed term, by the expiry of the term;
>
> (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

> (c) *by the death of a partner; and*
>
> (d) by the adjudication of a partner as an insolvent."

22. Dissolution of a partnership firm on account of death of one of the partners is subject to the contract entered into by the parties. In this context, it is pertinent to refer to the terms of the deed of partnership.

23. Clause 22 of the Partnership deed reads as follows:

> *"The partnership shall be in force for a period of 42 years certain from this date and the death of any partner shall not have the effect of dissolving the firm."*

This clause clearly states that death of any partner shall not have the effect of dissolving the firm. However, in the facts and circumstances of the case, we are not in a position to give absolute effect to this clause of the deed of partnership.

24. The learned counsel for the Respondents contended that since the parties agreed that in spite of the death of any of the partners, the firm shall continue for 42 years irrespective of the death of the original plaintiff (since deceased). They further, argued that it clearly contemplates that the legal representative of the partner, who dies, would be under a duty to enter into a fresh deed of partnership. The legal representatives were precluded from claiming benefits if they deny entering into a fresh partnership agreement.

25. In order to arrive at the conclusion that the partnership firm stood dissolved on account of death of one of the partners, the High Court had rightly placed reliance on *Smt. S. Parvathammal v. CIT* (1987 Income Tax Reports 161), wherein this Court held that in a firm consisting of two partners on account of death of one of the partners, the firm automatically dissolved and observed as follows:

> *"A partnership normally dissolves on the death of the*

partner unless there was an agreement in the original partnership deed. Even assuming that there was such an agreement in a partnership consisting of two partners on the death of one of them the partnership automatically comes to an end and there is no partnership which survives and into which a third party can be introduced. Hence on the death of S, the original partnership was dissolved. The subsequent taking in of the assessee as a partner was only as a result of entering into of a new partnership between R and the assessee. Partnership was not a matter of heritable status but purely one of contract."

26. In the light of aforementioned case, it is clear that when there are only two partners constituting the partnership firm, on the death of one of them, the firm is deemed to be dissolved despite the existence of a clause which says otherwise. A partnership is a contract between the partners. There cannot be any contract unilaterally without the acceptance by the other partner. The Appellants, the legal representatives of original plaintiff (since deceased) was not at all interested in continuing the firm or constitute a fresh firm and they cannot be asked to continue the partnership, as there is no legal obligation upon them to do so as partnership is not a matter of heritable status but purely one of contract, which is also clear from the definition of partnership under Section 4. Therefore, the trial court was justified in holding that the firm dissolved by virtue of death of one of the partners and the first appellate court as well as the High Court have taken the correct view in upholding the same.

27. As to the issue related to removing the movables from Anand Cinema and allowing the Respondents to recover the value of the building and structures embedded to the land, from the appellants, we should examine the relevant provision of the Act and the relevant clause of the partnership deed.

28. Section 14 of the Partnership Act talks about the property of the firm. It reads as follows:

"Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

29. In addition to this, it is necessary to examine the certain clauses of the Partnership deed, which were entered between the original plaintiff and the original defendants.

Clause 24 -

"The Party of the Second Part hereby declares, covenants and agrees that at the end of the period of forty two (42) years, this partnership shall automatically come to an end and thereafter the entire property, that is land, buildings, constructions, machineries, equipment, furniture, fixture, fittings etc., shall automatically vest in the party of the first part in "As is where is" condition. Neither party shall be entitled to remove any item or property except for replacement by the firm during the subsistence of this Partnership Firm"

30. The learned counsel for the Appellants contended that the High Court was in error in allowing the Respondents to remove the movables from Anand Cinema and in holding that they are entitled to the value of the building and structures embedded to the land, from the Appellants. Further, he argued that the High Court had concurrently found that the partnership is dissolved by operation of law and mismanagement by the Respondents and therefore by virtue of Clause 24 of the deed,

the Appellant was entitled to get the entire Anand cinema hall, which was admitted by the Respondent during his examination.

31. The learned counsel for the appellants on the question of the partnership property relied on various cases of this Court. In the case of *Arjun Kanoji Tankar v. Santaram Kanoji Tankar* [(1969) 3 SCC 555], this Court held that "the property belonging to a person, in the absence of an agreement to the contrary does not, on the person entering into a partnership with others, become the property of the partnership merely because it is used for the business for partnership. *It will become property of the partnership only if there is an agreement express or implied at the property was, under the agreement of partnership, to be treated as the property of the partnership."* [Emphasis supplied]

32. The same view has been reiterated in the case of *Arm Group Enterprises Ltd. v. Waldorf Restaurant,* [(2003) 6 SCC 432].

33. The learned counsel for the Appellant placed reliance on Halsbury's Law of England, to determine how to construe a partnership agreement. Paragraph 39 of the Halsbury's Law of England (4th Edition) states as follows:

> *"Partnership agreements, like any other agreements, will be construed according to normal canon of construction, so that a court will construe a partnership agreement in the light of partners objectives, and terms may be implied by the Court to give the agreement business efficacy."*

34. In the case of *Mills v. Clarke,* [1953 (1) AER 779] the defendant started the business of a photographer and then admitted the plaintiff- a successful freelance photographer as a partner. The leasehold premises, furniture and studio belonged to the defendant. It was intended to record the terms of partnership into a formal agreement, but no terms were ever settled, except that the partners were to share the profits equally.

On dissolution of the partnership it was held that no terms ought to be implied except such as were essential to business efficacy and that only consumable items of stock-in-trade were to be regarded as assets of the partnership, and the lease of the property, equipment and personal goodwill were to be treated as being the property of the partners who brought them into business.

35. The learned counsel for the Respondents contended that as per clauses 11 and 13 of the deed, the land, the building and the machinery became the property of the firm and the said property has to be treated as the property of the firm under Clause 21 and learned counsel for the respondents further submitted that as the plaintiff's share was only 2 anna as per clause 4, the value of the above properties of the firm shall be distributed in the ratio of 2:14 between them.

36. The learned counsel for the respondents relied on various cases of this court. In the case of *Commissioner of Income Tax, Madhya Pradesh v. Dewas Cine Corporation,* [(1968) 2 SCR 173], this Court held that "a partner may, it is true, in an action for dissolution insist that the assets of the partnership be realised by sale of its assets, but where in satisfaction of the claim of the partner to his share in the value of the residue determined on the footing of an actual or notional sale property is allotted, the property so allotted to him cannot be deemed in law to be sold to him.

37. Under the Partnership Act, 1932, property which is brought into the partnership by the partners when it is formed or which may be acquired in the course of the business becomes the property of the partnership and a partner is, subject to any special agreement between the partners, entitled upon dissolution to a share in the money representing the value of the property."

38. In the case of *Narayanappa v. Krishtappa,* [(1966) 3 SCR 400], the issue was whether on relinquishment of rights

by partners of an erstwhile partnership, there was a transfer of immovable property, which required to be registered to constitute a valid transfer. This Court observed:

> "No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own…His right is to obtain such profits, if any, as fall to his share from time to time and upon dissolution of the firm to share in the assets of the firm which remain after satisfying the liabilities set out in S.48. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property…The person who brought it in would, therefore, not be able to claim any exclusive right over any property which he has brought in, much less over any other partnership property."

39. This principle was reiterated in the case of *Malabar Fisheries Co. Calicut v. CIT,* [(1979) 4 SCC 766].

40. In the case of *S.V. Chandra Pandian v. S.V. Sivalinga Nadar* [(1993) 1 SCC 589], this Court held that:

> "In the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any, after the settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit… The mode of settlement of accounts set out in Section 48 clearly indicates that the partnership asset in its entirety must be converted into money from the pool disbursement has to be made…"

41. In the light of the argument advanced by the learned counsel for the parties, the relevant provisions of the Act and

the clauses of the deed, we do not find any infirmity in the reasoning given by the learned Judge of the High Court. It is true that there was no intention from either of the parties to treat these properties as the properties of the firm. A careful perusal of Clause 24 clearly indicates that the land as well as the building with the fixtures etc., to be vested with the original plaintiff (since deceased), after the expiry of term of 42 years. It is also true that directing the delivery of the entire property to the appellant would cause prejudice to the rights of the Respondents and would put him to loss. As noted hereinabove, the partnership got dissolved on the death of the original plaintiff (since deceased), it would be reasonable to allow both the parties to take their respective properties. The Appellants are entitled to the exclusive possession of the land and the Respondents are entitled to take away the movables from the property and recover the value of the buildings and structure embedded to the land. It has to be assessed by the technically qualified person. The Appellants are liable to pay the value of the remaining structures after adjusting the amount if any due to the Appellants.

42. Accordingly, we do not find any merit in these appeals and the appeals are thus dismissed. There will be no order as to costs.

B.B.B. Appeals dismissed.

ABDUL RAZAK (D) THROUGH LRS. AND ORS.
v.
MANGESH RAJARAM WAGLE AND ORS.
(Civil Appeal No. 55 of 2010)

JANUARY 07, 2010

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Code of Civil Procedure, 1908:

Or.6, r.16 – Additional written statement filed by appellants, the LRs of deceased defendant – Taken on record without any objection from plaintiffs-respondents – Respondents also did not object to framing of additional issues and led evidence in support of their case – Belated application filed by respondents for striking out additional written statement – Effect of – Held: The application of respondents was frivolous and not maintainable – Respondents filed application for striking out the additional written statement after a long time gap without any explanation – The application was filed by respondents after almost one year of completion of their evidence – In absence of any contrary evidence, it can be reasonably and legitimately presumed that respondents must have produced their evidence keeping in view the pleadings contained in the additional written statement.

Or.6, r.16 – Power of Court to strike out pleadings – When exercisable – Held: Such power can be exercised in either of the three eventualities i.e., where the pleadings are considered by the court unnecessary, scandalous, frivolous or vexatious; or where the court is satisfied that the pleadings tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise considered as an abuse of the court – Since striking out pleadings has serious adverse impact on the

rights of the concerned party, the power to do so has to be exercised with great care and circumspection.

Or.6, r.16 and Or.22, r.4 – Additional written statement filed by appellants, after their impleadment as LRs of deceased defendant – Plea of plaintiffs-respondents that the pleadings contained in the additional written statement were inconsistent with the defence set up by the predecessor-in-interest of appellants in the original written statement and the trial Court was duty bound to discard the same in view of Or.22, r.4 – Tenability of – Held: Not tenable – Claim made by the appellants was in no way inconsistent with or derogatory to the defence set up by their predecessor-in-interest – Once the additional written statement filed by appellants was taken on record without any objection by plaintiffs-respondents, who also led their evidence keeping in view the pleadings of the additional written statement, the High Court was not at all justified in allowing the application filed for striking off the additional written statement and that too without even adverting to Or.6, r.16 and without considering whether respondents were able to make out a case for exercise of power by the Court under that provision.

Constitution of India, 1950 – Articles 226 and 227 – Exercise of power under – Limitations of certiorari jurisdiction and supervisory jurisdiction – On facts, while deciding the writ petition filed by respondents and granting relief to them, the High Court erroneously did not keep in mind the guiding principles laid down for exercise of power under Articles 226 or 227 of the Constitution and adjudicated upon the writ petition, as if it was exercising appellate jurisdiction.

High Courts – Exercise of jurisdiction – High Courts to refrain from deciding writ petitions as if adjudicating appeals against orders of lower courts or other judicial/quasi judicial bodies/authorities.

Respondent nos.1 and 2 filed suit for declaration that

they were lawful tenants of the suit premises, and alternatively, for recovery of possession of the suit premises, which they alleged was forcibly occupied by respondent no.3. The premises in question is situated in the State of Goa.

Respondent no.3-defendant not only denied the averments contained in the plaint that he had illegally taken possession of the suit premises, but also pleaded that he was doing business of distribution of liquor in the suit premises on the basis of permission accorded by 'A', the other defendant, and further that the competent authority had granted him excise licence after being satisfied that the suit premises were suitable for doing business in liquor.

'A' filed a separate written statement stating that the predecessor-in-interest of respondent nos.1 and 2 had voluntarily surrendered the suit premises and thereafter, respondent no.3 occupied the same for conducting the business of distribution of liquor.

'A' died during the pendency of the suit. Thereupon, respondent nos.1 and 2 filed application for impleading A's widow (appellant no.1), son (appellant no.2) and three daughters (appellant nos. 3, 4 and 6) and two son-in-laws (appellant nos. 5 and 7) in place of 'A'. Appellant nos.3, 4 and 6 objected to the impleadment of appellant nos. 5 and 7, i.e. the son-in-laws on the ground that they were non-Goans and were not governed by personal law relating to properties in Goa. They also objected to the impleadment of appellant nos.1 and 3, i.e. the widow and son, on the ground that they themselves had become owners of the suit premises by virtue of the orders passed in the inventory proceedings initiated after the death of their grandparents. The trial court overruled all the objections raised by appellant nos. 3, 4 and 6 and

allowed the application of respondent nos. 1 and 2 by observing that joining of the widow, son and son-in-laws of the deceased will not prejudice the daughters i.e. the appellant nos. 3, 4 and 6 and they will be entitled to take defence suitable to their plea.

In furtherance of the observation made by the trial court, the appellants filed additional written statement, the sum and substance of which was that appellant nos.3, 4 and 6 had become owners of the suit property by virtue of the orders passed in the earlier inventory proceedings after the death of their grandparents. After filing of the additional written statement, the trial Court framed additional issues. Respondent nos.1 and 2 did not object to the taking on record of the additional written statement filed by the appellants or framing of the additional issues and led evidence. Thereafter, the appellants produced their evidence.

However, when the case was fixed for cross-examination of appellant no.3, respondent nos.1 and 2 filed application for striking off the additional written statement by asserting that the LRs of 'A' did not have right under the CPC to file such written statement and, in any case, they cannot be allowed to raise new plea about their title to the suit premises. Respondent nos.1 and 2 further pleaded that the additional written statement was liable to be struck off as before filing the same, the appellants did not seek leave of the court.

In their reply, the appellants pleaded that the additional written statement was filed with a view to bring on record the facts relating to the earlier inventory proceedings and the same cannot be struck off because the applicants had failed to make out a case for exercise of power by the court under Order VI, Rule 16 CPC.

The trial Court dismissed the application of respondent Nos. 1 and 2 by observing that leave of the Court will be presumed to have been granted because after the additional written statement was filed, respondent Nos. 1 and 2 had not objected to the same. As regards their plea that new or inconsistent case was sought to be set up by the appellants, the trial Court observed that this point can be considered at the time of deciding the case on merits. The trial Court then referred to Order VI Rule 16 and held that respondent Nos.1 and 2 had not been able to make out a case for striking off the additional written statement.

Respondent nos.1 and 2 filed writ petition, which the High Court allowed holding that the LRs of 'A' were not entitled to take a plea derogatory to the plea already taken; and that the trial Court was not justified in dismissing the application filed by respondent nos. 1 and 2 on the ground of delay, which could have been compensated by imposing cost.

In appeal to this Court, the questions which arose for consideration were - (i) What is the effect of delay in filing the application by respondent nos.1 and 2 for striking off the additional written statement (ii) Whether the High Court could pass an order for striking off the additional written statement despite the fact that respondent nos.1 and 2 failed to make out a case for exercise of power by the court under Order VI Rule 16 CPC and (iii) Whether the High Court was justified in setting aside the order of the trial Court without being satisfied that the same was vitiated by an error of jurisdiction or an error of law apparent on the face of the record and that such error resulted in substantial failure of justice.

Allowing the appeal, the Court

HELD:1. The additional written statement was filed

by the appellants and taken on record without any objection from respondent nos.1 and 2, who did not even seek leave of the court to file further pleadings in the light of the additional written statement. Also, it is clear that respondent nos.1 and 2 led evidence in support of their case and completed the same. In the absence of any contrary evidence, it can be reasonably and legitimately presumed that respondent nos.1 and 2 must have produced their evidence keeping in view the pleadings contained in the additional written statement. They filed application for striking out the additional written statement after a long time gap of three years and six months without explaining as to why they did not object to the taking on record of the additional written statement and framing of additional issues when it was filed and why they chose to lead evidence knowing fully well that after their impleadment as legal representatives of 'A', appellant Nos. 3, 4 and 6 had pleaded that they had become owners of the property by virtue of the orders passed in the inventory proceedings. The High Court casually brushed aside and rejected the plea of the appellants that the application filed by respondent nos.1 and 2 for striking off the additional written statement was highly belated and no explanation worth the name had been offered for the same by observing that the trial Court could have compensated them by imposing cost. The High Court should have seriously examined the issue of delay in the backdrop of the facts that respondent Nos. 1 and 2 did not object to the taking on record the additional written statement or framing of additional issues and led their evidence and further that the application was filed after almost one year of completion of their evidence. The observation made by the High Court that the proceedings of the suit will be delayed if the legal representatives of 'A' are allowed to take the plea based on their title is neither here nor there. It is true

that the suit filed by respondent Nos. 1 and 2 is pending for last about 17 years, but there is nothing on record to show that the appellants or their predecessors are responsible for the delay. The death of 'A' was not a predictable event, the happening of which could be averted by the parties or the court. In any case, the appellants cannot be blamed for the delay, if any, in the trial of the case. As a matter of fact, respondent Nos. 1 and 2 have delayed the proceedings for over two years by filing frivolous application for striking off the additional written statement. [Para 14] [914-G-H; 915-A-H; 916-A]

2.1. A reading of the plain language of Order VI Rule 16 CPC makes it clear that the court's power to strike out any pleading at any stage of the proceedings can be exercised in either of the three eventualities i.e., where the pleadings are considered by the court unnecessary, scandalous, frivolous or vexatious; or where the court is satisfied that the pleadings tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise considered as an abuse of the court. [Para 16] [916-E-F]

2.2. Normally, a court cannot direct or dictate the parties as to what should be their pleading and how they should prepare their pleadings. If the parties do not violate any statutory provision, they have the freedom to make appropriate averments and raise arguable issues. The court can strike off the pleadings only if it is satisfied that the same are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of the suit or the court is satisfied that suit is an abuse of the process of the court. Since striking off pleadings has serious adverse impact on the rights of the concerned party, the power to do so has to be exercised with great care and circumspection. [Para 17] [916-G-H; 917-A]

2.3. In the present case, the trial Court did make a reference to the provisions of Order VI Rule 16 and held that the application made by respondent Nos. 1 and 2 does not fall in either clauses of Rule 16. The High Court did not even bother to notice Order VI Rule 16 what to say of considering its applicability to the pleadings contained in the additional written statement and granted the prayer of respondent Nos. 1 and 2 by assuming that the plea raised by the appellants was inconsistent with the defence set up by their predecessor-in-interest. The High Court did not have the jurisdiction to direct striking off the additional written statement without being satisfied that respondent Nos. 1 and 2 were able to make out a case for exercise of power by the court under either of three clauses of Order VI Rule 16 CPC. [Para 19] [917-A; 918-A-C]

Sathi Vijay Kumar v. Tota Singh and others, **(2006) 13 SCC 353, relied on.**

Roop Lal Sathi v. Nachhattar Singh Gill, **(1982) 3 SCC 487;** *K.K.Modi v. K.N. Modi,* **(1998) 3 SCC 573 and** *Union Bank of India v. Naresh Kumar*, **(1996) 6 SCC 660, referred to.**

Knowles v. Roberts, **(1888) 38 Ch D 263, referred to.**

3.1. Although, from the record produced before this Court, it is not clear whether respondent Nos. 1 and 2 had filed writ petition under Article 226 of the Constitution or they invoked supervisory jurisdiction of the High Court under Article 227 of the Constitution, but a reading of the impugned order does not leave any manner of doubt that while granting relief to respondent Nos. 1 and 2, the High Court did not keep in mind the guiding principles laid down by this Court for exercise of power under Articles 226 or 227 of the Constitution. It seems that the High Court decided the matter by assuming that it was hearing

an appeal against the order of the trial Court. If this was not so, the High Court was duty bound to first consider whether it was called upon to exercise power under Article 226 of the Constitution or under Article 227 thereof. If respondent Nos. 1 and 2 had invoked the High Court's jurisdiction under Article 226, then the High Court ought to have considered whether the trial Court committed a jurisdictional error by refusing to strike off the additional written statement filed by the appellants or it was a case of failure on the part of the trial Court to exercise the power vested in it under Order VI Rule 16 CPC or the order under challenge was vitiated by an error of law apparent on the face of the record or there was violation of the rules of natural justice. In either case, the High Court was also required to consider whether there was substantial failure of justice or manifest injustice was caused to respondent Nos. 1 and 2 on account of the trial Court's refusal to strike off the additional written statement. [Para 20] [918-E-H; 919-A-C]

3.2. While deciding the writ petition filed by respondent Nos. 1 and 2, the High Court did not keep in mind the principles laid down by this Court and decided the same, as if it was exercising appellate jurisdiction of the High Court. It is hoped that in future the High Courts would keep in view the limitations of certiorari jurisdiction/ supervisory jurisdiction and refrain from deciding the writ petitions filed under Article 226 or petitions/applications filed under Article 227 of the Constitution as if they are adjudicating appeals filed against the orders of the lower courts or other judicial/quasi judicial bodies/authorities. [Para 21] [922-A-D]

3.3. The argument of respondent nos.1 and 2 that the pleadings contained in the additional written statement filed by appellants were inconsistent with and beyond the scope of the defence set up by 'A' in the original written statement and the trial Court was duty bound to discard

the same in view of the provision contained in Order 22 Rule 4 CPC is meritless and deserves to be rejected. In the plaint filed by them, respondent nos.1 and 2 did not make a mention of the inventory proceedings held after the death of the appellants' grandparents. There is nothing in the written statement of 'A' from which it can be inferred that he claimed ownership over the suit property. However, after the appellants were brought on record as legal representatives of late 'A', they filed additional written statement incorporating therein the plea that the suit property had become subject matter of inventory proceedings and the same was allotted to the daughters of 'A' i.e. appellant nos.3, 4 and 6. According to the appellants, 'A' was looking after the suit property because at the time of death of his parents, appellant Nos. 3, 4 and 6 were minor. Therefore, it cannot be said that the plea raised by the appellants is inconsistent with the averments contained in the original written statement by 'A'. The claim made by the appellants is in no way inconsistent with or derogatory to the defence set up by 'A'. In any case, once the additional written statement filed by the appellants was taken on record without any objection by respondent nos. 1 and 2, who also led their evidence keeping in view the pleadings of the additional written statement, the High Court was not at all justified in allowing the application filed for striking off the additional written statement and that too without even adverting to Order VI, Rule 16 CPC and considering whether respondent nos. 1 and 2 were able to make out a case for exercise of power by the Court under that provision. [Paras 22 and 26] [922-E-H; 923-A-D; 926-F-H; 927-A]

Syed Yakoob v. K.S. Radhakrishnan **AIR 1964 SC 477;** *Surya Dev Rai v. Ram Chander Rai* **(2003) 6 SCC 675 and** *J.C. Chatterjee v. Sri Kishan* **(1972) 2 SCC 461, relied on.**

Bal Kishan v. Om Parkash **(1986) 4 SCC 155 and** *Vidyawati v. Man Mohan* **(1995) 5 SCC 431, distinguished.**

Case Law Reference:

(2006) 13 SCC 353	**relied on**	**Para 18**
(1982) 3 SCC 487	**referred to**	**Para 18**
(1998) 3 SCC 573	**referred to**	**Para 18**
(1996) 6 SCC 660	**referred to**	**Para 18**
AIR 1964 SC 477	**relied on**	**Para 20**
(2003) 6 SCC 675	**relied on**	**Para 20**
(1972) 2 SCC 461	**relied on**	**Para 22**
(1986) 4 SCC 155	**distinguished**	**Para 22**
(1995) 5 SCC 431	**distinguished**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 55 of 2010.

From the Judgment & Order dated 1.2.2008 of the High Court of Bombay at Goa in Writ Petition No. 58 of 2008.

A. Sharan, Anis Suhrawardy, Shamama Anis, S. Mehdi Imam, Tabrez Ahmed for the Appellants.

Devatatt Kamat, Priyanka Telang, Rauf Rahim, Dinesh Kumar Garg, Abhishek Garg, Dhanjayan Garg for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. The appellants are aggrieved by the order of the learned Single Judge of the Bombay High Court, Goa Bench whereby he allowed the writ petition filed by respondent Nos. 1 and 2

and granted their prayer for striking off the additional written statement filed by the appellants after their impleadment as legal representatives of defendant No.2 – Abdul Razak.

3. Respondent Nos. 1 and 2 filed suit in the Court of Civil Judge (Senior Division), Panaji (hereinafter described as 'the trial Court') for declaring them as lawful tenants of suit premises and also for restraining the defendants – Suresh D. Naik (respondent No.3 herein) and Abdul Razak, who died during the pendency of the suit and is being represented by his legal representatives (appellants herein) to remove the lock allegedly put by respondent No.3 on the suit premises along with materials dumped there. An alternative prayer made by respondent Nos. 1 and 2 was for recovery of possession of suit premises in case it was held that they had already been dispossessed. The substance of the case set up by respondent Nos. 1 and 2 before the trial Court is that the suit premises were let out to their predecessor Shri Rajaram D. Wagle in 1951 by one Jussab Abdul Karim at a monthly rent of Rs.15/- which was subsequently increased to Rs.25/-; that the owner-cum-landlord sold the premises to Abdul Kadar Haji Jaffar (grandfather of appellant Nos.2, 3, 4 and 6); that Rajaram D. Wagle died on 29.4.1981 and after his death they have been using the suit premises for parking their cars; that on 5.1.1992, respondent No.3 broke open the lock of the suit premises and dumped his goods i.e., boxes of liquor bottles, but the same were removed by the police on a complaint made by respondent No.1 in that regard; that on 8.1.1992, respondent No. 3 again broke open the lock and forcibly occupied the suit premises and this time the police did not act on the complaint made by them.

4. In his written statement, respondent No.3 not only denied the averments contained in the plaint that he had illegally taken possession of the suit premises after breaking open the locks put by respondent Nos. 1 and 2, but also pleaded that after being forced to leave Kuwait in the wake of war, he came to India and is doing business of distribution of liquor in the suit

premises on the basis of permission accorded by defendant No.2 – Abdul Razak, who was a family friend. Respondent No.3 further pleaded that the competent authority granted him excise licence after being satisfied that the suit premises were suitable for doing business in liquor.

5. Abdul Razak (predecessor of the appellants) filed a separate written statement. He largely denied the averments contained in the plaint and pleaded that much before his death, Shri Rajaram D. Wagle had voluntarily surrendered the suit premises and thereafter, respondent No.3 was allowed to occupy the same for conducting business of distribution of liquor.

6. Abdul Razak died during the pendency of the suit. Thereupon, respondent Nos. 1 and 2 filed an application for impleading his widow (appellant No.1), son and three daughters (appellant Nos. 2, 3 4 and 6) and two son-in-laws (appellant Nos. 5 and 7) in place of the deceased. Appellant Nos. 3, 4 and 6 objected to the impleadment of the son-in-laws by stating that they are non-Goans and are not governed by personal law relating to properties in Goa. They also objected to the impleadment of appellant Nos. 1 and 3 i.e., the widow and son of the deceased on the ground that the suit premises had been allotted to them in the inventory proceedings.

7. By order dated 10.12.2003, the learned trial Court overruled all the objections raised by appellant Nos. 3, 4 and 6 and allowed the application of respondent Nos. 1 and 2 by observing that joining of the widow, son and son-in-laws of the deceased will not prejudice the daughters and they will be entitled to take defence suitable to their plea.

8. In furtherance of the observation made by the trial Court in the aforementioned order, the appellants filed additional written statement dated 3.3.2004, the sum and substance of which is that in the inventory proceedings No.80/1989/A held in the Court of Civil Judge (Senior Division) at Panaji after the

death of Abdul Kadar Haji Jaffar and his wife, the suit property was allotted to their grand-daughters (appellant Nos.3, 4 and 6) because other heirs did not object to this. The appellants pleaded that in the meeting held on 10.4.1990, members of the Family Council unanimously agreed for allotment of the properties and this was approved by the Court vide order dated 26.9.1990. A reference was also made to Special Civil Suit No. 89/99/B filed by appellant Nos. 3, 4 and 6 in the trial Court for grant of permanent injunction on the ground that respondent Nos. 1 and 2 had filed Execution Application No.15/98/A for being put in possession of the suit premises in execution of order dated 17.4.1997 passed in an application for temporary and mandatory injunction. According to the appellants, the trial Court allowed the execution application and the appeal and special leave petition filed by them were dismissed by the High Court and this Court respectively. In the additional written statement, it was also averred that son-in-laws of late Abdul Razak have no right, title or interest in the suit property and, therefore, they cannot be treated as his legal representatives. The impleadment of appellant No.2 was also questioned on the premise that he has no right in the suit property.

9. After filing of the additional written statement, the trial Court framed the following additional issues:

1. Whether the plaintiffs prove that defendants illegally damaged and destroyed the two ramps existing adjacent to the entrance of the suit premises?

2. Whether the plaintiffs prove that the suit filed by them for declaration of tenancy right is maintainable for want of the owners of the suit premises?

3. Whether the plaintiffs prove that Sajeeda Razak, Matheen I Saint, Mohammad Arif Razak Ajaz Ahmed are legal representatives of deceased defendant No.2 impleaded in the suit as defendants 2(i), 2(ii), 2(v) and 2(vii) respectively.

What relief? What order?

10. Respondent Nos. 1 and 2 did not object to the taking on record of the additional written statement filed by the appellants or framing of the additional issues and led evidence, the recording of which was completed during 2006. Thereafter, the appellants produced their evidence. When the case was fixed for cross-examination of appellant No.3, who is one of the witnesses cited by the appellants, respondent Nos. 1 and 2 filed application dated 9.10.2007 for striking off the additional written statement by asserting that the legal representatives of the deceased defendant No.2 do not have right under the Code of Civil Procedure (CPC) to file such written statement and, in any case, they cannot be allowed to raise new plea about their title to the suit premises. Respondent Nos. 1 and 2 further pleaded that the additional written statement is liable to be struck off because before filing the same, the appellants did not seek leave of the court. In their reply, the appellants pleaded that the additional written statement was filed with a view to bring on record the facts relating to the inventory proceedings and the same cannot be struck off because the applicants have failed to make out a case for exercise of power by the court under Order VI Rule 16 CPC.

11. The trial Court dismissed the application of respondent Nos. 1 and 2 by observing that leave of the Court will be presumed to have been granted because the additional written statement was filed on 3.3.2004 and respondent Nos. 1 and 2 had not objected to the same. As regards their plea that new or inconsistent case was sought to be set up by the appellants, the trial Court observed that this point can be considered at the time of deciding the case on merits. The trial Court then referred to Order VI Rule 16 and held that respondent Nos. 1 and 2 have not been able to make out a case for striking off the additional written statement.

12. Respondent Nos. 1 and 2 challenged the order of the trial Court in W.P. No. 58/2008. By the impugned order, the

learned Single Judge allowed the writ petition and held that the legal representatives of deceased defendant No.2 could have taken a plea which was appropriate to their character as legal representatives, but they were not entitled to take a plea derogatory to the plea already taken. The learned Single Judge further held that the trial Court was not justified in dismissing the application on the ground of delay, which could have been compensated by imposing cost.

13. We have heard learned counsel for the parties. Three questions which merit consideration by this Court are –

(i) What is the effect of delay in filing the application by respondent Nos. 1 and 2 for striking off the additional written statement?

(ii) Whether the High Court could pass an order for striking off the additional written statement despite the fact that respondent Nos. 1 and 2 failed to make out a case for exercise of power by the court under Order VI Rule 16 CPC?

(iii) Whether the High Court was justified in setting aside the order of the trial Court without being satisfied that the same was vitiated by an error of jurisdiction or an error of law apparent on the face of the record and that such error resulted in substantial failure of justice?

Re: (i):

14. Undisputedly, the additional written statement was filed on 3.3.2004 and the same was taken on record without any objection from respondent Nos. 1 and 2, who did not even seek leave of the court to file further pleadings in the light of the additional written statement. Although, the parties have not furnished details of the proceedings of the case for next about two years, this much is clear that respondent Nos.1 and 2 led evidence in support of their case and completed the same in

2006. In the absence of any contrary evidence, it can be reasonably and legitimately presumed that respondent Nos. 1 and 2 must have produced their evidence keeping in view the pleadings contained in the additional written statement. They filed application for striking out the additional written statement after a long time gap of three years and six months without explaining as to why they did not object to the taking on record of the additional written statement and framing of additional issues in 2004 and why they chose to lead evidence knowing fully well that after their impleadment as legal representatives of Abdul Razak, appellant Nos. 3, 4 and 6 had pleaded that they had become owners of the property by virtue of the orders passed in the inventory proceedings. The learned Single Judge casually brushed aside and rejected the plea of the appellants that the application filed by respondent Nos. 1 and 2 for striking off the additional written statement was highly belated and no explanation worth the name had been offered for the same by observing that the trial Court could have compensated them by imposing cost. In our view, the learned Single Judge should have seriously examined the issue of delay in the backdrop of the facts that respondent Nos. 1 and 2 did not object to the taking on record the additional written statement or framing of additional issues and led their evidence and further that the application was filed after almost one year of completion of their evidence. The observation made by the learned Single Judge that the proceedings of the suit will be delayed if the legal representatives of the deceased defendant are allowed to take the plea based on their title is neither here nor there. It is true that the suit filed by respondent Nos. 1 and 2 is pending for last about 17 years, but there is nothing on record to show that the appellants or their predecessors are responsible for the delay. The death of Abdul Razak was not a predictable event, the happening of which could be averted by the parties or the court. In any case, the appellants cannot be blamed for the delay, if any, in the trial of the case. As a matter of fact, respondent Nos. 1 and 2 have delayed the proceedings for over two years by filing frivolous application for striking off the

additional written statement which, as mentioned above, was taken on record in March, 2004.

<u>Re: (ii):</u>

15. Order VI Rule 16 CPC which empowers the Court to strike out the pleadings reads thus:

> "*Striking out pleadings.* – The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading—
>
> (a) which may be unnecessary, scandalous, frivolous or vexatious, or
>
> (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or
>
> (c) which is otherwise an abuse of the process of the court."

16. A reading of the plain language of the above reproduced provisions makes it clear that the court's power to strike out any pleading at any stage of the proceedings can be exercised in either of the three eventualities i.e., where the pleadings are considered by the court unnecessary, scandalous, frivolous or vexatious; or where the court is satisfied that the pleadings tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise considered as an abuse of the court.

17. Normally, a court cannot direct or dictate the parties as to what should be their pleading and how they should prepare their pleadings. If the parties do not violate any statutory provision, they have the freedom to make appropriate averments and raise arguable issues. The court can strike off the pleadings only if it is satisfied that the same are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of the suit or the court is satisfied that suit is an abuse of the process of the court.

Since the striking off pleadings has serious adverse impact on the rights of the concerned party, the power to do so has to be exercised with great care and circumspection. In *Knowles v. Roberts* (1888) 38 Ch D, 263, Boven, L.J. Observed:

> "It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right. It is a recognized principle that a defendant may claim *ex debito justitiae* to have the plaintiff's claim presented in an intelligible form, so that he may not be embarrassed in meeting it; and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery."

18. The above reproduced observations have been quoted with approval in *Sathi Vijay Kumar v. Tota Singh and others* (2006) 13 SCC 353. In that case, the order passed by the High Court deleting paragraphs 11, 12 and 13(a) from the election petition filed by the appellant was questioned before this Court on the ground that the case does not fall within the ambit of Order VI Rule 16. This Court first held that the provisions of Order VI Rule 16 CPC are applicable to election petitions. The Court then referred to the earlier judgments in *Roop Lal Sathi v. Nachhattar Singh Gill* (1982) 3 SCC 487, *K.K. Modi v. K.N. Modi* (1998) 3 SCC 573, *Union Bank of India v. Naresh Kumar* (1996) 6 SCC 660 and held that the power to strike out pleading is extraordinary in nature and must be exercised by the Court sparingly and with extreme care, caution and circumspection.

19. In this case, the learned trial Court did make a

reference to the provisions of Order VI Rule 16 and held that the application made by the plaintiffs (respondent Nos. 1 and 2 herein) does not fall in either clauses of Rule 16. The learned Single Judge of the High Court did not even bother to notice Order VI Rule 16 what to say of considering its applicability to the pleadings contained in the additional written statement and granted the prayer of respondent Nos. 1 and 2 by assuming that the plea raised by the appellants was inconsistent with the defence set up by their predecessor-in-interest. In our opinion, the learned Single Judge did not have the jurisdiction to direct striking off the additional written statement without being satisfied that respondent Nos. 1 and 2 were able to make out a case for exercise of power by the court under either of three clauses of Order VI Rule 16 CPC.

<u>Re: (iii) :</u>

20. Although, from the record produced before this Court it is not clear whether respondent Nos. 1 and 2 had filed writ petition under Article 226 of the Constitution of India or they had invoked supervisory jurisdiction of the High Court under Article 227 of the Constitution, but a reading of the impugned order does not leave any manner of doubt that while granting relief to respondent Nos. 1 and 2, the learned Single Judge did not keep in mind the guiding principles laid down by this Court for exercise of power under Articles 226 or 227 of the Constitution. It seems to us that the learned Single Judge decided the matter by assuming that he was hearing an appeal against the order of the trial Court. If this was not so, the learned Single Judge was duty bound to first consider whether he was called upon to exercise power under Article 226 of the Constitution of India or under Article 227 thereof. If respondent Nos. 1 and 2 had invoked the High Court's jurisdiction under Article 226, then the learned Single Judge ought to have considered whether the trial Court committed a jurisdictional error by refusing to strike off the additional written statement filed by the appellants or it was a case of failure on the part of the trial Court to exercise the

power vested in it under Order VI Rule 16 CPC or the order under challenge was vitiated by an error of law apparent on the face of the record or there was violation of the rules of natural justice. In either case, the learned Single Judge was also required to consider whether there has been substantial failure of justice or manifest injustice has been caused to respondent Nos. 1 and 2 on account of the trial Court's refusal to strike off the additional written statement. These are the parameters laid down by this Court in *Syed Yakoob v. K.S. Radhakrishnan* AIR 1964 SC 477. If the petition filed by respondent Nos. 1 and 2 was under Article 227 of the Constitution of India, then the learned Single Judge should have taken note of the often quoted judgment in *Surya Dev Rai v. Ram Chander Rai* (2003) 6 SCC 675, in which a two-Judge Bench, after threadbare analysis of Articles 226 or 227 of the Constitution and considering large number of judicial precedents on the subject, recorded the following conclusions:

> "(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.
>
> (2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.
>
> (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction — by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction — by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no

> procedure specified, and thereby occasioning failure of justice.
>
> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.
>
> (5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.
>
> (6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.
>
> (7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate

court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

21. We regretfully note that while deciding the writ petition filed by respondent Nos. 1 and 2, the learned Single Judge did not keep in mind the principles laid down by this Court in the aforementioned two judgments and decided the same as if he was exercising appellate jurisdiction of the High Court. There have been several other instances in which different High Courts have passed orders in exercise of power under Articles 226 or 227 of the Constitution of India disregarding the limitations identified and indicated by this Court in several decisions on the exercise of that power. We hope and trust that in future the High Courts would keep in view the limitations of certiorari jurisdiction/supervisory jurisdiction and refrain from deciding the writ petitions filed under Article 226 or petitions/applications filed under Article 227 of the Constitution as if they are adjudicating appeals filed against the orders of the lower courts or other judicial/quasi judicial bodies/authorities.

22. Before concluding, we deem it appropriate to consider the argument of the learned counsel for respondent Nos. 1 and 2 that the pleadings contained in the additional written statement filed by the appellants were inconsistent with and beyond the scope of the defence set up by Abdul Razak in the original written statement and the trial Court was duty bound to discard the same in view of the provision contained in Order 22 Rule 4 CPC and the judgments of this Court in *J.C. Chatterjee v. Sri Kishan* (1972) 2 SCC 461, *Bal Kishan v. Om Parkash* (1986) 4 SCC 155 and *Vidyawati v. Man Mohan* (1995) 5 SCC 431. In our opinion, the argument of the learned counsel is meritless and deserves to be rejected. In the plaint filed by them, respondent Nos. 1 and 2 did not make a mention of the inventory proceedings held after the death of Abdul Kadar Hazi Jaffar and his wife and order dated 26.9.1990 passed by the trial Court. In his written statement, Abdul Razak pleaded that before his death, the tenant Shri Rajaram D. Wagle had surrendered possession of the premises to him and that the plaintiffs had nothing to do with the suit premises. He further

pleaded that the suit premises were given to defendant No.2 for conducting business of distribution of liquor. There is nothing in the written statement of Abdul Razak from which it can be inferred that he has claimed ownership over the suit property. After they were brought on record as legal representatives of late Abdul Razak, the appellants filed additional written statement incorporating therein the plea that the suit property had become subject matter of inventory proceedings No.80/89/A and the same was allotted to the daughters of Abdul Razak i.e. appellant Nos.3, 4 and 6. The appellants also pleaded that in the meeting of the Family Council held on 10.4.1990, a unanimous decision was taken for allotment of the properties and the same was approved by the trial Court vide order dated 26.9.1990. According to the appellants, Abdul Razak was looking after the suit property because at the time of death of his parents, appellant Nos. 3, 4 and 6 were minor. Therefore, it cannot be said that the plea raised by the appellants is inconsistent with the averments contained in the original written statement by Abdul Razak. Order 22 Rule 4(1) and (2) CPC on which reliance has been placed by learned counsel for respondent Nos. 1 and 2 reads as under:

> "*4. Procedure in case of death of one of several defendants or of sole defendant.*—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."

23. In *J.C. Chatterjee's* case, this Court interpreted the

above reproduced provision and held:

> Under sub-clause (*ii*) of Rule 4 of Order 22 of the Civil Procedure Code any person so made a party as a legal representative of the deceased, respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title.

24. In *Bal Kishan's* case, the proposition laid down in *J.C. Chatterjee's* case was reiterated, but its width was limited by observing that the same would apply only to those cases where the Court hearing the case has jurisdiction to try the issues relating to independent title also. The facts of *Bal Kishan's* case were that respondent No. 1 therein filed a petition for eviction of the tenant by alleging that the latter had sublet the premises without his consent. During the pendency of the petition, the tenant Musadi Lal died. Thereupon, the appellant Bal Kishan filed an application for being brought on record as legal representative of the deceased. The Rent Controller allowed the application. Thereafter, the appellant filed additional written statement asserting therein that the premises in question being residential and commercial, the legal heir of the tenant could not be treated as a tenant as defined under Section 2(h) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 and that possession of such legal heir of the tenant would be that of a trespasser. He accordingly prayed for dismissal of the eviction petition. The Rent Controller rejected the appellant's plea and allowed the eviction petition by holding that Musadi

Lal had sublet the premises to Med Ram without his consent. The appeal and revision filed by the appellant were dismissed by the Appellate Authority and the High Court respectively. Before this Court, the appellant relied upon the ratio of *J.C. Chatterjee's* case and argued that he was entitled to raise an additional plea that the eviction petition was not maintainable. While rejecting this plea, this Court held:

> But in the instant case the appellant cannot claim the benefit of the above decision for two reasons. First, the appellant had not been brought on record as a respondent in the eviction petition in his personal capacity but had been brought on record only as the legal representative of Musadi Lal. Secondly, in the circumstances of this case, even if a prayer had been made to bring the appellant on record in his personal capacity, the Rent Controller could not have allowed the application and permitted him to raise the plea of independent title because such a plea would oust the jurisdiction of the Rent Controller to try the case itself. *The observations made in the Jagdish Chander Chatterjee case have to be confined to only those cases where the court hearing the case has jurisdiction to try the issues relating to independent title also.* The Rent Controller, who had no jurisdiction to pass the decree for possession against a trespasser could not have, therefore, impleaded the appellant as a respondent to the petition for eviction in his independent capacity.

(emphasis supplied)

25. In *Vidyawati's* case, this Court considered the question whether a person impleaded as a legal representative of the deceased defendant can independently claim title to and interest in the property under a will. It was contended by the appellant that claim of the original defendant and that of the legal representative are founded on the will executed by Champawati and the courts below were not right in refusing to

permit her to file additional written statement. While approving the view taken by the courts below, this Court observed "whether the petitioner has independent right, title and interest de hors the claim of the first defendant is a matter to be gone into at a later proceeding. It is true that when the petitioner was impleaded as a party-defendant, all rights under Order XXII Rule 4(2), and defences available to the deceased defendant became available to her. In addition, if the petitioner had any independent right, title or interest in the property, then she had to get herself impleaded in the suit as a party-defendant. Thereafter, she could resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. For taking this view, the Court relied upon the judgments in *J.C. Chatterjee's* case and *Bal Kishan's* case.

26. The judgments of *Bal Kishan's* case and *Vidyawati's* case are clearly distinguishable. In the first case, the earlier judgment in *J.C. Chatterjee's* case, which substantially supports the appellants was distinguished on the ground that the plea raised by the impleaded legal representative of the tenant was inconsistent with his defence and, if accepted, the same would result in ouster of the jurisdiction of the Rent Controller. In the second case also, the Court found that the plea raised by the appellant, who was impleaded as legal representative of the defendant that she had independent title under the will executed by Champawati was not in consonance with the plea taken by the original defendant. However, as discussed in the earlier part of the judgment, the claim made by the appellants is in no way inconsistent with or derogatory to the defence set up by Abdul Razak. In any case, once the additional written statement filed by the appellants was taken on record without any objection by respondent Nos. 1 and 2, who also led their evidence keeping in view the pleadings of the additional written statement, the High Court was not at all justified in allowing the application filed for striking off the additional written statement and that too without even adverting to Order VI Rule 16 CPC and considering whether respondent Nos. 1 and 2 were able to

make out a case for exercise of power by the court under that provision.

27. In the result, the appeal is allowed. The impugned order of the High Court is set aside and the one passed by the trial Court is restored. Respondent Nos. 1 and 2 shall pay cost of Rs.25,000/- to the appellants for burdening them with unnecessary litigation.

B.B.B. Appeal allowed.

STATE OF BIHAR & ORS.
v.
KALYANPUR CEMENTS LTD.
(Civil Appeal No. 5181 of 2002)

JANUARY 8, 2010

[TARUN CHATTERJEE AND SURINDER SINGH NIJJAR JJ.]

Industrial Policy, 1995 – Clauses 22(2)(i) and 24 – Sales tax exemption – Sick company – Assistance to the company for restructuring agreed by financial institutions, on the condition that it obtained sales tax exemption from State Government – Repeated assurance by State Government to issue sales tax exemption Notification – Writ petition seeking direction to issue the Notification – State first informed the High court that it would issue Notification after approval of proposal of Notification – Later informed the Court that State has decided not to grant sales tax incentives to sick companies – High Court quashed the decision of the State and directed it to issue the Notification – On appeal, Supreme Court by interim order directing the company to deposit an amount equivalent to sales tax payable by it in a Bank – The amount to be payable to the party which ultimately succeeded – State issuing the Notification – Failure of company to deposit the amount taking the plea that it was sick – Held: Denial of sales tax exemption is arbitrary – The State initially having given repeated assurances, was estopped from denying the grant of exemption at later stage – Company rightly invoked the doctrine of promissory estoppel – State cannot take advantage of its own lapses in implementing the Industrial Policy for denying the claim of the company – The decision making process culminating into orders denying grant of exemption is seriously flawed – However, the company, in view of its financial condition, cannot be permitted *to retain the amount collected from the customer on sale of its product – This would amount to unjust enrichment – Direction to release the amount deposited by the company pursuant to interim order of Supreme Court, to the State – Doctrine of Promissory estoppel – Unjust Enrichment.*

Administrative Law – Doctrine of promissory estoppel – Invokability of – Discussed.

Taxation – exemption of tax and refund of tax – Difference between.

Words and Phrases – 'Sick unit' – Meaning of, in the context of Industrial Policy, 1995.

Respondent-Company was declared as a sick unit, by the Board for Industrial and Financial Reconstruction. The company, in order to rehabilitate itself sought assistance from financial institutions for restructuring package. The proposal for financial assistance and restructuring was approved by various financial institutions subject to the condition that the company obtained a sales tax exemption for a period of 5 years from the State Government, in terms of Industrial Policy, 1995. The company applied for grant of sales tax exemption. Thereafter the matter remained pending for consideration by the State Government and financial institutions. In various meetings of the State, the Company and the financial institutions, categoric assurances were given by the State that necessary sales tax exemption Notification would be issued. However, no such Notification was issued.

The company filed a writ petition seeking direction to the State to issue necessary Notification. The State stated that it would be possible to issue the Notification after approval of proposal of Notification by the Chief

(Finance) Minister. Thereafter the State informed the Court that the State by order dated 6.1.2001 had decided not to grant any sales tax incentives to sick industrial units, and therefore the claim of the company was rejected. The company, therefore, amended the petition, challenging the decision dated 6.1.2001. The State in its further affidavit stated that the decision of the State was later considered by the Cabinet on 5.3.2001 and it was decided not to issue any Notification. High Court allowed the writ petition quashing the decisions dated 6.1.2001 and 5.3.2001. The Court directed the State to issue follow up Notification to give effect to the provisions of the Policy. Hence the present appeal.

Supreme Court by an interim order dated 18.11.2002 directed the respondent-company to deposit an amount equivalent to the sales tax payable by it as and when it became due, in an interest bearing account of a Bank; and that the amount so kept would be payable to the party which ultimately succeeded.

The State filed IA No. 3 of 2006, seeking stay of the judgment of High Court. It was stated in the application that the State issued the Notification in pursuance of order dated 18.11.2002, granting exemption for five years or till disposal of SLP. The respondent-company, however, informed the State that it was unable to comply with the directions because of its sickness. As the company failed to comply with the directions, prayer was made to recall the same.

Dismissing the appeal, and allowing the application, the Court

HELD: 1.1. In order to invoke the doctrine of promissory estoppel, it must be established that (a) a party must make an unequivocal promise or

representation by word or conduct to the other party (b) the representation was intended to create legal relations or affect the legal relationship, to arise in the future (c) a clear foundation has to be laid in the petition, with supporting documents (d) it has to be shown that the party invoking the doctrine has altered its position relying on the promise (e) it is possible for the Government to resile from its promise when public interest would be prejudiced if the Government were required to carry out the promise (f) the Court will not apply the doctrine in abstract. [Para 26] [956-B-E]

1.2. From the facts of the case, it is apparent that the State Government had been consistently giving assurances not only to the company but also to the financial institutions that the necessary sales tax exemption Notification will be issued. The company had laid a clear, sound and a positive foundation for invoking the doctrine of 'promissory estoppel'. The company as well as the financial institutions were entitled to rely upon the repeated assurances given by the State Government. [Paras 56 and 59] [969-C-D; 971-C]

1.3. Having made the statement before the High Court that it would be possible to issue necessary Notification after approval of the proposal by the Chief (Finance) Minister, the Government has resiled from the unequivocal representations in the decisions dated 06.01.2001 and 05.03.2001. Therefore, strong reliance was placed on clauses 22 and 24 of the Industrial Policy, 1995 and the doctrine of 'promissory estoppel' in support of the plea that the action of the State Government in issuing orders dated 06.01.2001 and 05.03.2001 are wholly arbitrary and unjust. [Para 61] [972-A-B]

1.4. The conclusion reached by the High Court that w*hen* *the State Government gives an assurance and*

undertaking, in form of a policy then in fact it allures person/industries to enter into the individual ventures, invest money on the assurances contained in the policy, it would not be justified on the part of the State Government to say later on that on a second thought they were withdrawing the policy and the benefits flowing from that policy, **is based on due consideration of the material placed before it. There is no reason to differ with the opinion expressed by the High Court. [Paras 62 and 63] [972-D-F; G]**

Mangalore Chemical and Fertilizer Ltd. vs. Deputy Commissioner of Commercial Taxes and Ors. **(1992) Suppl. 1 SCC 21;** *State of Punjab vs. Nestle India Ltd. and Anr.* **(2004) 6 SCC 465;** *Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector and ETIO and Ors.* **(2007) 5 SCC 447;** *MRF Ltd. Kottayam vs. Asstt.Commissioner (Assessment) Sales Tax and Ors.* **(2006) 8 SCC 702;** *Motilal Padampat Sugar Mills Co. Ltd. vs. State of UP* **(1979) 2 SCC 409, relied on.**

Kasinka Trading vs. Union of India **(1995) 1 SCC 274;** *STO vs. Shree Durga Oil Mills* **(1998) 1 SCC 572;** *Bakul Cashew Co. vs. STO* **(1986) 2 SCC 365;** *Sharma Transport vs. Govt. of A.P.* **(2002) 2 SCC 188;** *Shri Bakul Oil Industries vs. State of Gujarat* **(1987) 1 SCC;** *Motilal Padampat Sugar Mills Co. Ltd. vs. State of UP* **(1979) 2 SCC 409;** *DCM Ltd. vs. Union of India* **(1996) 5 SCC 468;** *Shrijee Sales Corpn. vs. Union of India* **(1997) 3 SCC 398;** *Pawan Alloys and Castings (P) Ltd. UPSEB* **(1997) 7 SCC 251***; Bannari Amma Sugars Ltd. vs. Commercial Tax Officer* **(2005) 1 SCC 625;** *Rom Industries Ltd. vs. State of J & K* **(2005) 7 SCC 348;** *State of Jharkhand vs. Ambay Cements* **(2005) 1 SCC 368;** *M.P. Mathur vs. DTC* **(2006) 13 SCC 706;** *Excise Commissioner vs. Ram Kumar* **(1976) 3 SCC 540, referred to.**

Central London Property Trust, Ltd. vs. High Trees House, Ltd. **(1956) 1 All ER 256, referred to.**

'Statutory Interpretation' by Francis Bennion **1984 edn. 683, referred to.**

2.1. In the present case, the claim of the Government is based on a change in policy advocated in the Chief Ministers' Conference. These Conferences have taken place before the affidavit is filed on 05.12.2001. Therefore, the High Court concluded that the Government has not been candid in disclosure of the reasons for passing the order dated 06.01.2001. The aforesaid decisions with regard to the discontinuance of the sales tax exemptions from 01.01.2000 could not have affected the rights of the company under the Industrial Policy, 1995. Necessary application was made to the Government seeking exemption on 21.11.1997. For more than 3 years, the Company and the financial institutions had been assured by the Government that the Notification will be issued forthwith. However, it was not issued. The action of the appellants is arbitrary and indefensible. [Para 68] [981-A-E]

2.2. A perusal of the aforesaid policy clearly shows that the Government was determined to take effective measures to render all possible assistance for amelioration of the continuing problem of industrial sickness in the State. It was viewed as a matter of great concern for the Government. Clause 22(2) deals with sickness in large and medium sectors. Under clause 22(2)(i) of Industrial Policy, 1995 a Committee headed by the Industrial Development Commissioner, was to recommend concessions and facilities which were considered necessary for revival of the potentially viable non-BIFR sick industrial units. The Company was, therefore, eligible under Clause 22(2)(ii). The Industrial Policy, 1995 did not envisage sickness in its strict terms as defined under the Sick Industrial Companies (Special Provisions) Act, 1985. The policy was of a wider application and included industrial sickness not only ***qua*** **BIFR companies but also in relation to non-BIFR potentially viable sick companies. [Para 70] [984-F-H; 985-A-B]**

2.3. The definition of 'sick unit' in Clause 6 of annexure to the Policy, makes it abundantly clear that the sickness of the company (SLEC) could also be decided by the State Level empowered Committee headed by the Chief Secretary. The exemption claim of the company was duly considered by the Committee constituted under Clause 22(2)(i). Its recommendations were duly placed before the SLEC under Clause 22(2)(ii). The recommendations were not implemented only because the Government failed to issue a Notification under Clause 24 of the Industrial Policy, 1995 within the stipulated period of one month. Even if it is accepted that the provisions contained in Clause 24 was mandatory, the time of one month for issuing the Notification could only have been extended for a reasonable period. It is inconceivable that it could have taken the Government 3 years to issue the follow up Notification. The failure of the appellants to issue the necessary Notification within a reasonable period of the enforcement of the Industrial Policy, 1995 has rendered the decisions dated 06.01.2001 and 05.03.2001 wholly arbitrary. The appellant cannot be permitted to rely on its own lapses in implementing its policy to defeat the just and valid claim of the company. [Para 71] [985-E-H; 986-A]

2.4. It is not correct to say that no relief can be granted to the Company as the Policy has lapsed on 31.08.2000. Accepting such a plea would be to put a premium and accord a justification to the wholly arbitrary action of the appellant, in not issuing the Notification in accordance with the provisions contained in Clause 24 of the Industrial Policy, 1995. [Para 72] [986-B-C]

2.5. The assurances given in various meetings were reiterated before the High Court in the Affidavit dated 05.12.2000. It was clearly stated that the draft Notification was being prepared and being approved. It was thus obvious that the Notification merely had to be published in the Official Gazette. After making the aforesaid statements in the affidavit, order dated 06.01.2001 was issued. It was no longer open to the appellant not to issue the Notification on the ground that the Policy had lapsed on 31.08.2000. The second reason that the exemption could not be granted to the company as no Notification had been issued under Clause 24 cannot be accepted as the appellant-State cannot be permitted to take advantage of its own wrong. The third reason given is that the State-Level Empowered Committee (SLEC) had not approved the rehabilitation package. This clearly is against the record. Not only the exemption was recommended by the competent Committees under the Industrial Policy, 1995, emphatic assurances were given that the Notification will be issued within a very short period. The fourth reason with regard to the resolution passed at the Chief Ministers' Conference is equally extraneous to the issue. The company had made the application for exemption at a much prior time in 1997. No material has been placed either before the High Court or before this Court about the legal enforceability of the resolutions passed at the Chief Ministers' Conference. The decision making process which culminated in passing of the orders dated 06.01.2001 and 05.03.2001 is seriously flawed, therefore, the same have been justifiably quashed by the High Court. [Para 73] [986-E-H; 987-A-C]

State of UP and Anr. vs. Dinakar Sinha **(2007) 10 SCC 548;** *M/s. Velji Lakhamsi and Co. and Ors. vs. M/s. Benett Coleman and Co. and Ors.* **(1977) 3 SCC 160;** *District Mining

Officer and Ors. vs. Tata Iron and Steel Co. and Anr.* **(2001) 7 SCC 358, referred to.**

3.1. It would not be possible to accept the plea of the company that in view of the financial condition of the company, it may be permitted to retain the amount collected under the orders of Supreme Court. The amount was collected from the consumer to offset the tax liability. Such amount cannot be permitted to be retained by the company. Exemption and refund of tax are two different legal and distinct concepts. The objective of the exemption is to grant incentive to encourage industrialization. It is to enable the industry to compete in the market. On the other hand, refund of tax is made only when it has been realized illegally or contrary to the provisions of law. Tax lawfully levied and realized cannot be refunded. [Para 79] [989-E-G]

3.2. The company has collected more than Rs.60 crores on the sale of cement by virtue of the directions issued by Supreme Court in the Order dated 18.11.2002. The company cannot be permitted to retain the amount collected from the customers. This would amount unjust enrichment. Therefore, a direction is required to be issued that the amount deposited by the company with the Bank pursuant to the orders of this Court, be released to the appellant-State. Even if the delay in issuance of the exemption Notification by the State has crippled the company financially, then the company is trying to revive itself through financial restructuring. The survival of the company now depends on the approval of the Financial Restructuring Package prepared by respondent No.2. This package has been submitted to the Chief Minister of Bihar which is still on the consideration of the Government. [Para 78] [988-G-H; 989-A-D]

3.3. Direction is, therefore, issued that the amount deposited by the company in the designated account

opened and operated pursuant to the order of this Court dated 18.11.2002 together with accrued interest shall be released to the appellant-State, forthwith. [Para 80] [989-H; 990-A]

Prestige Lights Ltd. vs. StateBank of India **(2007) 8 SCC 449;** *Amrit Banaspati Co. Ltd and Anr. vs. State of Punjab* **(1992) 2 SCC 411, referred to.**

Case Law Reference:

(1956) 1 All ER 256	**Referred to.**	**Para 24**
(1995) 1 SCC 274	**Referred to.**	**Para 25**
(1998) 1 SCC 572	**Referred to.**	**Para 27**
(1986) 2 SCC 365	**Referred to.**	**Para 28**
(2002) 2 SCC 188	**Referred to.**	**Para 29**
(1987) 1 SCC 31	**Referred to.**	**Para 30**
(1996) 5 SCC 468	**Referred to.**	**Para 33**
(1997) 3 SCC 398	**Referred to.**	**Para 36**
(1997) 7 SCC 251	**Referred to.**	**Para 35**
(2005) 1 SCC 625	**Referred to.**	**Para 37**
(2005) 7 SCC 348	**Referred to.**	**Para 38**
(2005) 1 SCC 368	**Referred to.**	**Para 42**
2006) 13 SCC 706	**Referred to.**	**Para 44**
(1976) 3 SCC 540	**Referred to.**	**Para 45**
(2007) 8 SCC 449	**Referred to.**	**Para 46**
(1992) 2 SCC 411	**Referred to.**	**Para 47**
(2007) 10 SCC 548	**Referred to.**	**Para 48**
(1977) 3 SCC 160	**Referred to.**	**Para 49**
(2001) 7 SCC 358	**Referred to.**	**Para 50**
(1992) Suppl. 1 SCC 21	**Relied on.**	**Para 64**
(2004) 6 SCC 465	**Relied on.**	**Para 64**
(2007) 5 SCC 447	**Relied on.**	**Para 66**
(2006) 8 SCC 702	**Relied on.**	**Para 67**
(1979) 2 SCC 409	**Relied on.**	**Para 68**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5181 of 2002.

From the Judgment & Order dated 24.4.2002 of the High Court of Judicature at Patna in C.W.J.C. No. 6838 of 2000.

Dr. Rajiv Dhawan, Dinesh Dwivedi, Mohit Kumar Shah, Gopal Singh, Ravi Bhushan, Pallavi Mohan for the Appellants.

Ravi Shankar Prasad, Ranjit Kumar (for Suresh A. Shroof & Co.), Suprarna, Srivastava, Rajiv Ranjan, Sudershini Ray, Ram Swarup Sharma for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal has been filed by the State of Bihar challenging the judgment and order dated 24.04.2002 of the High Court of Judicature at Patna in CWJC No.6838 of 2000, whereby, the High Court has allowed the writ petition filed by the respondent herein. The respondent – M/s. Kalyanpur Cement Ltd. (hereinafter referred to as ‘the Company’), is a public sector company incorporated in the year 1937 as a Lime-producing Company. It is engaged in the business of cement manufacturing and marketing operations since 1946. It had commenced production with a capacity of 46000 metric tonnes. It underwent a series of expansion in 1958, 1968 and 1980. Nowadays, the Company is operating one-million-tonne cement plant. In view of the changes in the technology worldwide, it has set up a brand new state-of-art 'dry process' plant in 1994 at a capital cost of Rs.250-260 crores. This was made possible with financial assistance of World Bank and the All India Financial Institutions. Its advisor and financial collaborator is Holder Bank (HOLCIM) at Switzerland. The Company claims to be one of the very few large scale surviving industrial units in the State of Bihar. It is the only large scale industry in central part of the State. Over 2000 persons are in the employment of the Company. The Company claims that due to circumstances beyond its control such as recession in the cement industry as well as Government related problems; delayed decision in granting Sales Tax Deferment benefit the Company began to suffer heavy losses. This was accentuated by the non-availability of the sanctioned working capital from the financial institutions in the absence of the sale tax exemption under the Industrial Policy, 1995. There was continuous loss in production for a number of years. This has resulted in erosion of Net-Worth of the Company, as the total Net-Worth of the Company was less than its accumulated losses in December, 2002, it has registered with Board for Industrial and Financial Reconstruction (hereinafter referred to as 'BIFR') as a sick unit. It has been actually declared as sick Company by BIFR on 28.05.2002. Its reference case is pending with the BIFR. The Company in order to rehabilitate itself sought the assistance from financial institutions for restructuring package. The Company's proposal for financial assistance and restructuring has been approved by various financial institutions, in principal. However, the same has been made conditional on certain preconditions being met. One of the conditions imposed by the financial institutions was that the restructuring package would be made available only on the Company obtaining a Sales Tax exemption for a period of 5 years from the State Government, in terms of Industrial Policy, 1995. Accordingly, Company submitted an application to the State Government on 21.11.1997 for grant of Sales Tax exemption under the Industrial Policy, 1995 for a period of 5 years w.e.f. 01.01.1998. Thereafter, the matter remained pending for consideration by

the State Government and the financial institutions. There were a series of joint meetings of the Government, Financial Institutions and the Company, over the next three years. In all these meetings, as well as correspondence categoric assurances were given that the necessary Sales Tax exemption notification would be issued shortly. However, no such notification was issued causing great hardship to the Company. It was, therefore, constrained to file writ petition (CWJC No.6838 of 2000) in the High Court at Patna.

2. In this writ petition, the prayer was for issuance of the writ in the nature of mandamus directing the State of Bihar to issue necessary Notification under Clause 24 of the 1995 Policy. The claim of the Company was that Notification under Clause 24 of the Industrial Policy, 1995 ought to have been issued within one month of the release/publication of the Policy in September, 1995. Voluminous record was produced before the High Court in support of the submission that the Company is entitled to exemption under the 1995 Policy. The State of Bihar contested the writ petition by filing a counter affidavit. Supplementary counter affidavit was filed on behalf of the Government through Secretary-cum-Commissioner, Department of Commercial Taxes (respondent No.4 in the writ petition) on 05.12.2000. In paragraph 5 of the aforesaid affidavit it is stated as under:-

> "5. That the Hon'ble Minister, Department of Commercial Taxes has approved the proposal along with draft notification regarding extension of Sales Tax related incentives to sick industrial units."

3. In paragraph 8 of the affidavit it is averred *"That the deponent states that it shall be possible to issue necessary notification after approval of the proposal of the relevant notification by the Hon'ble Chief (Finance) Minister of the Cabinet."* It is also stated in the affidavit "*That the deponent has further requested the Secretary-cum-Commissioner,*

Department of Finance, vide letter dated 28.11.2000 to take necessary approval earliest as the same has to inform to the Hon'ble Court." Thereafter, yet another supplementary counter affidavit dated 09.01.2001 was filed by Shri Krishan Nand Roy, Assistant Commissioner, Commercial Taxes, Bihar. In the affidavit, it was contended that the State Government in a meeting under the Chairmanship of the Chief Minister held on 06.01.2001 has decided upon due deliberation not to grant any Sales Tax incentives to sick industrial units. Therefore, the claim of the Company has been rejected. The four stated reasons justifying the aforesaid decision were as under:-

> "*(1) The period of Industrial Policy 1995 was from 1.9.1995 to 31.8.2000. Therefore, this policy is not effective to date.*
>
> (2) The question to provide facility to those sick units are mentioned in clause 22 of the above policy. No notification has been issued by the Government to provide facility of Sales Tax till now, on whose basis, there could be right of any specialized person/unit to get the facility.
>
> (3) So far as the question of applicants' Unit in petition No. CWJC No.6838/2000 is concerned, his matter has not yet been approved by the High Level Empowered Committee under the Chairmanship of Chief Secretary under Clause 22(1) of Industrial Policy, 1995. It is worth mentioning here that in absence of above mentioned, even approval cannot be provided.
>
> (4) Tax reforms at All India Level, which has been continuing last one year it has been decided at the conference of Chief Ministers that except States of Special Category Sales Tax facility must be ended by rest all other States. The States would not do this, there could be possibility of cut down the payable Central Assistance to those States."

4. Therefore, the Company amended the writ petition and challenged the decision dated 06.01.2001 of the State Government. It was pleaded by the Company that the grounds for rejection of the Company's case and non-issuance of the Notification was not in accordance with law It appears that another counter affidavit was filed on 16.02.2001 by respondent No.4. This was followed by yet another supplementary counter affidavit filed by Virendra Kumar Singh, Joint Commissioner, Commercial Taxes, Headquarter, Patna on 02.08.2001. In this affidavit it was brought to the notice of the Court that the decision taken on 06.01.2001 was considered by the Cabinet in its meeting held on 05.03.2001 wherein it was decided not to issue any notification for granting any concession/facility to sick industrial units in the State. This decision was duly conveyed by letter dated 05.03.2001 to the IDC Bihar, Patna. In view of the aforesaid decision the Secretary Industries Department rejected the company's application and communicated the decision to the Company on 14.05.2001. Both the decisions were sought to be justified by the State Government.

5. The High Court considered the entire issue. The Company as well as the State made detailed reference to the documents which were placed on the record. Ultimately, the writ petition has been allowed. The decisions dated 06.01.2001 and 05.03.2001 have been quashed. Further directions issued to the State Government are as follows;

> "*The concerned departments and organizations are hereby directed to issue follow up notification to give effect to the provisions of the policy within one month from today. After the notification is issued a Committee headed by the Industrial Development Commissioner would be constituted to evolve suitable measures for potentially viable non BIFR sick industrial unit (the present petitioner) and the said Committee would submit its recommendations before the State Level Empowered*

Committee which in its turn shall place the said recommendations before the Government. After receiving the said recommendations from the State Level Empowered Committee, the Government shall take final decision in the matter. The petition is thus allowed."

6. This decision has been challenged by the appellant-State.

7. At this stage it would be appropriate to notice the orders passed by this Court during the proceedings. On 18.11.2002, following directions were issued:-

"Heard learned counsel for the parties.

As an interim arrangement during the pendency of this appeal, with a view to protect the interests of either side, we direct the respondent to deposit an amount equivalent to the sale tax payable by it as and when it becomes due in an interest bearing account in a nationalized bank. This amount and the amount accrued during the pendency of the appeal, shall not be withdrawn by either side.

The amount so kept in deposit shall become payable to the party which ultimately succeeds in this appeal.

The appellants are directed to issue the exemption orders and on receipt of such order, the above said amount shall be deposited. The issuance of the exemption orders is without prejudice to the case of the parties in this appeal.

The IA is thus disposed of."

8. Thereafter IA No.3 of 2006 was filed by the appellant seeking stay of the judgment of the High Court, it has been stated that the application has been necessitated because of the intervening circumstances and the conduct of the Company.

It was further stated that pursuant to the direction issued by this Court on 18.11.2002, the appellant issued Notification No.SO-174 dated 18.10.2004 granting exemption to the Company. The Notification was to have effect for five years from the date of publication in the Official Gazette or till the disposal of the Special Leave Petition. The Notification was issued on the following terms:-

"2. Terms and conditions-

(a) Tax payable by M/s Kalyanpur Cement Ltd. shall be deposited per month in an interest-bearing account in a nationalized bank.

(b) M/s Kalyanpur Cement Ltd. shall provide information of such bank account to the circle where he is registered.

(c) M/s Kalyanpur Cement Ltd. shall submit the details regarding amount of payment in the bank account as mentioned in para (a) above along with brief abstract each month.

9. Thereafter the appellant requested the company to comply with the directions of this court. The Company, however, informed the appellant that it was unable to comply with the directions because of its 'sickness'. Since the Company failed to comply with the aforesaid order, a prayer was made for recalling the same.

10. The Company in its reply elaborately explained the efforts being made by the financial institutions to ensure the survival of the Company. It reiterated that the Company had acted honestly and in good faith on assurances/approval given by the appellant at various stages. The Company continued with its operation in anticipation of receiving the appellant's approval at some point of time. Had the appellant not given the assurances, the Company could have suspended its operation. The Government gave assurances and granted approval on 07.01.1998, 23.01.1998, 12.03.1998, 21.01.1999, 12.07.1999,

29.10.1999, 02.12.1999, 17.12.1999, 25.01.2000, 31.03.2000, 29.05.2000 and 30.06.2000. It was also pointed out that even the officers of the Commercial Taxes Department including Commissioner, Commercial Taxes to the effect that the Notification was in the process of being issued. It was also pointed out that even after the VAT regime being introduced, Sales Tax related incentives to industries are being given to industries by various States. In fact under the Industrial Policy 2003 as well as the Industrial Policy, 2006, Sales Tax incentives in some form or the other have been retained/provided. It is further pointed out that the Notification dated 18.10.2004 was issued after expiry of two years from the date of the order passed by this Court. The delayed action of the Appellant practically crippled the Company financially and jeopardized efforts for revival as the Sales Tax benefit is crucial for the Company's revival and continued operations. It is reiterated that the Company is entitled to get the benefit under the Industrial Policy, 1995. With regard to the non-deposit of the *"amount equivalent to the Sales Tax payable by it as and when it becomes due"*, it is stated that the Company had *bona fide* opened the Bank account with a Nationalized Bank but could not deposit the amount equivalent to the Sales Tax due because of circumstances beyond its control.

11. During the pendency of the Interim Application, proposal for the approval of the reconstruction package of the Company was under the active consideration of the State. Therefore, the proceedings were adjourned from time to time.

12. During this period an application was also filed by the Assets Reconstruction Company (I) Ltd. for being impleaded as a party. The aforesaid application has been allowed by this Court on 04.09.2006 and the applicant has been impleaded as respondent No.2.

13. We have heard the Counsel for the parties. Dr. Rajiv Dhawan and Mr. Dinesh Dwivedi, Senior Advocates made the submissions on behalf of the appellant. Dr. Dhawan submits

that in the aforesaid judgment the High Court has held that:

i. the petitioner had a right to be granted sales tax exemption under 1995 Industrial Policy;

ii the decision of 6 January 2001 denying such exemption was *arbitrary* (which was challenged but alleged not to be on record);

iii. the decision of 5 March 2001 was wrong, even though not on record and not challenged.

14. According to Dr. Dhawan the High Court has wrongly quashed the order dated 06.01.2001 on the basis that it was an arbitrary somersault after 05.12.2000. This conclusion is erroneous as the aforesaid order had given four cogent reasons in support of the decisions which have been duly noticed by the High Court. The aforesaid reasons could not be said to be extraneous to the decision dated 06.01.2001. Thereafter, it is submitted that the relevant rule/clauses 22 and 24 were wrongly interpreted because it stated "*Clause 22.2 of the policy would come into force after a notification under Clause 24 is issued."* The High Court has wrongly held that the precondition of revival under Clause 22 came into effect after the final decision under Clause 24. According to the learned senior counsel the High Court failed to notice that clause 22.2 was about revival of the Company and not just granting Sales Tax exemptions. Furthermore, Clause 22.3 barred exemption/ deferment to be given to such sick and closed industrial units which have once availed of such facilities in the past. This Company has availed the deferment in the past and had not paid the sums due. It is then emphasized that Clause 24 was a monitoring Clause, but the time period of one month was simply a target. Therefore, it was neither mandatory nor directory.

15. Learned Senior counsel then submitted that the High Court has wrongly based its decision on *Mangalore Chemical*

and Fertilizer Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, (1992) Suppl. 1 SCC 21. According to Dr. Dhawan, this case would be inapplicable because in fact, in that case, prior permission had already been granted. He further submitted that the High Court wrongly ignored the significance of the Chief Ministers' Conference although the High Court notices the Conferences of the Chief Ministers, it failed to give sufficient importance to this national public policy aspect emanating from the Conferences between the Chief Ministers of all States and the Union Government. Dr. Dhawan further submitted that the High Court has wrongly assumed that there was any allurement offered to the Company. In fact the High Court did not properly apply the doctrine of 'Promissory Estoppel'. At best the High Court only found a case of possible intention on the part of the State to grant exemption to the Company during the limited period from 5th December, 2000 to 6th January, 2001. Yet the High Court issued a writ in the nature of Mandamus directing the State to issue the exemption notification.

16. In support of his submissions, learned senior counsel has made detailed reference to the facts and the documents on record. According to him, the facts in this case are not such as to give rise to a cause of action, relying on the doctrine of 'promissory estoppel'. There is no material on the record to show that any unequivocal promise was made to the Company and it had acted on such a promise. All the meetings were only exploratory in nature. In any event, no mandamus could have been issued after the Scheme had lapsed and no default by the appellant-State has been established. According to the learned senior counsel, the impugned judgement of the High Court is wrong in law, in respect of the rules, orders of the State and the Scheme of the Industrial Policy. It is also wrong on facts.

17. Learned Senior counsel relied on number of judgments in support of the submissions *Central London Property Trust,*

Ltd. Vs. High Trees House, Ltd. (1956) 1 All ER 256; *Kasinka Trading vs. Union of India* (1995) 1 SCC 274; *STO vs. Shree Durga Oil Mills* (1998) 1 SCC 572; *Bakul Cashew Co. vs. STO* (1986) 2 SCC 365; *Sharma Transport vs. Govt. of AP* (2002) 2 SCC 188; *Bannari Amma Sugars Ltd. Vs. Commercial Tax Officer* (2005) 1 SCC 625 at 637; *Shri Bakul Oil Industries vs. State of Gujarat* (1987) 1 SCC 31; *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of UP* (1979) 2 SCC 409; *DCM Ltd. Vs. Union of India* (1996) 5 SCC 468; *Shrijee Sales Corpn. Vs. Union of India* (1997) 3 SCC 398; *Pawan Alloys & Castings (P) Ltd. UP SEB* (1997) 7 SCC 251.

18. Mr. Dinesh Dwivedi, Senior Advocate submitted that there are two categories of cases, where incentive is given (i) to set up or start an industry;(ii) benefits to improve the industry. The incentive in the second category can be withdrawn as it is only an enabling provision. In such circumstances, the Executive is permitted to resile. Referring to the detailed provisions of the 1995 Policy, he submitted that Clause 16(1) and 16(2) relate to new unit. 16(3) relates to units undertaking expunction/ diversification. Clause 22.1 relates to industrial sickness in SSI sector. Clause 22.2 deals with sickness in large and medium scale sector. According to him, under this Clause nothing definite is promised. It permits the Committee to recommend concessions and facilities for revival of the sick units to the State-level Empowered Committee (SLEC). Therefore, any recommendations made by this Committee cannot be said to be assurances capable of attracting the doctrine of 'promissory estoppel'. According to the learned Senior Counsel the entire matter is covered against the Company by the judgment of this Court in *M.P. Mathur vs. DTC* (2006) 13 SCC 706. Learned Senior Counsel also relied on *Kasinka Trading* (supra) in support of his submission that clear foundation has to be laid of the assurance that was given. It is further submitted that the claim of the Company cannot possibly succeed by invoking the doctrine of 'promissory estoppel' as the Company has not altered its position by relying on the assurances given by the

appellant-State. Learned counsel then submitted that the Company has misunderstood the meaning of exemption. They are under the impression that they can collect tax and not pay to the Government. That according to the learned Senior Counsel is not correct. Exemption simply means that no tax shall be chargeable on goods. In the affidavit filed in reply to IA No.3, it is admitted by the Company that the tax collected has not been deposited. Therefore, the Company is in contempt of the interim orders passed by this Court. The Company is liable to refund the amount of Rs.60 crores to the Government.

19. Learned Senior counsel submitted that no relief can be granted to the Company as it had taken advantage of the interim order without complying with the preconditions of the order. In support of this, he relied upon *Prestige Lights Ltd. Vs. State Bank of India,* (2007) 8 SCC 449. It is submitted that a direction ought to be issued to the Company to refund the amount of tax collected. He relied on *Amrit Banaspati Co. Ltd and another vs. State of Punjab* (1992) 2 SCC 411. Mr. Dwivedi, thereafter, submitted that the Policy of granting exemption had lapsed on 31st August, 2000. Therefore, no exemption notification could have been issued thereafter. He further submits that Industrial Policy, 1995 was only a temporary scheme, therefore, no benefit could be given after expiry. He relied on *State of UP and another vs. Dinkar Sinha,* (2007) 10 SCC 548; *M/s. Velji Lakhamsi and Co. and others vs. M/s. Benett Coleman and Co. and others* (1977) 3 SCC 160; *District Mining Officer and others vs. Tata Iron and Steel Co. and another* (2001) 7 SCC 358.

20. Mr. Ravi Shankar Prashad, Senior Advocate appearing for the respondent No.1 submitted that the Company is only the large scale industry left in the State of Bihar. In the 1990s, the cement industry was in a bad state, as the expectations of the Government of increase in demand did not fructify. The Company is a viable unit. It has been made sick by the inaction of the Government. He further submitted that the

exemption has been duly recommended by the Committee under Clause 22.2(i). It cannot be denied the benefit on the basis of Clause 22(3). At the time when earlier benefits were given the Company was not sick. It would be entitled to the benefit in view of Clause 22(1)(vi). According to the learned Senior counsel, the Company has gone into a whirlpool as the rehabilitation package has not been given as the Government has not issued the exemption notification under Clause 24 of the Industrial Policy, 1995. Relying on the facts and figures on the record, it is submitted that the Company would be able to clear its liability within a short period. He further submitted that the doctrine of 'promissory estoppel' is fully applicable in the facts of this case. The unequivocal representation is contained in the Industrial Policy, 1995. This representation is further reinforced in the documents which have been relied upon by the Company. According to him, the eligibility of the Company for exemption is not doubted. In the proceedings before the High Court, the appellants had filed an affidavit admitting that the draft notification has been prepared and it is only to be gazetted. This affidavit was filed after the expiry of the Industrial Policy, 1995. Therefore, it cannot now be submitted by the appellant that no exemption could be granted since the Policy had lapsed. Learned senior counsel further submitted that for three years the State Government had issued assurances that the notification would be duly issued. The financial institutions had also approved the rehabilitation package, in principal, provided the State Government granted the necessary Sales Tax exemption. It is, therefore, not open to the appellant to submit that the Government can now resile from the promise. According to him, that the justification with regard to the discontinuation of the Sales tax related concessions/ exemptions consequent upon introduction of the VAT regime is without any basis. These incentives are continuing even under the Industrial Policy, 2003 and 2006. It was for these reasons that the High Court set aside the decisions dated 06.01.2001 and 05.03.2001. Mr. Prasad further submits that by now it is settled that promissory estoppel gives a cause of action and also preserves a right. The action of the appellants in passing the impugned orders is arbitrary and whimsical. It cannot be supported on any of the four reasons mentioned in the Order dated 06.01.2001. In support of its submissions, the Learned Senior counsel relied on *Mangalore Fertilizer* (supra), *Union of India and Others vs. Godfrey Philips India Ltd.* (1985) 4 SCC 369; *State of Punjab vs. Nestle India Ltd. and another* (2004) 6 SCC 465; *Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector & ETIO and others* (2007) 5 SCC 447; *MRF Ltd., Kottayam vs. Asstt. Commissioner (Assessment) Sales Tax and others* (2006) 8 SCC 702; *Amrit Banaspati* (supra). Relying on the aforesaid judgments, it is submitted that the High Court has estopped the appellant State Government from hiding behind the technicality and deny the Sales Tax exemption to respondent No.1 under the Industrial Policy, 1995. It is further submitted that during the pendency of appeal before this Court the Company had submitted a modified package to the State Government in October, 2006. This was rejected by the Government vide order dated 12th March, 2007, the proposal was rejected only on the ground that the Company has huge liability amounting to Rs.314.12 crores. According to Mr. Ranjit Singh, the aforesaid figure is not a correct present figure of the financial status of the Company making detailed figures to certain facts and figures. He further submitted that the total amount due from the Company is Rs.46.81 crores out of which it is eligible to a relief of Rs.30.04 crores under notification No.24 dated 27.07.2006. The Company is, therefore, viable. The modified package has been arbitrary rejected by the appellants.

21. Mr. Ranjit Singh appearing for respondent NO.2 submits that under the SARFAESI Act, the secured creditor Assets Reconstruction Company (I) Ltd.- respondent No.2 is now the lender instead of the financial institution. Aim of respondent No.2 is to revive the Company by reconstruction. It was submitted that the Company is a 'sick company' registered with the BIFR under the Sick Industrial Companies (Special

Provisions) Act, 1985 and undergoing a process of restructuring. The Company's proposal for financial assistance and restructuring was earlier approved by the financial institutions, namely, IFCI IDBI, ICICI and IIBI in the year 1998 subject to the condition of grant of Sales Tax exemption for a period of 5 years in terms of the Industrial Policy, 1995 of the Government of State of Bihar. Respondent No.2 is a Securitization and Reconstruction Company established under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 with the mandate to assist the Banks and financial institutions in reducing Non-Performing Assets (NPA) by adopting method for recovery or reconstruction. As such it has been assigned the loan outstandings of a number of financial institutions noted above. Now it is a secured creditor to the extent of approximately 94.2% of the total secured debt of the Company. Therefore, respondent No.2 being an assignee of the outstanding is committed to the rehabilitation and revival of the Company. The Company has already filed a Scheme of Arrangement under Section 391 of the Companies Act, 1956 for revival of the Company. The Scheme has the support of respondent No.2. However, the Scheme is pending approval as it is based on certain relief and concessions to be granted to the Company by the State Government. One such concession is the Sales Tax exemption to be given by the State Government. The claim made by the Company with regard to being one of the most modernized and efficient cement plants is reiterated. It is further stated that the plant has a capacity of about 10 lac tonnes per annum at Rohtas District of the State. It is further pointed that the main reason for the sickness of the Company has been the industry and region specific externalities. It is submitted that the viability studies conducted by the specialized agencies have confirmed the Company's viability and ability to convert its Net-Worth into positive and repay back Government due another term loan within 8 to 10 years. It is further submitted that any change in the Sales Tax exemption would adversely affect the implementation of the proposed Scheme. However, the modified revival package which was given to the Government has been arbitrarily rejected.

22. We have considered the submissions made by the learned counsel for the parties.

23. We have considered the detailed facts and relevant documents which are on the record. However, in our opinion, before we consider the submissions made on the factual situation of this case, it would be appropriate to consider the primary issue as to whether the Company could have invoked the principle of 'promissory estoppel' in support of its claim.

24. It is well-known that the doctrine of promissory estoppel has been recognized and enforced in the Courts in England for a considerable period of time. The principle of 'promissory estoppel' was stated by Denning, J in the oft-quoted judgment in *Central London Property Trust Ltd. v. High Trees House, Ltd.* (1956) 1 All ER 256. In this matter the landlords had let a new block of flats in 1957 to the tenants on a 90-99 lease at a ground rent of ?2500 (Pound Sterling). However, in view of war time conditions and without consideration, as a result of discussions, an arrangement was made between the parties to reduce the ground rent to ?1,250 for the years 1941, 1942, 1943 and 1944 the tenants paid the reduced rent. At the end of the war in September, 1945, the landlord, however, claimed that the original ground rent reserved under the lease had to be paid. The landlord also claimed arrears for the years when the reduced rent was paid in the sum of ?7916. No payment was received. The landlord, therefore, brought an action to test the proposition of law. The Court notices the plea of the tenant as follows -*"The tenants said first that the reduction of ?1,250 was to apply throughout the term of ninety-nine years, and that the reduced rent was payable during the whole of that time. Alternatively, they said that was payable up to Sept.24, 1945, when the increased rent would start."* Upon consideration of the entire issue, it is observed by Denning, J as follows:-

"If I consider this matter without regard to recent developments in the law there is no doubt that the whole claim must succeed……."

"As to estoppel, this representation with reference to reducing the rent was not a representation of existing fact, which is the essence of common law estoppel; it was a representation in effect as to the future – a representation that the rent would not be enforced at the full rate but only at the reduced rate…….. "So at common law it seems to me there would be no answer to the whole claim. "

"What, then, is the position in view of developments in the law in recent years? The law has not been standing still even since Jorden v. Money (1854) (5 HL Cas. 185). There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases or promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have been so acted on. In such cases the Courts have said these promises must be honoured."

"I am satisfied that the promise was understood by all parties only to apply in the conditions prevailing at the time of the flats partially let, and the promise did not extend any further than that."

25. The doctrine of promissory estoppel as developed in the administrative law of this country has been eloquently explained in *Kasinka Trading v. Union of India* (1995) 1 SCC 274 by Dr. A.S. Anand, J, in the following words:-

"11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties."

"12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."

26. In our opinion, the aforesaid statement of law covers the submissions of Dr. Dhawan and Mr. Dwivedi that in order to invoke the aforesaid doctrine, it must be established that (a) that a party must make an unequivocal promise or representation by word or conduct to the other party (b) the representation was intended to create legal relations or affect the legal relationship, to arise in the future (c) a clear foundation has to be laid in the petition, with supporting documents (d) it has to be shown that the party invoking the doctrine has altered its position relying on the promise (e) it is possible for the Government to resile from its promise when public interest would be prejudiced if the Government were required to carry out the promise (f) the Court will not apply the doctrine in abstract. However, since the judgments have been cited, we may notice the law laid down therein.

27. In *STO vs. Durga Oil Mills* (1998) 1 SCC 572 it was held that "Moreover, as it has been noted earlier that the IPR itself had not granted any exemption but had indicated that orders will be issued by various departments for granting the exemptions. The exemption order under Sales Tax could only be issued under Section 6 which could be amended or withdrawn altogether. This is expressly provided by Section 6. If the respondent acted on the basis of a notification issued under Section 6 it should have known that such notification was liable to be amended or rescinded at any point of time, if the Government felt that it was necessary to do so in public interest."

28. In *Bakul Cashew Co. v. STO* (1986) 2 SCC 365 "In cases of this nature the evidence of representation should be

clear and unambiguous. It "must be certain to every intent". The statements that are made by ministers at such meetings, such as, "let us see", "we shall consider the question of granting of exemption sympathetically", "we shall get the matter examined," "you have a good case for exemption" etc. even if true, cannot form the basis for a plea of estoppel."

29. In *Sharma Transport v. Govt. of AP* (2002) 2 SCC 188 it is observed that "There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine."

30. In *Shri Bakul Oil Industries vs. State of Gujarat,* this Court held that "Viewed from another perspective, it may be noticed that the State Government was under no obligation to grant exemption from sales tax. The appellants could not, therefore, have insisted on the State Government granting exemption to them from payment of sales tax. What consequently follows is that the exemption granted by the Government was only by way of concession. Once this position emerges it goes without saying that a concession can be withdrawn at any time and no time limit can be insisted upon before the concession is withdrawn. The notifications of the Government clearly manifest that the State Government had earlier granted the exemption only by way of concession and subsequently by means of revised notification issued on July 17, 1971, the concession had been withdrawn. As the State Government was under no obligation, in any manner known to law, to grant exemption it was fully within its powers to revoke the exemption by means of a subsequent notification. This is an additional factor militating against the contentions of the appellants."

31. In *Motilal Padampat Sugar Mills Co. Ltd. vs. State of UP* (1979) 2 SCC 409, it is held that "we do not think it is necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise…"

"But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Govenrment. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it."

In the same paragraph it is further observed that:-

"24……..the Government cannot, as Shah,J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole judge of its liability and repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden"

32. It is further held that "Lastly, a proper reading of the observation of the Court clearly shows that what the Court intended to say was that where the Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the Government from doing so. This proposition is unexceptionable, because where the Government owes a duty to the public to act in a particular manner, and here

obviously duty means a course of conduct enjoined by law, the doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. This doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law."

33. In *DCM Ltd. vs. Union of India* (1996) 5 SCC 468, this Court reiterated that "It is well settled that the doctrine of promissory estoppel represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the inter-position of equity which has always proved to its form, stepped in to mitigate the rigour of strict law. It is equally true that the doctrine of promissory estoppel is not limited in its application only to defence but it can also find a cause of action. This doctrine is applicable against the Government in the exercise of its governmental public or executive functions and the doctrine of executive necessity or freedom of future executive action, cannot be invoked to defeat the applicability of this doctrine. It is further well established that the doctrine of promissory estoppel must yield when the equity so requires. If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be unequitable to hold the Government or public authority to the promise or representation made by it, the court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it."

34. In *Shrijee Sales Corpn. Vs. Union of India* (1997) 3 SCC 398 it was held that "It is not necessary for us to go into a historical analysis of the case – law relating to promissory

estoppel against the Government. Suffice it to say that the principle of promissory estoppel is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand; it would then be able to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such a public interest exits."

35. In *Pawan Alloys & Casting (P) Ltd. v. UP SEB* (1997) 7 SCC 251 it is held that "(31). The appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this incentive rebate even prior to the expiry of three years as available to the appellants concerned. It has also to be held that even if such withdrawal of development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed."

36. In *Shreeji Sales Corpn.* (supra) it is also held that "*However, in the present case, there is a supervening public interest and hence it should not be mandatory for the Government to give a notice before withdrawing the exemption.*"

37. In *Bannari Amman Sugars Ltd. vs. Commercial Tax Officer* (2005) 1 SCC 625 it is observed that "We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the Government is not required to hear the

persons who have been granted the benefit which is sought to be withdrawn."

38. In *Rom Industries Ltd. vs. State of J&K,* (2005) 7 SCC 348 this Court held that "We are not prepared to hold that the government policy by itself could give rise to any promissory estoppel in favour of the appellants against the respondents since the policy itself made it absolutely clear that if would come into effect only on appropriate notification being issued. The notification was issued in exercise of the admitted powers of the State Government under the State General Sales Tax Act. The State Government having power and competent to grant the exemption was equally empowered to withdraw it. As we have also noticed there was nothing either in the notification or in the policy which provided that the Negative List would not be amended or altered. On the contrary clause (vii) of para 7 to GO No.10 of 1995 expressly reserved the Government's right to amend the Negative List. The right if any of the appellants was a precarious one and could not found a claim for promissory estoppel."

39. Both the learned Senior counsel had also emphasized that there is a distinction between cases (a) where a policy automatically applies subject to eligibility [e.g. *Pawan alloys* (supra)] (b) where the idea was to allure people and all persons who set up industries were entitled to an exemption; and (c) where the exemption would apply only after a considered decision is taken to consider eligibility and worthiness [e.g. Rom Industries (supra)].

40. According to the learned Senior counsel there is also a distinction between cases where (a) an exemption is granted but taken away prematurely [e.g. *Pawan Alloys* (supra)]; (b) an exemption is to be given after due consideration. Thus, in the present appeal, the promise would be considered to be made only when a decision is actually made by the empowered authority after being satisfied that the revival of the Company was possible.

41. The learned Senior counsel also placed reliance on *Sharma Transport* (supra) wherein it was held that "It is equally settled law that the promissory estoppel cannot be used to compel the Government or public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make."

42. Learned Senior counsel also relied on the decision in *State of Jharkhand vs. Ambay Cements* (2005) 1 SCC 368, in support of his submission where promissory estoppel applies only where a person is eligible consistent with the purpose for which the policy was made. In that case, it was held that "In our view, the conditions prescribed by the authorities for grant of exemption are mandatory for availing the exemption and the High Court exercising jurisdiction under Article 226 of the Constitution cannot direct the grant of exemption in favour of the respondent overlooking the statutory conditions prescribed for such grant and that too in the absence of any challenge to the validity of such conditions."

43. In addition Mr. Dwivedi, learned Senior counsel relied on a number of other decisions which we may notice.

44. In *M.P. Mathur* (supra), wherein this Court reiterated that in order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be made in the petition itself by the party invoking the doctrine and bald expressions without any supporting material would not be sufficient.

45. In *Excise Commissioner vs. Ram Kumar* (1976) 3 SCC 540 this Court reiterated that "*it is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers.*"

46. With respect to the submissions made by the learned Senior counsel on IA No.3 reliance is placed on *Prestige Lights*

(supra), wherein this Court reiterated the principle that the Court may refuse to hear the parties on merits who has violated the directions issued by the Court. Since not hearing a party on merits is a "drastic step" it should not be taken except in grave and extraordinary situations, "*but sometimes such an action is needed in the larger interest of justice when a party obtaining interim relief intentionally and deliberately flouts such order by nor abiding by the terms and conditions on which a relief is granted by the court in his favour.*"

47. In *Amrit Banaspati* (supra), it is observed that "But promissory estoppel being an extension of principle of equity, the basic purpose of which is to promote justice founded on fairness and relieve a promisee of any injustice perpetrated due to promisor's going back on its promise, is incapable of being enforced in a court of law if the promise which furnishes the cause of action nor the agreement, express or implied, giving rise to binding contract is statutorily prohibited or is against public policy."

> "11. Exemption from tax to encourage industrialization should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason."
>
> "12. But refund of tax is made in consequence of excess payment of it or its realization illegally or contrary to the provisions of law. A provision or agreement to refund tax due to realize in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realized under a statute. It would be invalid and ultra vires."

48. In the case of *Dinakar Sinha* (supra), this Court observed that "31. The 1973 Rules was a temporary statute. It died its natural death on expiry thereof. The 1980 Rules does not contain any repeal and saving clause. The provisions of the

relevant provisions of the General Clauses Act will, thus, have no application. Once a statute expires by efflux of time, the question of giving effect to a right arising thereunder may nor arise….”

49. In *M/s. Bennett Coleman* (supra), this Court held that “This pivotal point canvassed by the learned Counsel for the appellants though it looks attractive at first sight cannot stand a close scrutiny. It is true that the offences committed against a temporary statute have, as a general rule, to be prosecuted and punished before the statute expires and in the absence of a special provision to the contrary, the criminal proceedings which are being taken against a person under the temporary statute will ipso facto terminate as soon as the statute expires. But the analogy of criminal proceedings or physical constraint cannot, in our opinion, be extended to rights and liabilities of the kind with which we are concerned here for it is equally well settled that transactions which are concluded and completed under the temporary statute while the same was in force often endure and continue in being despite the expiry of the statute and so do the rights or obligations acquired or incurred thereunder depending upon the provisions of the statute and nature and character of the rights and liabilities.”

50. In *District Mining Officer* (supra), this Court observed that “A statute can be said to be either perpetual or temporary. It is perpetual when no time is fixed for its duration and such a statute remains in force until its repeal, which may be express or implied. But a statute is temporary when its duration is only for a specified time and such a statute expires on the expiry of the specified time, unless it is repealed earlier. The relevant provisions of the different State laws relating to cesses or taxes on minerals having been deemed to have been enacted by Parliament and having been deemed to have been enacted by Parliament and having been deemed to have remained in force up to the 4th day of April, 1991 under the Validation Act, those laws relating to cesses or taxes on minerals must be held to

be temporary statutes in the eye of law. Necessarily, therefore, its life expired and it would be difficult to conceive that notwithstanding the expiry of the law itself, the collecting machinery under the law could be operated upon for making the collection of the cess or tax collectable upto 4.4.1991. Admittedly, to a temporary statute, the provisions of Section 6 of the General Clauses Act, 1897 will have no application.”

51. Let us now examine the factual situation in the light of the observations made by this Court in various judgments relied upon by the learned counsel for the parties.

52. The Company applied to the State Government on 21.11.1997 for grant of sales tax exemption under the Industrial Policy, 1995. Even though the Company was entitled under the aforesaid Policy to exemption for 8 years, it made an application only for 5 years’ exemption. This request of the Company was considered by the State-level Committee on Rehabilitation in a meeting held on 07.01.1998. This was attended by the senior Officers of the State Government, representatives of the financial Institutions and the Company. It was observed as follows:-

> “It was felt that the Company is potential sick unit and is fit for consideration for exemption from payment of Sales Tax for a period of 5 years from 1.1.1998.
>
> The Committee recommended that as per the provision of Industrial Policy 1995 the Sales Tax exemption on finished products can be granted to M/s. Kalyanpur Cement Ltd. for a period of five years from 1.1.1998 to 31.12.2002 to improve liquidity of the Company for its rehabilitation and sound financial position and decided to put up the case in the meeting of the High Empowered Committee under the Chairmanship of the Chief Secretary for final decision.”

53. In a meeting held on 23.01.1998 it was noticed that

the Company has been provided the facility of deferment of commercial taxes on two earlier occasions. The deferred amount is being repaid even though payment of the unit is not up-to-date. It was also accepted that the benefits under the Industrial Policy, 1995 which are to be given to the new units are also to be given to sick and closed units. However, it was observed that the opinion of the Advocate General should be taken as to whether any amendment is required in the Sales Tax rules. In an another meeting held on the same date i.e. on 12th March, 1998 the reconstruction proposal of the Company was again considered in a meeting of the High Level Authorisation Committee (HLAC) held under the Chairmanship of the Chief Secretary. In this meeting, it was noticed that the Company is running in losses. The main reason for the present position of the Company is sluggishness in the cement market. The Company had, therefore, made an application for Sales Tax exemption from 01.01.1998 to 31.12.2002 under the Industrial Policy, 1995. Upon consideration and discussion, it was decided that before exempting the Company from Sales Tax, opinion of Advocate General should be taken as to whether any amendment is required in the Bihar Finance Act. Subsequently, the Advocate General opined that no amendments are required in the Bihar Finance Act, 1981 and that the exemption can be considered for a class of dealers i.e. sick units in terms of Section 7(3)(b) of that Act.

54. In an another meeting held on 12.07.1999 at IFCI Head Office, New Delhi, the representatives of the State Government clearly stated that the Government of Bihar was committed to the revival of industry in the State in general and that of ACL in particular as it was located in one of the backward districts of Bihar and provided direct employment to over 2000 persons. With regard to the Sales Tax exemption it was stated that the legal opinion of the Advocate General, Bihar had already been obtained and the final decision of the Cabinet sub-Committee is expected within 2-3 months' time. The Indian promoters of the Company had been invited to join the meeting and were

requested to respond to the observations of the participants. It was explained on behalf of the Company that although the performance of the Company was consistently above the rated capacity, it had not been able to achieve optimum level of operations mainly due to lack of adequate working capital. Since the promoters were not to bring any further funds, most of the required amount would have to be met out of the proposed funding and expected Sales Tax exemption. In the summary record of the proceedings of the Joint Meeting, it was recorded that "there was further discussion amongst the participants and there was a general consensus that a restructuring package would be necessary for ensuring the revival of KCL and accordingly, KCL be advised to submit, at the earliest, a revised restructuring proposal with a cut off date of 31.12.1999……". "It was considered necessary to stipulate preconditions such as the State Government of Bihar granting the Sales Tax exemption and renewal/revalidation of the mining leases for the proposed restructuring packages, as and when sanctioned."

54. Thereafter, the representatives of the Company were invited to join the meeting held between the Government of Bihar and financial institutions on 29.10.1999. Reference was made, in this meeting, to the deliberations at the previous meeting held on 12.07.1999, when it was decided to undertake revised restructuring exercise in respect of the Company. Accordingly, a revised restructuring proposal was formulated by the Industrial Finance Corporation of India Ltd. (hereinafter referred to as 'IFCI'). In this meeting of the representative of the State Government mentioned that the legal opinion of the Advocate General Bihar has been obtained. However, decision of the Sales Tax exemption proposal had been held up due to the Election. It was now expected to be taken up in December, 1999. The financial institutions stated that they would consider granting reliefs only after grant of Sales Tax exemptions by the State Government of Bihar.

55. Thereafter by letter dated 02.10.1999, the State Government informed the financial institutions as under:-

> "The State Government has since decided to notify the provisions of providing Sales Tax benefits to "Sick Units" and potentially viable non-BIFR sick units in the meeting of the Economic Sub-Committee held on November 30,1999. We shall forward a copy of the notification as soon as it is gazetted…."

56. From the above it becomes apparent that the State Government had been consistently giving assurances not only to the Company but also to the financial institutions that the necessary Sales Tax exemption notification will be issued. In our opinion the Company had laid a clear, sound and a positive foundation for invoking the doctrine of 'promissory estoppel'. Therefore, it is not possible to accept the submissions made by Dr. Dhawan and Mr. Dwivedi that no definite promises were ever made. This, however, is not the end of the matter.

57. Even in the meeting held on 17.12.1999 under the Chairmanship of the Minister for Water Resources and Industry, Bihar the problems being faced by the Company were discussed. It was pointed out by the Industrial Development Commissioner that future of thousands of people is linked with the Company and, therefore, positive cooperation of financial institutions/bank is desirable for its rehabilitation. The Chairman of the Company was invited to apprise the meeting of the financial and other difficulties. It was accepted by the whole-time Director of IFCI, Mr. Ganguly that the financial institutions have always been supporting the Company and will support in the future. It was also stated by him that in the Industrial Policy, 1995 there is a provision of giving Sales Tax exemption for 8 years to a sick company. However, the Company had asked for the above facility only for 5 years. So far as the viability of the Company is concerned, it was stated to have already been established. After hearing all the concerned parties, the Minister mentioned that the Government of Bihar is very keen for

rehabilitation of the Company and that all possible support will be provided for implementation of the rehabilitation package prepared by financial institutions. So far as the Sales Tax relief is concerned, it was stated that "a decision will be taken in a day or two and the notification relating therewith will be issued by 2nd week of January, 2000….". With this assurance a consensus had emerged among the financial institutions and the Banks that if the Government implements the Industrial Policy, 1995 in its true spirit particularly on the issue relating to deferment/ exemption Sales Tax, the financial institutions and Banks will give their full cooperation. A number of very important decisions were taken in the aforesaid meeting. Decision No.4 was that "State Government will ensure that the notification regarding Sales Tax exemption is issued by the 2nd week of January, 2000".

58. On 25th January, 2000, the State Government informed the lead institution (IFCI) that the matter was discussed in the Cabinet Sub-Committee and draft notification was approved therein. It was further pointed out that due to ensuing Assembly Elections, it was being examined whether it was a violation of Model Code of Conduct or not. Once it is sorted out, action will be taken in this regard. Again vide letter dated 31.03.2000, the State Government informed the IFCI that the matter was delayed due to election and the necessary notification shall be issued soon. There was another meeting held on 29.05.2000 under the Chairmanship of the Minister of Industries on problems faced by the Company. The meeting recorded as follows:-

> "After intense discussion in the meeting, the following decisions were taken:
>
> > 1. Under the Industrial Policy, 1995 the Commercial Tax Department shall immediately issue the matching notification to provide the facility of exemption/deferment from Sales Tax to be potentially sick and closed units.

> 2. The Forest and Environment Deptt. Will take necessary steps immediately to take out the Limestone bearing areas from the Kaimur Wild Life Sanctuary and for grant of Mining Leases to KCL so that the Limestone availability to the Company is ensured uninterruptedly and thousands of workers working are saved from unemployment (given Forest and Environment Deptt.)"

59. All the aforesaid material would be leading to a conclusion that the Company as well as the financial institutions were entitled to rely upon the repeated assurances given by the State Government. However, since the promised notification was not forthcoming, the Company was constrained to file the writ petition.

60. Before the High Court the Company had claimed that it was eligible to avail Sales Tax incentive for a period of 8 years under clause 22(ii) of the 1995 Policy. This incentive was necessary for the revival of the Unit. It has been found to be eligible for exemption at the highest level of the Government. The State Government had held out clear and unequivocal assurances and promises to the Company as also the financial institutions with the necessary Notification under Clause 24 of the Industrial Policy, 1995 would be issued. The assurances/ promises are contained in official documents. It was, therefore, submitted that the Government cannot be permitted to resile from the representations.

61. During the course of the proceedings in the writ petition, the State Government in its supplementary affidavit dated 05.12.2000 filed on behalf of respondent No.4 (i.e. Secretary-cum-Commissioner, Commercial Taxes Department) again categorically reiterated that "the Hon'ble Minister, Department of Commercial Taxes has approved the proposals along with draft notification regarding extension of Sales Tax related incentives to sick industrial units……". It had been submitted to the Chief (Finance) Minister on 18.11.2000. It shall

be possible to issue necessary notification after approval of the proposal by the Chief (Finance) Minister. Having made the aforesaid statements in an affidavit before the High Court, the Government has resiled from the unequivocal representations in the decisions dated 06.01.2001 and 05.03.2001. Therefore, strong reliance was placed on clauses 22 and 24 of the 1995 Policy and the doctrine of 'promissory estoppel' in support of the plea that the action of the State Government in issuing orders dated 06.01.2001 and 05.03.2001 are wholly arbitrary and unjust.

62. In reply, it was contended that the decision dated 06.01.2001 had been taken for the four reasons stated earlier. It was further stated that the decisions taken in the meeting of the Cabinet held on 05.03.2001 was upon thoughtful and due consideration of all the relevant factors. Taking into consideration the totality of the circumstance, a policy decisions had been taken that notification relating to the Sales Tax incentive be not issued. Therefore, the Company was not entitled to any relief. It was on consideration of the entire matter that the High Court concluded as follows:-

> "When the State Government gives an assurance and undertaking, in form of a policy then in fact it allures person/ industries to enter into the individual ventures, invest money on the assurances contained in the policy, would it be justified on the part of the State Government to say later on that on a second thought they were withdrawing the policy and the benefits flowing from that policy? We are unable to agree to this argument."

63. We are of the opinion that the aforesaid conclusion reached by the High Court is based on due consideration of the material placed before it. We see no reason to differ with the opinion expressed by the High Court. We are unable to accept the submissions made by Dr. Dhawan and Mr. Dwivedi that no clear-cut assurances were held out to the Company. We are also unable to accept the submissions of Mr. Dwivedi that

the Company has failed to place on the record sufficient material to establish that unequivocal promises and representations had been made by the appellant to the Company by word and by conduct.

64. In our opinion, the matter is squarely covered by the observations made by this Court in the *Mangalore Chemicals* (supra) "There is, as set out earlier, no dispute that the appellant was entitled to the benefit of the Notification dated June 30, 1969. There is also no dispute that the refunds were eligible to be adjusted against sales tax payable for respective years. The only controversy is whether the appellant, not having actually secured the "prior permission" would be entitled to adjustment having regard to the words of the Notification of August 11, 1975, that "until permission of renewal is granted by the Deputy Commissioner of Commercial Taxes, the new industry should not be allowed to adjust the refunds". The contention virtually means this: "No doubt you were eligible and entitled to make the adjustments. There was also no impediment in law to grant you such permission. But see language of clause 5. Since we did not give you the permission you cannot be permitted to adjust." Is this the effect of the law?

> "10. The sales tax already paid by the appellant on the raw materials procured by it is the subject matter of the refunds. The sales tax against which the refund is sought to be adjusted is the sales tax payable by appellant on the sales of goods manufactured by it. If the contention of the Revenue is correct, the position is that while the appellant is entitled to the refund it cannot, however, adjust the same against current dues of the particular year but should pay the tax working out its refunds separately. The situation may well have been such but the snag comes here. If the adjustments made by the appellant in its monthly statements are disallowed, the sales tax payable would be deemed to be in default and would attract a penalty ranging from 1 1/2 per cent to 2 1/2 per cent per month from the date it fell due. That penalty, in the facts of this case, would be very much more than the amounts of refund."

> "11. What emerges from the undisputed facts is that appellant was entitled to the benefit of these adjustments in the respective years. It had done and carried out all that was necessary for it to do and carry out in that behalf. The grant of permission remained pending on account of certain outstanding inter-departmental issues as to which of the departments — the Department of Sales Tax or the Department of Industries — should absorb the financial impact of these concessions. Correspondence indicates that on account of these questions, internal to administration, the request for permission to adjust was not processed."

> "22……There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld — not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. Appellant had nothing to do with those issues. Appellant is now told, "We are sorry. We should have given you the permission. But now that the period is over, nothing can be done". The answer to this is in the words of Lord Denning:[4] "Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality".

23. Francis Bennion in his Statutory Interpretation, (1984 edn.) says at page 683:

"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfillment of the purposes of the legislation."

65. The law with regard to the applicability of the doctrine

of promissory estoppel was again comprehensively considered by this Court in the case of *Nestle India* (supra). Ruma Pal, J. speaking for the Bench observed as follows:-

> "24. But first a recapitulation of the law on the subject of promissory estoppel. The foundation of the doctrine was laid in the decision of Chandrasekhara Aiyar, J. in Collector of *Bombay v. Municipal Corpn. of the City of Bombay*………….." "……….Chandrasekhara Aiyar, J. concurred with the conclusion of Das, J. but based his reasoning on the fact that by the resolution, representations had been made to the Corporation by the Government and the accident that the grant was invalid did not wipe out the existence of the representation nor the fact that it was acted upon by the Corporation. What has since been recognised as a signal exposition of the principles of promissory estoppel, Chandrasekhara Aiyar, J. said: (AIR p. 476, paras 21 & 22)
>
> "The invalidity of the grant does not lead to the obliteration of the representation.
>
> Can the Government be now allowed to go back on the representation, and, if we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed. If the resolution can be read as meaning that the grant was of rent-free land, the case would come strictly within the doctrine of estoppel enunciated in Section 115 of the Evidence Act. But even otherwise, that is, if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. … Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power."
>
> **"25.** In other words, promissory estoppel long

> recognised as a legitimate defence in equity was held to found a cause of action against the Government, even when, and this needs to be emphasised, the representation sought to be enforced was legally invalid in the sense that it was made in a manner which was not in conformity with the procedure prescribed by statute."
>
> **"26.** This principle was built upon in *Union of India v. Anglo Afghan Agencies* where it was said (SCR at p. 385): (AIR p 728, para 23)
>
> "23. Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."
>
> xxxx xxxx xxxx xxxx
>
> "44. Of course, the Government cannot rely on a representation made without complying with the procedure prescribed by the relevant statute, but a citizen may and can compel the Government to do so if the factors necessary for founding a plea of promissory estoppel are established. Such a proposition would not "fall foul of our constitutional scheme and public interest". On the other hand, as was observed in Motilal Padampat Sugar Mills case and approved in the subsequent decisions: (SCC p. 442, para 24)
>
> "It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a

Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel."

"46. ……….The facts in the present case are similar to those prevailing in Godfrey Philips. There too, as we have noted earlier, the statutory provisions required exemption to be granted by notification. Nevertheless, the Court having found that the essential prerequisites for the operation of promissory estoppel had been established, directed the issuance of the exemption notification."

66. In *Petrochemical* (supra), this Court has clearly reiterated the promissory estoppel would apply where a party alters his position pursuant to or in furtherance of the promise made by a State. It is also clearly held that such a policy decision can be expressed in notifications under statutory provisions or even by executive instructions. Whenever the ingredients for invoking the principle of promissory estoppel are established, it could give rise to a cause of action. Not only may it give rise to a cause of action but would also preserve a right. The relevant observations are as under:-

"121**.** The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. The appellants had undoubtedly been enjoying the benefit of (sic exemption from) payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants."

"122**.** Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its

application against constitutional or statutory provisions is impermissible in law."

"130**.** We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved."

67. This Court in *MRF Ltd. Kottayam* (supra) considered the legality of a notification withdrawing the exemption granted by an earlier notification. Relying on the representations contained in the earlier notification, MRF had altered its position. Whilst setting aside the subsequent notification withdrawing the exemptions, this Court held that the whole actions of the State including exercise of executive power has to be tested on the touchstone of Article 14 of the Constitution of India. It was held that the action of the State must be fair. In this context we may notice the observations made in paragraph 38 and 39 of the judgment:-

"38. The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been restated by this Court in *Bannari Amman Sugars Ltd. v. CTO*[21]. It was observed in paras 8 and 9: (SCC pp. 633-34)

"8. A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest. (See *Union of India v. Hindustan Development Corpn*)

9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious

test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness." (emphasis supplied)"

"39. MRF made a huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years…….. "…….The action of the State cannot be permitted to operate if it is arbitrary or unreasonable. This Court in E.P. Royappa v. State of T.N observed that where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Equity that arises in favour of a party as a result of a representation made by the State is founded on the basic concept of "justice and fair play". The attempt to take away the said benefit of exemption with effect from 15-1-1998 and thereby deprive MRF of the benefit of exemption for more than 5 years out of a total period of 7 years, in our opinion, is highly arbitrary, unjust and unreasonable and deserves to be quashed."

68. We are also unable to accept the submission with the decisions dated 06.01.2001 and 05.03.2001 had been taken due to the change in the national policy. This was sought to be justified by Dr. Dhawan on the basis of the Conferences of Chief Ministers/Finance Ministers. It is settled law as noticed by Bhagwati, J in *Motilal Padampat* (supra) that the Government cannot, claim to be exempt from liability to carry out the promise, on some indefinite and undisclosed ground of necessity or expediency. The Government is required to place before the Court the entire material on account of which it claims to be exempt from liability. Thereafter, it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be

sufficient to exonerate the Government from liability. It is only when the Court is satisfied that the Court would decline to enforce the promise against the Government. However, the burden would be upon the Government to show that it would be inequitable to hold the Government bound by the promise. The Court would insist a highly rigorous standard of proof in the discharge of this burden. In the present case, the claim of the Government is based on a change in policy advocated in the Chief Ministers' Conference. These Conferences have taken place before the affidavit is filed on 05.12.2001. Therefore, the High Court concluded that the Government has not been candid in disclosure of the reasons for passing the order dated 06.01.2001. In our opinion, the aforesaid decisions with regard to the discontinuance of the Sales Tax exemptions from 01.01.2000 could not have affected the rights of the Company under the Industrial Policy, 1995. Necessary application was made to the Government seeking exemption on 21.11.1997. For more than 3 years, the Company and the financial institutions had been assured by the Government that the notification will be issued forthwith. However, it was not issued. We are of the opinion that the action of the appellants is arbitrary and indefensible.

69. Learned Senior counsel for the appellants had also submitted that it was not necessary to issue the notification within one month as stipulated in clause 24 of the Industrial Policy, 1995. In order to appreciate the aforesaid submission, it would be necessary to make a reference to the relevant clauses of the Industrial Policy, 1995. Clause 22, 23 and 24 are as under:-

> *"REVIVAL OF SICK UNITS.*
>
> The continuing problems of industrial sickness is a matter of great concern for the Government. Closure of units leads to unemployment and locking up of capital deployed in such ventures. The State Government is determined to take effective measures and to render all possible assistance for the amelioration of this malaise.
>
> *22.1. INDUSTRIAL SICKNESS IN SSI SECTION*
>
> The State Government proposes to take the following measures for the revival of SSI units:
>
> i. there are scores of medium and small scale units which are sick but have the potential of becoming viable. For such SSI units which are outside the purview of the Bureau of Industrial and Financial Reconstruction (BIFR), the State Government proposes to form an apex body on the lines of BIFR with Director of Industries as its Head to consider their revival.
>
> ii. The State level apex body for rehabilitation of sick industry would be vested with adequate powers so that it can effectively implement management and financial restructuring.
>
> iii. The sick SSI units would be identified as per guidelines given by RBI/IDBI. Appropriate packages of reliefs and concessions for such units would be approved for their rehabilitation.
>
> iv. Sick units undergoing rehabilitation will not have to take sickness certificate every year. The approved revival package for each sick unit would indicate the period of revival.
>
> v. The Apex Body shall monitor the progress of the revival package.
>
> vi. A sick unit being revived would be entitled to Sales Tax exemption/deferment exemption from Minimum Guarantee etc. as determined in the revival package.
>
> vii. The State level Apex body would besides

representatives of Government Department/ Organisations/ financial institutions will also have its members one representative each of confederation of Indian Industries, Bihar Industries Association and Bihar Chamber of Commerce.

The rehabilitation package would be implemented within a fixed time frame so that the process of revival is not delayed.

22.2 SICKNESS IN LARGE AND MEDIUM SECTOR

i. A committee with Industrial Development Commissioner as its head will be constituted to evolve suitable measures for potentially viable non-BIFR sick industrial units including PSUs in the large and medium sector.

The Committee will recommend concessions and facilities including those in this policy statement if considered necessary for revival of the Unit; These recommendations would be placed before the Government through State level Empowered Committee (SLEC) already constituted under the chairmanship of Chief Secretary for final decision.

ii. Concessions and facilities identified under the Scheme of rehabilitation prepared by the Board for Industrial and Financial Reconstruction (BIFR) or by Inter-Institutional Committee of IRBI, BICICO/BSFC and Bank would be placed before the Committee headed by the Industrial Development Commissioner for consideration and recommendation to Government through SLEC for approval.

iii. Rehabilitation measures for sick but potentially viable industrial units may, inter alia, include reliefs and concessions or sacrifice from various government departments/ organizations and or additional facilities

including allocation of power from BSEB/DVC and any other agency/statutory body/local authority."

22.3. Such closed and sick industrial units which have once availed of the facility of Sales Tax exemption/ deferment under a rehabilitation package prepared by BIFR shall not get the same facility again if they turn sick or are closed again. This will also apply to other facilities given to such sick and closed industrial units which have once availed of such facilities in the past. However, the State Government may consider extending such facilities on case to case basis as required.

23. Definition(s) given in the Annexure form(s) part of the policy.

24. MONITORING AND REVIEW

All concerned departments and organizations will issue follow up notifications to give effect to the provisions of the policy within a month. This will be appropriately monitored by the Govt.

The State Government may carry out Mid Term Review of this Policy."

70. A perusal of the aforesaid policy clearly shows that the Government was determined to take effective measures to render all possible assistance for amelioration of the continuing problem of industrial sickness in the State. It was viewed as a matter of great concern for the Government. Under Clause 22(1), the State Government was to constitute an apex body on the lines of BIFR with Director of Industries to consider the revival of sick Medium and Small Scale Units. Clause 22(2) deals with sickness in large and medium sector. Under clause 22(2)(i), a Committee headed by the Industrial Development Commissioner was to evolve suitable measures for potentially viable non-BIFR sick industrial units. Under Clause 22(2)(ii) the

Committee was to recommend concessions and facilities which were considered necessary for revival of the unit. The Company was, therefore, eligible under the aforesaid Clause 22(2)(ii). The Industrial Policy, 1995 did not envisage sickness in its strict terms as defined under the Sick Industrial Companies (Special Provisions) Act, 1985. The policy was of a wider application and included industrial sickness not only qua BIFR companies but also in relation to non-BIFR potentially viable sick companies. The Clause 6 of the Annexure attached to the Policy defines a sick unit as under:-

> *"Sick Unit:*
>
> Sick unit means an industrial unit declared sick by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provision) Act, 1985 or by the Apex Body headed by the Director of Industries for SSI or the High Level Empowered Committee headed by the Chief Secretary for large and medium sector."

71. The aforesaid definition makes it abundantly clear that the sickness of the Company could also be decided by the SLEC headed by the Chief Secretary. The exemption claim of the Company was duly considered by the Committee constituted under Clause 22.2(i). Its recommendations were duly placed before the SLEC under Clause 22.2(ii). The recommendations were not implemented only because the Government failed to issue a notification under Clause 24 of the Industrial Policy, 1995 within the stipulated period of one month. Even if we are to accept the submissions of Dr. Dhawan and Mr. Dwivedi that the provisions contained in Clause 24 was mandatory the time of one month for issuing the notification could only have been extended for a reasonable period. It is inconceivable that it could have taken the Government 3 years to issue the follow up notification. We are of the considered opinion that failure of the appellants to issue the necessary notification within a reasonable period of the enforcement of the Industrial Policy, 1995 has rendered the decisions dated

06.01.2001 and 05.03.2001 wholly arbitrary. The appellant cannot be permitted to rely on its own lapses in implementing its policy to defeat the just and valid claim of the Company.

72. For the same reason we are unable to accept the submissions of the learned senior counsel for the appellant that no relief can be granted to the Company as the Policy has lapsed on 31.08.2000. Accepting such a submission would be to put a premium and accord a justification to the wholly arbitrary action of the appellant, in not issuing the notification in accordance with the provisions contained in Clause 24 of the Industrial Policy, 1995. The entire sequence of meetings adverted to above would clearly indicate that rehabilitation package for the Company was considered by the financial institutions keeping in view the provisions contained in the Industrial Policy, 1995. The two Committees constituted under the aforesaid policy had duly recommended granting of exemptions. This was much before the policy lapsed on 31.08.2000.

73. The assurances given in various meetings were reiterated before the High Court in the Affidavit dated 05.12.2000. It was clearly stated that the draft notification was being prepared and being approved. It was thus obvious that the notification merely had to be published in the Official Gazette. After making the aforesaid statements in the affidavit, order dated 06.01.2001 was issued. The four reasons given in support of the decision are clearly arbitrary. It was no longer open to the appellant not to issue the notification on the ground that the Policy had lapsed on 31.08.2000. The second reason that the exemption could not be granted to the Company as no notification had been issued under Clause 24 cannot be accepted as the appellant-State cannot be permitted to take advantage of its own wrong. The third reason given is that the State-level Empowered Committee (SLEC) had not approved the rehabilitation package. This clearly is against the record which has been examined by us in the earlier part of the

judgment. Not only the exemption was recommended by the competent Committees under the Industrial Policy, 1995, emphatic assurances were given that the notification will be issued within a very short period. The fourth reason with regard to the resolution passed at the Chief Ministers' Conference is equally extraneous to the issue. The Company had made the application for exemption at a much prior time in 1997. No material has been placed either before the High Court or before this Court about the legal enforceability of the resolutions passed at the Chief Ministers' Conference. In our opinion the decision making process which culminated in passing of the orders dated 06.01.2001 and 05.03.2001 is seriously flawed, therefore, the same have been justifiably quashed by the High Court.

74. We may now consider the submissions made in IA No.3 of 2006. On 18.11.2002, this Court passed the following order:

> "As an interim arrangement during the pendency of this appeal, with a view to protect the interests of either side, we direct the respondent to deposit an amount equivalent to the sale tax payable by it as and when it becomes due in an interest hearing account in a nationalized bank. This amount and the amount accused during the pendency of the appeal, shall not be withdrawn by other side.
>
> The amount so kept in deposit shall become payable to the party which ultimately succeeds in this appeal.
>
> The appellants are directed to issue the exemption orders and on receipt of such order, the above said amount shall be deposited. The issuance of the exemption order is without prejudice to the case of the parties in this appeal.
>
> The I.A. in the disposed of."

75. It is not in dispute for us that pursuant to the aforesaid directions the appellant has issued the Notification No. SO-174 dated 18.10.2004 granting exemption to the company. The notification was to have effect for five years from the date of publication in the official gazette or till the disposal of special leave petition No.5181 of 2002, whichever is earlier. The notification was issued subject to the terms and conditions notice earlier in the judgment. Under the aforesaid terms and conditions, the company was to deposit the tax payable per month with an interest bearing (wrongly typed in the order as hearing) account in a nationalized bank. The company was also to provide information of the bank account to the circle where it is registered. Details regarding amount of payment made each month was also to be supplied to the appellant.

76. It is now the submission of the learned counsel for the appellant that the company has neither complied with the order passed by this Court on 18.11.2002 nor the conditions stipulated in the notification dated 16.10.2004. It is further submitted that prayers in the application were to recall the order dated 18.11.2002 and to stay the operation of a judgment under appeal dated 24.04.2002. However the application was not finally disposed of, even though the pleadings were complete.

77. During the pendency of the proceedings there have been some further development, which will now need to be taken into consideration by the Court, to do justice between the parties.

78. During the interregnum the company has been collecting the amount equivalent to the tax from the consumers. According to Dr. Rajiv Dhawan, Mr. Dwivedi during this period the company has collected more than Rs.60 crores on the sale of cement by virtue of the directions issued by this Court in the Order dated 18.11.2002. In view of the law laid down by this Court in Amrit Banaspati (supra) the company cannot be permitted to retain the amount collected from the customers.

This would amount unjust enrichment. Therefore, a direction is required to be issued that the amount deposited by the company with the bank pursuant to the orders of this Court be released to the appellant State. On the other hand, Mr. Parshad has submitted that the delay in issuance of the exemption Notification by the State has crippled the Company financially. Even then the Company is trying to revive itself through financial restructuring. The survival of the Company now depends on the approval of the Financial Restructuring Package prepared by the respondent No.2. This package has been submitted to the Chief Minister of Bihar which is still on the consideration of the Government. With regard to the non-deposit of amount equivalent to the tax due, Mr. Parshad reiterated that the Company had made bona fide efforts, but was unable to deposit the amount due to its ‘sickness’. On the one hand the revised rehabilitation package is kept under consideration, on the other the appellants seeks the vacation of the order dated 18.11.2002. The application, according to the learned senior counsel, deserves outright dismissal.

79. We have considered the submissions made by the learned counsel. It would be not possible to accept the submissions of Mr. Parshad that in view of the financial condition of the company it may be permitted to retain the amount collected under the orders of this Court. The amount was collected from the consumer to offset the tax liability. Such amount cannot be permitted to be retained by the company. In Amrit Banaspati case (supra) it has been held that exemption and refund of tax are two different legal and distinct concepts. The objective of the exemption is to grant incentive to encourage industrialization. It is to enable the industry to compete in the market. On the other hand, refund of tax is made only when it has been realized illegally or contrary to the provisions of law. Tax lawfully levied and realized cannot be refunded. In view of the settled position of the law, we decline to accept the suggestion made by Mr. Parshad.

80. Direction is, therefore, issued that the amount deposited by the company in the designated account opened and operated pursuant to the order of this Court dated 18.11.2002 together with accrued interest shall be released to the appellant State, forthwith.

81. I.A. No.3 is therefore allowed in the aforesaid terms.

82. In view of the above, the appeal filed by the State challenging the judgment and order dated 24.4.2002 is dismissed, however, I.A. No.3 is allowed to the extent indicated above.

K.K.T. Appeal dismissed and Application allowed.

RUBABBUDDIN SHEIKH
v.
STATE OF GUJARAT & ORS.
(Writ Petition (Crl.) No. 6 of 2007 etc.)

JANUARY 12, 2010

[TARUN CHATTERJEE AND AFTAB ALAM, JJ.]

Constitution of India, 1950 – Article 32 – Writ petition – Seeking transfer of investigation to CBI – In a case of alleged abduction and fake encounter by State police authorities – Direction sought for registration of offence and investigation of alleged encounter of the material witness against the police officials – Writ of Habeas Corpus also sought to produce wife of the abducted person who was also alleged to be missing – Investigation into the matter initiated by the State police in the matter on the direction of Registry of Supreme Court, which was issued on the basis of letter to the Chief Justice of India by the writ petitioner – Police filing eight Action Taken Reports before the Court – In one of the reports informed that dead body of the wife of abducted person disposed of – Hence no formal writ of Habeas Corpus issued – Held: There are grave allegations against high police officials – There are large and various discrepancies in Action Taken Reports and in investigation conducted by State Police – The investigation of the case is also spread over other States – The investigation by the local police was de hors the mandate of CrPC and not impartial – In the interest of justice and to instil confidence in the minds of victims as well as public, the investigation is handed over to CBI – In order to do complete justice in a case, court can handover investigation to CBI even after submission of the charge-sheet by local police – Investigation – Code of Criminal Procedure, 1973 – Chapter 12.

The writ petitioner sent a letter to the Chief Justice

of India informing about killing of his brother 'S' in a fake encounter and disappearance of his sister-in-law 'K' at the hands of Anti Terrorist Squad of Gujarat Police and Rajasthan Special Task Force. The letter was forwarded by the Registry of Supreme Court to the Gujarat Police to take action. After several reminders, enquiry was directed in the matter by the police.

In the meantime the petitioner filed writ petition No. 6 of 2007, seeking direction for investigation by CBI into the alleged abduction and fake encounter of 'S', and registration of an offence and investigation by CBI into alleged encounter of 'T', a close associate of 'S', who was a material witness against the police personnel. The petitioner also sought writ of *habeas corpus* **to produce 'K'.**

The State filed its interim reports in the matter, wherein it was stated that further inquiry was required and also sought permission to interrogate 'T'. However, from records it appeared that 'T' during a transit remand, escaped the police custody, and when the police personnel tried to apprehend him, 'T' assaulted them and then police personnel fired at him in self-defence, killing him.

As per direction of this Court, Gujarat Police filed eight Action Taken Reports in respect of the matter. In one of the Reports, the State brought to the notice of the Court that the body of 'K' was disposed of by burning. In view of the same, Supreme Court restrained itself from issuing a formal writ of *Habeas Corpus.*

Another Writ Petition No. 115 of 2007 was also filed by mother of 'T', alleging fake encounter of her son. She sought registration of the FIR in that case and its investigation by CBI. Contempt Petition was also filed in the writ petition No. 6/2007.

The question for consideration before this Court was whether in the facts and circumstances of the case, it was just and proper to transfer the case to CBI Authorities or any other independent agency, when the charge-sheet had already been submitted by the local police.

Disposing of the Writ Petition No. 6 of 2007 and contempt petition filed therein, and adjourning the hearing in the Writ Petition No. 115 of 2007, the court.

HELD: 1.1. In an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI. [Para 54] [1018-D-F]

1.2. In the instant case, taking into consideration the grave allegations made against the high police officials of the State in respect of which some of them have already been in custody, it is proper and appropriate and in the interest of justice even at this stage, that is, when the charge-sheet has already been submitted, the investigation shall be transferred to the CBI authorities for proper and thorough investigation of the case. [Para 51] [1016-G-H; 1017-A-B]

1.3. The accusations are directed against the local police personnel in which High Police officials of the State of Gujarat have been made the accused. If investigation is allowed to be carried out by the local police authorities, all concerned including the relatives of the deceased may feel that investigation was not proper

and in those circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility, however faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody. [Para 49] [1015-G-H; 1016-A-D]

1.4. There are large and various discrepancies in Action Taken Reports and the investigation conducted by the police authorities of the State of Gujarat and the charge-sheet filed by the State Investigating Agency also cannot be said to have run in a proper direction. From the factual discrepancies appearing in eight Action Taken Reports and from the charge-sheet, the Court feels that the police authorities of the State of Gujarat had failed to carry out a fair and impartial investigation as the Court initially wanted them to do. It cannot be questioned that the offences, the high police officials have committed, were of grave nature which need to be strictly dealt with. [Paras 55 and 59] [1019-B-E; 1021-B-D]

1.5. The investigation of crime was carried out *de hors* the mandate contained in Cr.P.C. and particularly Chapter XII containing Sections 154-176. There had been no fresh FIR filed despite primary investigation No. 66 to make the same the basis for investigation and trial. [Para 60] [1021-F]

1.6. Admittedly, the FIR dated 16th of November, 2005 which was filed following the alleged encounter was a fabricated one and, therefore, it could not have formed the basis of the real investigation to find the truth. The investigation and charge-sheet were silent on the motive behind the 'killings'. The only motive stated is fame. From

the Action Taken Reports submitted by the State Police Authorities, it is found that the State Police Authorities of Gujarat had to take help from the other police officials of other States, namely, Andhra Pradesh and Rajasthan. If the investigation is transferred to the CBI Authorities, it would be fair and proper that the other State police officials should also help the CBI Authorities in coming to a final conclusion on the allegations made by the writ petitioner and also on the offences alleged to have been committed by some of them. [Para 60] [1021-G-H; 1022-A-D]

1.7. Although the charge-sheet was submitted, but considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, the investigation concluded in the present case cannot be said to be satisfactorily held. [Para 65] [1024-D-E]

1.8. The scope of this order, however, cannot deal with the power of this Court to monitor the investigation, but on the other hand in order to make sure that justice is not only done, but also is seen to be done and considering the involvement of the State Police Authorities and particularly the high officials of the State of Gujarat, even at this stage, the court is compelled to direct the CBI authorities to investigate into the matter. Since the high police officials of the State of Gujarat are involved and some of them had already been in custody, it would not be sufficient to instill confidence in the minds of the victims as well as of the public that still the State Police authorities would be allowed to continue with the investigation when allegations and offences were mostly against them. In the present circumstances and in view of the involvement of the police officials of the State in this crime, the Court cannot direct the State Police authorities to continue with the investigation and the charge-sheet and for a proper and fair investigation. [Para 65] [1024-F-H; 1025-A-C]

1.9. The CBI Authorities shall investigate all aspects of the case relating to the killing of 'S' and his wife 'K' including the alleged possibility of a larger conspiracy. The report of the CBI Authorities shall be filed in this Court when this court will pass further necessary orders in accordance with the said report, if necessary. [Para 66] [1025-E-F]

R. S. Sodhi vs. State of U.P. **AIR 1994 SC 38;** *Ramesh Kumari vs. State (NCT Delhi) and Ors.* **2006 (2) SCC 677;** *Kashmeri Devi vs. Delhi Administration* **AIR 1988 SC 1323;** *Gudalure M. J. Cherian and Ors. vs. Union of India* **1992 (1) SCC 397;** *Punjab and Haryana High Court Bar Association vs. State of Punjab and Ors.* **AIR 1994 SC 1023;** *Sheikh Hasib alias Tabarak v. The State of Bihar* **1972 (4) SCC 773;** *Babu Lodhi v. State of UP* **1987 (2) SCC 352;** *Prem Kumar and Anr.v. State of Bihar* **1995 (3) SCC 228, relied on.**

Vineet Naryan and Ors. vs. Union of India **1996 (2) SCC 199;** *Union of India vs. Sushil Kumar Modi* **1998 (8) SCC 661;** *Rajiv Ranjan Singh 'Lalan' (VIII) and Anr. vs. Union of India and Ors.* **2006 (6) SCC 613;** *Aleque Padamsee and Ors. vs. Union of India and Ors.* **2007 (6) SCC 171;** *M.C. Mehta vs. Union of India and Ors.* **2008 (1) SCC 407, distinguished.**

Case Law Reference:

1996 (2) SCC 199	**Distinguished.**	**Para 38**
1998 (8) SCC 661	**Distinguished.**	**Para 39**
2006 (6) SCC 613	**Distinguished.**	**Para 42**
2007 (6) SCC 171	**Distinguished.**	**Para 44**
2008 (1) SCC 407	**Distinguished.**	**Para 45**

AIR 1994 SC 38	**Relied on.**	**Para 48**
2006 (2) SCC 677	**Relied on.**	**Para 50**
AIR 1988 SC 1323	**Relied on.**	**Para 51**
1992 (1) SCC 397	**Relied on.**	**Para 52**
AIR 1994 SC 1023	**Relied on.**	**Para 53**
1972 (4) SCC 773	**Relied on.**	**Para 60**
1987 (2) SCC 352	**Relied on.**	**Para 60**
1995 (3) SCC 228	**Relied on.**	**Para 60**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 6 of 2007.

WITH

W.P. (Crl.) No. 115 of 2007.

Conmt. Petn. Crl. No. 8 of 2207 in W.P. (Crl.) No. 6 of 2007.

Gopal Subramanium, S.G., Harin, P. Raval, ASG, Dushyant A. Dave (NP), Mukul Rohtagi, Shekhar, Naphade (NP), Tushar Mehta, AAG, Arunav Patnaik, Jinesh Kapadia, Aman Ahluwalia, Huzefa Ahmadi (NP), Ejaz Maqbool, Abhijit Sinha, Pardhuman Gohil, Taruna Singh, Garima Kapoor, Meenakshi Arora, Hemantika Wahi, Jesal, Saurav Kripal, K. Enatoli Sema, Pinky, Sushma Suri, GP. Capt. Karan Singh Bhati, Aishwarya Bhati, Himanshu, Malini Poduval, Shibu Shankar Misra, E.C. Agrawala, P. Narasiman, Arunabh Choudhury, Anupam Lal Das, Raktim Gogoi, Kashi Vishweshwar, A. Sumathi for the appearing parties.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Acting on a letter written by the writ petitioner, Rubabbuddin Sheikh, to the Chief Justice

of India about the killing of his brother, Sohrabuddin Sheikh in a fake encounter and disappearance of his sister-in-law Kausarbi at the hands of the Anti Terrorist Squad (ATS) Gujarat Police and Rajasthan Special Task Force (RSTF), the Registry of this Court forwarded the letter to the Director General of Police, Gujarat to take action. This letter of the Registry of this Court was issued on 21st of January, 2007. After about six months and after several reminders, the Director General, Police, Gujarat, directed Ms. Geetha Johri, Inspector General, Police (Crime), to inquire about the facts stated in the letter. A case was registered as Enquiry No. 66 of 2006. From 11th of September, 2006 to 22nd of January, 2007 four Interim Reports were submitted by one V.L. Solanki, Police Inspector, working under Ms. Johri.

2. In the present writ petition, the writ petitioner seeks a direction for investigation by the Central Bureau of Investigation (in short the 'CBI') into the alleged abduction and fake encounter of the brother of the writ petitioner Sohrabuddin by the Gujarat Police Authorities. The writ petitioner also seeks the registration of an offence and investigation by the CBI into the alleged encounter of one Tulsiram, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kausarbi, and was thus a material witness against the Police personnel. The writ petitioner further seeks a writ of habeas corpus to produce Kausarbi, the sister-in-law of the writ petitioner.

3. As noted herein above, out of the four interim reports submitted by one V.L.Solanki, Police Inspector, working under Ms. Johri, only one report was submitted initially in this Court. It was only on 16th of May, 2007 that the other three reports were submitted.

4. In the Report submitted on 12th of May, 2007, by Ms.Johri, it has been stated as follows:

"However, based on the statement of various witnesses and subsequent identification of the photographs of Sohrabuddin and Kausarbi taken by Inquiry Team of CID Crime there appears to be some discrepancy regarding the presence of Sohrabuddin and Kausarbi at Hyderabad and Ahmedabad which needs to be further enquired into. Further enquiry also needs to be conducted with regards (1) who were the persons who claimed to be police who picked up the three passengers namely Sohrabuddin, Kausarbi and third unknown person. (2) what happened to Kausarbi after 22.11.2005 when the so-called police personnel took her off the bus."

5. In the same report, Ms. Johri sought permission to interrogate one Tulsiram who was at that time in Rajasthan Jail. From the record, it appears that on 27th/28th of December, 2006, an FIR was lodged in which it was stated that when Tulsiram was sent on transit remand from Rajasthan to Gujarat, two armed persons rescued him at gun point and fled with Tulsiram. In the said FIR, it has been alleged that while search was launched to locate Tulsiram early in the next morning, he, along with two other persons, was spotted on a highway trying to stop a matador van. It has also been alleged, that one of the police officers who was following the matador in which Tulsiram was traveling, accosted him, upon which Tulsiram was said to have fired at the Police officer and the bullet was said to have hit the mudguard of the vehicle. The Police Officers were said to have fired at Tulsiram in self-defence, killing him. However, the other two persons somehow managed to escape in the darkness.

6. One Mr. Raigar, Additional Director General of Police and Head of CID Gujarat Police who was in-charge of the investigation on the incident of death of Sohrabuddin and disappearance of Kausarbi was replaced by one Mr. O.P. Mathur, Additional Director General of Police (prison) who was given an additional charge as Head of CID.

7. Ms. Johri was replaced by Mr. Rajneesh Rai, Deputy Inspector General, as an Investigating Officer in respect of the fake encounter relating to the incident of Sohrabuddin's case and disappearance of Kausarbi.

8. The Writ Petitioner had, on an earlier occasion, filed a petition under Article 32 of the Constitution of India, praying for a direction to the Gujarat police to produce Kausarbi and for a fair and impartial investigation in both the episodes by the CBI so that the matter goes beyond the influence of the local police. On the said application, while issuing a notice to the Union of India, this Court on 22nd of January 2007 requested Mr. Gopal Subramanium, learned Addl. Solicitor General for India, (as he then was) who was present in the Court, to take instructions in the matter, in the meantime.

9. Subsequently, by another order dated 19th of March 2007, this Court issued a notice to the State of Gujarat which was made returnable on 23rd of March 2007. It is evident from the said order that the State of Gujarat was asked to produce the relevant records on 23rd of March 2007. When the matter came up before it on 23rd of March 2007, the learned senior counsel for the respondent State submitted that as regards some of the police officers who were involved in the alleged acts, some of the details were collected by the State and after the full details were available further action would be taken in the matter. It was also submitted that the State would be writing to the Government of Madhya Pradesh for giving protection to the writ petitioner, residing at Village Jharnia Sheikh, Dist Ujjain, M.P. Three weeks time was granted to the State to file a report in a sealed cover. In the meantime, the report submitted by the Additional Solicitor General for India, (as he then was), was perused and placed on record. The matter came up again on 20th of April 2007 for consideration before this Court. A week's time was granted to enable the State of Gujarat to make submissions on the report submitted by Additional Solicitor General for India (as he then was), a copy of which was

ordered to be supplied to the learned Counsel for the State of Gujarat and other parties.

10. On 27th of April 2007, the State of Gujarat submitted an interim report on the investigation conducted by them in pursuance of the orders of this Court dated 22nd of January, 2007, 19th of March 2007, 20th of March, 2007 and 23rd of April 2007.

11. At that point of time, it was submitted by the learned counsel for the State of Gujarat before this Court that if some more time was granted, a comprehensive status report or Action Taken Report could be submitted before this Court. The learned Attorney General for India submitted that in view of the serious nature of the offence in which some highly placed police officials of the State of Gujarat were alleged to have been involved, orders may be immediately passed directing the CBI to take charge of the investigation and report to this Court.

12. This Court, by an order dated 3rd of May, 2007 ordered that some more time may be granted to the State of Gujarat before any further action was taken in the matter. However, after going through the Interim Report of the Additional Solicitor General and also the Interim Status Report filed by the State of Gujarat, this Court held the view that a prima facie case was made out for issuance of a Rule Nisi calling upon the Union of India and the State of Gujarat to show cause why the order prayed for should not be granted and also as to why a writ of Habeas Corpus should not be issued to produce Kausarbi in Court. At that stage, learned senior counsel appearing for the State of Gujarat brought to the notice of the court that the body of Kausarbi was disposed of by burning it in village Illol, Sabarkantha District', which fact was brought on record in the Action Taken Report No. 3 submitted on 30th of April, 2007. In that view of the matter at that stage, this Court restrained itself from issuing a formal writ. The State of Gujarat was directed to submit the final status report within two weeks from that date. An allegation was made that Ms.Johri was taken off the

investigation for some reasons best known to the State Authorities. The State of Gujarat was directed to submit a report in that regard also.

13. When the matter came up for hearing before this Court on 17th of May, 2007, Learned Attorney General for India again submitted before us that this was a fit case where this Court should pass an order directing handing over the investigation from the State Investigating Agency to CBI as the investigation would not only be made in the State of Gujarat, but also in the States of Andhra Pradesh and Rajasthan and for such investigation, cooperation of the State of Rajasthan and State of Andhra Pradesh and their high police officials may be required. Therefore, according to Attorney General for India, it would be difficult for the Investigating Agency of the State of Gujarat to make proper and thorough enquiry and submit a report to this Court. Mr. Ahmadi, learned counsel appearing on behalf of the writ petitioner also submitted that this Court should direct the CBI to take over the investigation at the same time permitting Ms.Johri and Mr. Rajneesh Rai to make the investigation jointly and submit a report to this Court. Mr. Gopal Subramanium, learned Addl. Solicitor General for India (as he then was) also agreed with the submissions of Mr.Ahmadi that it was a fit case for handing over the investigation to CBI from the State of Gujarat.

14. From the Action Taken Report No. 4 submitted before this Court on 14th of May, 2007, it was found that the assistance of Directorate of Forensic Science, Gujarat State, and BJ Medical College, Ahmedabad has been sought to obtain advice on the exhibits collected from the scene of offence. Permission of the Court was also sought for microanalysis and other related tests in case of the accused namely, (1) Shri D.B. Vanzara, IPS, Ex-DIG of Police, Border Range, Kutch-Bhuj, (2) Shri Rajkumar Pandyan, Ex-SP, CID, IB and (3) Shri Dinesh MN, IPS, SP, Alwar, Rajasthan. The application was pending then. In Action Taken Report No. 4, it was also stated that efforts

were being made to arrest the remaining accused officers and men against whom there was prima facie evidence. Efforts were being made to trace the remains of Kausarbi. A well where reportedly the remains of Kausarbi were disposed of was dug up and samples collected were sent to Forensic Science Laboratory, Gandhinagar for further analysis and for comparison with the soil samples taken from the scene where the body of Kausarbi was alleged to have been disposed of by burning at Illol Village, Sabarkanta District, in the State of Gujarat. From the Action Taken Report No. 4 it appeared that the following investigations were still awaited:

a. Andhra Pradesh Police Personnel who helped the ATS, Gujarat in picking up the accused was yet to be identified. Cooperation of DGP & IGP, Andhra Pradesh was enlisted in this regard.

b. Apprehension of accused of Rajasthan for which help of DGP & IGP Rajasthan was enlisted.

c. Reports from Directorate of Forensic Science, Gujarat State.

d. Identification of the farm house to which Kausarbi was shifted and method by which she might have died and those involved in the crime, if any.

15. From the aforesaid report, it also appeared that the charge sheet shall be filed as soon as the evidence came on record. It was observed by this Court at that point of time that on a perusal of the materials already brought on record, it was difficult to conclude at that stage that the investigation was not proceeding towards correct direction. At that stage, we did not find it appropriate to direct the State of Gujarat to include Mr. Raigar with Ms. Johri for completing the investigation.

16. At that stage, it was submitted before this Court by the learned senior counsel appearing for the state of Gujarat that

the final report would be submitted within four to six weeks from 15th of May, 2007.

17. Fifth Action Taken Report was dated 2nd of July, 2007. In this report, taking a departure from what was stated in the Fourth Action Taken Report, Ms.Johri stated that the Andhra Pradesh Police authorities had denied any official involvement of Andhra Pradesh Police Personnel. Examining 194 witnesses, they had been able to array another six persons as accused. Against the order of the Metropolitan Court rejecting permission of the Court for conducting the NARCO Analysis test of six accused persons, an appeal had been filed in the Sessions Court.

18. The body of Kausarbi was cremated on 29th of November, 2005 in Illol village. The assistance of Directorate of Forensic Science was sought to establish whether soil samples collected from Illol village contained any remains of a human body. As per FSI dated 28th of May, 2007, nothing incriminating was found.

19. The investigation was pending with respect to i) Arrest of two police personnel ii) To establish the identity of Andhra Pradesh Police personnel who might have unofficially helped ATS officials.

20. Charge sheet was proposed to be filed within prescribed time frame against the accused who was arrested.

21. On 16th of July, 2007, this Court directed that a copy of the charge sheet must be supplied to the Addl. Solicitor General for India (as he then was) after taking note of the fact that the 6th Action Taken Report dated 14th of July, 2007 was filed in court. This Report reiterated the stand that no official assistance was rendered by Andhra Pradesh Police to ATS Gujarat. Charge sheet had been filed in the Court of Chief Metropolitan Magistrate against 13 accused for Criminal Conspiracy, abduction, wrongful confinement, murder etc. 13

have been arrested. One of the 13 accused whose names had been listed is one Mr. N.V. Chauhan, PSI who, in the previous ATR, had been mentioned as yet to be arrested. However, the name of one Mr. Jadeja, Driver PC who was also supposed to be arrested as per previous ATR, did not appear among the names of the accused who were arrested. Evidently, he had not been charge sheeted.

22. The motives for killings was attributed as "name, fame and promotion", in case of Sohrabuddin's death and "destruction of evidence", in Kausarbi's case.

23. The report expressly states that no link of Tulsiram Prajapati had been established in this case. The third person who was abducted was not to be said Tulsiram Prajapati.

24. Ms.Johri also stated that the investigation had been carried on in a fair and impartial manner under her direct supervision.

25. It was stated that the writ petitioner did not cooperate with the investigation. It is also stated that copies of ATR cannot be supplied as the same would help the accused.

26. On 2nd of August, 2007, the Seventh Action Taken Report was filed, which stated that the third person who was picked up was one Kalimuddin, who was suspected to be an informer of Police. He could be hiding somewhere, unharmed. It again detailed the efforts of the State CID (Crime) to make sure that none of the accused goes scot-free. Accused Police Officers, irrespective of their rank, had been arrested. They were suspended or transferred to avoid their interference with the case. Police personnel themselves had deposed against the accused Police officers. No anticipatory bail was granted to any of the accused.

27. Mr. Jadeja was the one who had first revealed the name of N.K.Amin on 26th of April, 2007.

28. The accused had challenged subjecting them to NARCO analysis and the matter was pending before the Court. The Report submitted that analyzing the voluminous details of the calls made by the accused, collected from various service providers, would take time. It was also urged that the Habeus Corpus filed by Rubabbuddin Sheikh does not survive as Kausarbi's body was found to be cremated.

29. On 15th of September, 2008, Ms. Johri filed the Eighth Action Taken Report. It mentioned that a supplementary charge sheet was filed on 10th of December, 2007. It also detailed the status of bail applications rejected or pending. The Writ Petitioner filed an application in the Sessions Court, which was partly allowed and the Investigating Officer Police Inspector Shri. D.H.Trivedi, was directed to carry out further investigation under Section 173(8) of the Code of Criminal Procedure within 90 days.

30. The details of communication between the witnesses and the owner of the Crane which was sent to pull out the tempo which got bogged while carrying firewood for the cremation of Kausarbi's body were revealed. The call details revealed the movements of the accused, their connection between each other, and the wrongful confinement of Kausarbi and Sohrabbuddin in Disha farm.

31. In order to establish motive as mentioned in the charge sheet, details of 15 criminal cases in which Sohrabbuddin was involved were collected. Efforts were still made to trace Kalimuddin and to identify the Police officers and men of Andhra Pradesh who had allegedly helped the accused though no involvement of the Police Personnel of Andhra Pradesh was suspected. On the question of NARCO Analysis, the matter was heard by this Court and the judgment was kept reserved. FSL Gujarat had stated that NARCO Analysis would be conducted only with the consent of the accused. The Investigating Officer was asked to move the High Court in the matter.

32. After eight Action Taken Reports were submitted and objections thereto were also filed by the parties, the writ petition came up for final hearing for the purpose of deciding whether in the facts and circumstances of the present case, it would be just and proper to transfer the case to the CBI Authorities for the purpose of investigation into the allegations made on behalf of the writ petitioner. On this aspect of the matter, we have heard Mr.Dushyant Dave, learned senior counsel for the writ petitioner and Mr.Gopal Subramanium, learned Solicitor General for India, who appeared as Amicus Curiae and Mr.Mukul Rohtagi, learned senior counsel for the State of Gujarat and other learned counsel appearing for the parties. After hearing the learned senior counsel and after going through the eight Action Taken Reports and other materials on record, two questions were articulated by the learned counsel for the parties - one is whether after the charge sheet was submitted by the police and the trial was going on, under that circumstances whether the investigation can be transferred to the CBI Authorities. Secondly, it was argued that in respect of the fact that eight Action Taken Reports were submitted but from the said reports, it would be clear that the Police Authorities of the State of Gujarat were not taking proper action in the matter although some of their high police officials were taken to custody. Therefore, let us first consider the first question, namely, whether investigation can be transferred to CBI Authorities or any other independent agency when the charge sheet has already been submitted. In support of his contention that the investigation can be transferred to the CBI Authorities when the charge sheet in the criminal proceeding was already filed, reference was made to in *Kashmeri Devi vs. Delhi Administration & Anr.* [AIR 1988 SC 1323] by the learned senior counsel for the writ petitioner. He also relied on a decision of this court in the case of *Inder Singh vs. State of Punjab & Ors.* [1994 (6) SCC 275] in which this Court held that the enquiry should be transferred to the CBI Authorities for investigation in view of the fact that the police authorities had not been able to locate the whereabouts of the abducted

persons. Therefore, these decisions were cited by the learned counsel for the writ petitioner to show that even after the charge sheet has been filed in the Court of Competent Jurisdiction, this Court is empowered to direct the CBI Authorities or any other independent agency to take over the investigation from the police authorities. The learned counsel for the writ petitioner also placed strong reliance on a decision of this Court in the case of *Gudalure M.J.Cherian & Ors. vs. Union of India* [1992 (1) SCC 397] from which it also appears that although the charge sheet was filed in that case, this Court directed the CBI to hold further investigation in respect of the offence so committed. Similar is the question raised in *P & H High Court Bar Association vs. State of Punjab & Ors.* [AIR 1994 SC 1023] in which case also the investigation was handed over to the CBI Authorities after the charge sheet was submitted in the court. While making such order, this Court observed :

> "The High Court was wholly unjustified in closing its eyes and ears to the controversy which had shocked the lawyer fraternity in the Region. For the reasons best known to it, the High Court became wholly oblivious to the patent facts on the record and failed to perform the duty entrusted to it under the Constitution. After giving our thoughtful consideration to the facts and circumstances of this case, we are of the view that the least the High Court could have done in this case was to have directed an independent investigation/enquiry into the mysterious and most tragic abduction and alleged murder of Kulwant Singh, Advocate and his family.
>
> We are conscious that the investigation having been completed by the police and charge-sheet submitted to the court, it is not for this Court, ordinarily, to reopen the investigation. Nevertheless, in the facts and circumstances of the present case, to do complete justice in the matter and to instill confidence in the public mind it is necessary, in our view, to have fresh investigation in this case through

a specialised agency like the Central Bureau of Investigation (CBI)."

33. Accordingly, the learned senior counsel appearing for the writ petitioner submitted that even if the charge sheet was submitted it was still open to the court to direct investigation to be made by the CBI Authorities and accordingly in view of the above position in law, this Court, considering the facts and circumstances of the present case, should direct the CBI Authorities to investigate the offences alleged to have been committed by some of the police authorities of the State of Gujarat and submit a report if this Court is of the view that the State Police Authorities who had already filed eight Action Taken Reports had not done such investigation in the proper direction nor had they investigated in a fair and proper manner.

34. This submission of the learned senior counsel for the writ petitioner was hotly contested by Mr.Mukul Rohtagi, learned senior counsel who appeared for the State of Gujarat. According to Mr. Rohtagi, after the charge sheet was submitted in court, it was not open to the court to hand over the investigation to the CBI or any other independent agency and in support of that contention a decision of this Court in the case of *Vineet Narayan & Ors. vs. Union of India* [1996 (2) SCC 199] was relied on. In this decision, this Court observed:

> "In case of persons against whom a prima facie case is made out and a charge-sheet is filed in the competent court, it is that Court which will then deal with that case on merits, in accordance with law.
>
> However, if in respect of any such person the final report after full investigation is that no prima facie case is made out to proceed further, so that the case must be closed against him, that report must be promptly submitted to this Court for its satisfaction that the authorities concerned have not failed to perform their legal obligations and have reasonably come to such conclusion. No such

> report having been submitted by the CBI or any other agency till now in this Court, action on such report by this Court would be considered, if and when that occasion arises."

35. Subsequent to the aforesaid decision of this Court, another decision of this Court, namely, *Union of India vs. Sushil Kumar Modi* [1998 (8) SCC 661] was relied on by Mr.Rohatgi, learned senior counsel in which this Court observed after considering and following the decision in *Vineet Narayan's* case that once a charge sheet is filed, the adequacy or otherwise of the charge sheet and the investigation cannot be gone into by this Court under Article 32 of the Constitution of India and the only remedy which can be pursued if any aggrieved party feels that in some areas the investigation is inadequate is an application under Section 173 (8) of the Code of Criminal Procedure. This Court observed as follows:

> "This position is so obvious that no discussion of the point is necessary. However, we may add that this position has never been doubted in similar cases dealt with by this Court. It was made clear by this Court in the very first case, namely, *Vineet Narain v. Union of India* that once a chargesheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making the CBI and other investigative agencies concerned perform their function of investigating into the offences concerned comes to an end and thereafter it is only the Court in which the charge sheet is filed which is to deal with all matters relating to the trial of the accused including matters falling within the scope of Section 173(8) of the Code of Criminal Procedure. We make this observation only to reiterate this clear position in law so that no doubts in any quarter may survive. It is therefore clear that the impugned order of the High Court dealing primarily with this aspect cannot be sustained."

36. Another decision of this Court which was strongly relied

on by Mr.Mukul Rohatgi, learned senior counsel appearing for the State of Gujarat is the decision in *Rajiv Ranjan Singh 'Lalan' (VIII) and Anr. Vs. Union of India & Ors.* [2006 (6) SCC 613]. In this decision referring to the case of *Sushil Kumar Modi* (supra) and *Vineet Narayan* (supra), this court held :

> "It is thus clear from the above judgment that once a charge-sheet is filed in the competent Court after completion of the investigation, the process of monitoring by this Court for the purpose of making CBI and other investigative agencies concerned perform their function of investigating into the offences concerned comes to an end and thereafter, it is only the Court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused including matters falling within the scope of Section 173(8).
>
> We respectfully agree with the above view expressed by this Court. In our view, monitoring of pending trial is subversion of criminal law as it stands to mean that the Court behind the back of the accused is entering into a dialogue with the investigating agency. Therefore, there can be no monitoring, after the charge sheet is filed."

37. Mr.Rohatgi, learned senior counsel appearing for the State of Gujarat had then drawn our attention to another decision of this Court in the case of *Hari Singh vs. State of U.P.* [(2006) 5 SCC 733] in which it was held that when there is a remedy provided under the Code of Criminal Procedure, 1973, the CBI Authorities cannot be directed to investigate into the matter.

38. Before we take up the decisions cited at the Bar from the side of the writ petitioner, we may deal with the decisions cited by Mr.Rohatgi, learned senior counsel appearing for the State of Gujarat. The first decision is *Vineet Narayan* (supra). In that case, it was alleged that the CBI and the Revenue Authorities had failed to perform their duties and legal

obligations inasmuch as the investigation into "Jain Diaries" seized in raids conducted by the CBI is concerned.

39. From a careful examination of this decision of this Court relied on by the learned senior counsel appearing for the respondent, we are not in a position to say that the said decision has clearly held that after the charge sheet is submitted, the question of handing over the investigation of the criminal case to the CBI cannot arise at all. From that decision, it is clear that the CBI and the Revenue Authority had failed to perform their duties and legal obligations inasmuch as the investigation into 'Jain Diaries' seized in raids conducted by the CBI was concerned. Therefore, we are unable to accept the contention of Mr.Rohatgi that this decision can at all help the State of Gujarat to substantiate their argument that after the charge sheet is filed in court, there was no question that the investigation cannot be handed over to the CBI authorities. So far as the decision cited by Mr.Rohatgi in *Union of India vs. Sushil Kumar Modi* (supra) is concerned, it is clear that the said decision was rendered following the decision in the case of *Vineet Narayan* (supra). In view of our discussions made in respect of the *Vineet Narayan's* case, we do not think that any advantage could be taken by the State of Gujarat to hold that after the charge sheet is submitted it was not open for the court to hand over the investigation to an independent agency.

40. In *Vineet Narayan's* case (supra), the fact was that the investigation was already with the CBI Authorities and in that investigation charge sheet was submitted. In that context, this Court observed that once the charge sheet has been submitted, the CBI Authorities cannot approach the High Court for issuance of directions in such investigation where the charge sheet was already submitted.

41. In *Sushil Kumar Modi* (supra), we find that the investigation was also with the CBI and charge sheet in that investigation was submitted, therefore, this Court in *Sushil Kumar Modi* (supra) observed that there was no occasion for

any of the officer of the CBI to approach the High Court or for the Division Bench of the High Court to issue any directions, oral or otherwise, for seeking the aid of the army for execution of the warrant against Shri Lalu Prasad Yadav. Again in Para 7 of the decision in *Sushil Kumar Modi's* case (supra), it would be evident that the CBI Authorities were investigating the offences and that is the reason this Court observed that after the charge sheet was filed, no directions can be taken by the CBI Authorities or its officers from the High Court or this Court as the case may be. This is not the case before us. It is true that in the present case, the charge sheet has already been submitted but that does not debar, in our view, this court from handing over the investigation to the CBI Authorities.

42. So far as *Rajiv Ranjan Singh's* case (supra) which was relied on by Mr.Mukul Rohatgi, learned senior counsel for the State of Gujarat, is concerned, we find that this decision was also rendered relying on *Sushil Kumar Modi's* case (supra) and *Vineet Narayan's* case (supra) as noted herein earlier. In that case also, the process of monitoring by this Court for the purpose of making the CBI investigating agency perform their functions and investigate into the offence would come to an end but it is repeated that in the present case the question is whether an investigation can be handed over to the CBI authorities even if the charge sheet is submitted. The question of monitoring investigation by the CBI Authorities in all the three cases cited by Mr.Rohatgi in the facts and circumstances of the present case cannot arise at all.

43. It was next contended by Mr.Rohatgi, learned senior counsel for the State of Gujarat that it was not open for this court under Article 32 of the Constitution to direct the CBI Authorities or any other independent agency to investigate into the matter when the police authorities are proceeding with the trial and charge sheet has already been submitted. Therefore, according to Mr.Rohatgi when there is specific remedy provided under the Code of Criminal Procedure, 1973, this Court cannot again

direct the CBI to investigate into the offence alleged by allowing a writ petition under Article 32 of the Constitution.

44. In support of this contention, reliance was also placed in the case of *Aleque Padamsee & Ors. vs. Union of India & Ors.* [2007 (6) SCC 171].

45. Reliance was also placed in a decision of this Court in *M.C.Mehta vs. Union of India & Ors.* [2008 (1) SCC 407] where this Court held that once the court is satisfied itself that a proper investigation has been carried out, it would not venture to take over the functions of the Magistrate or pass any order which would interfere with its judicial functions. Accordingly, Mr.Mukul Rohatgi submitted that in the absence of any error being committed by the police authorities in conducting the investigation, it would not be proper for this Court to exercise its power under Article 32 of the Constitution and direct that the CBI authorities or any other independent agency should be given the charge of investigating the offence alleged in this writ petition.

46. Accordingly, Mr.Mukul Rohatgi, learned senior counsel submitted that in view of the decisions of this Court, it would not be proper for this Court at this stage, when the investigation has been carried out by the police without any blemish, to hand over the investigation to the CBI authorities or any other independent agency particularly when the charge sheet has already been submitted.

47. Having heard the learned senior counsel appearing for the parties and after going through the eight Action Taken Reports submitted by the Police Authorities before this Court and after considering the decisions of this Court cited at the Bar and the materials on record and considering the nature of offence sought to be investigated by the State Police Authorities who are themselves involved in such crime, we are unable to accept that the investigation at this stage cannot be handed over to the CBI Authorities or any other independent

agency. We have already discussed the decisions cited by Mr.Mukul Rohatgi, learned senior counsel appearing for the State of Gujarat and have already distinguished the said cases and came to a conclusion that those decisions were rendered when CBI enquiries have already been made and at that stage this Court held that after the charge sheet is submitted, the CBI authorities would not be able to approach this Court or the High Court to have issuance of directions from this Court.

48. In *R.S.Sodhi vs. State of U.P.* (AIR 1994 SC 38) on which reliance was placed by the learned senior counsel appearing for the writ petitioner, this Court observed :

> "We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that *since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However, faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them.* It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice, to entrust the investigation to the Central Bureau of Investigation."
>
> (Emphasis supplied)

49. This decision clearly helps the writ petitioner for handing over the investigation to the CBI Authorities or any other independent agency. It is an admitted position in the present case that the accusations are directed against the local police personnel in which High Police officials of the State of Gujarat have been made the accused. Therefore, it would be

proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility, however, faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.

50. It is also well known that when police officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI authorities would be an appropriate authority to investigate the case. In *Ramesh Kumari vs. State (NCT Delhi) & Ors.* [2006 (2) SCC 677], this Court at Paragraph 8 observed :

> "………………We are also of the view that since there is allegation against the police personnel, the interest of justice would be better served *if the case is registered and investigated by an independent agency like CBI."*

51. In *Kashmeri Devi vs. Delhi Administration,* (supra), this court held that in a case where the police had not acted fairly and in fact acted in partisan manner to shield real culprits, it would be proper and interest of justice will be served if such investigation is handed over to the CBI authorities or an independent agency for proper investigation of the case. In this

case, taking into consideration the grave allegations made against the high police officials of the State in respect of which some of them have already been in custody, we feel it proper and appropriate and in the interest of justice even at this stage, that is, when the charge sheet has already been submitted, the investigation shall be transferred to the CBI Authorities for proper and thorough investigation of the case. In *Kashmeri Devi* (supra), this Court also observed as follows:-

> "Since according to the respondent charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge sheet has been submitted to exercise his powers under Section 173(8) Cr. P.C. to direct the Central Bureau of Investigation for proper and thorough investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge sheet, if any, in accordance with law."

52. In *Gudalure M.J.Cherian* (supra), in that case also the charge sheet was submitted but inspite of that, in view of the peculiar facts of that case, the investigation was transferred from the file of the Sessions Judge, Moradabad to Sessions Judge, Delhi. Inspite of such fact that the charge sheet was filed in that case, this Court directed the CBI to hold further investigation inspite of the offences committed. In this case at Page 400 this court observed :

> "…………………….The investigation having been completed by the police and the charge sheet submitted to the court, it is not for this court ordinarily to reopen the investigation specially by entrusting the same to a specialized agency like CBI. We are also conscious that of late the demand for CBI investigation even in police cases is on the increase. Nevertheless – in a given situation, to do justice between the parties and to instill confidence in the public mind – it may become necessary to ask the CBI to investigate a crime. It only shows the efficiency and the independence of the agency."

53. In this connection, we may reiterate the decision of this Court in the case of *P & H High Court Bar Association* (supra) strongly relied on by the learned senior counsel appearing for the writ petitioner. A reference of the paragraph of the said decision on which reliance could be placed has already been made in Para No.32 from which it would be evident that in order to do complete justice in the matter and to instill confidence in the public mind, this court felt it necessary to have investigations through the specialized agency like the CBI.

54. Therefore, in view of our discussions made hereinabove, it is difficult to accept the contentions of Mr.Rohatgi learned senior counsel appearing for the state of Gujarat that after the charge sheet is submitted in Court in the criminal proceeding it was not open for this court or even for the High Court to direct investigation of the case to be handed over to the CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

55. Keeping this discussion in mind, that is to say, in an appropriate case, the court is empowered to hand over the investigation to an independent agency like the CBI even when the charge sheet has been submitted, we now deal with the facts of this case whether such investigation should be transferred to the CBI Authorities or any other independent agency in spite of the fact that the charge sheet has been submitted in court. On this ground, we have carefully examined eight Action Taken

Reports submitted by the State Police Authorities before us and also the various materials produced and the submissions of the learned counsel for both the parties. From a careful examination of the materials on record including the eight Action Taken Reports submitted by the State Police Authorities and considering the respective submissions of the learned senior counsel for the parties, we are of the view that there are large and various discrepancies in such reports and the investigation conducted by the police authorities of the State of Gujarat and also the charge sheet filed by the State Investigating Agency cannot be said to have run in a proper direction. It appears from the charge sheet itself that it does not reveal the identity of police personnel of Andhra Pradesh even when it states that Sohrabbuddin and two others were picked up by Gujarat Police Personnel, accompanied by seven personnel of Hyderabad Police. It also appears from the Chargesheet that Kausarbi was taken into one of the two Tata Sumo Jeeps in which these police personnel accompanied the accused. They were not even among the people who were listed as accused. Mr.Gopal Subramanium, Addl. Solicitor General for India (as he then was) was justified in making the comment that an honest investigating agency cannot plead their inability to identify seven personnel of the Police Force of the State.

56. From the charge sheet, it also appears that the third person was 'sent somewhere'. However, it appears that the literal translation of the Chargesheet in Gujarati would mean that he was 'anyhow made to disappear'. From this, we are also satisfied that an attempt was made by the investigating agency of the State of Gujarat to mislead the Court. Also there had been no mention of Accused No. 12 (Dr.N.K.Amin) as a part of the criminal conspiracy in the charge sheet, who otherwise finds mention in the original charge sheet.

57. With respect to the killing of Kausarbi, it was only stated that she was seen in the company of the ATS personnel, on 26th of November, 2005 and her dead body was taken for

cremation on 29th of November, 2005. It is not clear from the eight Action Taken Reports filed by the police authorities of the State of Gujarat as to what happened to Kausarbi in the meanwhile, nor is the mode of killing stated. The investigating agency of the State of Gujarat has made a false excuse for not conducting the NARCO Analysis of the accused because a judgment of this Court is pending on the matter, though the Sessions Judge had permitted such NARCO Analysis. In our view, it is merely an excuse for not being able to conduct the investigation relating to mode and manner of killing of Kausarbi.

58. It also appears from the charge sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted. The possibility of the third person being Tulsiram Prajapati cannot be ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram. In our view, the facts surrounding his death evokes strong suspicion that a deliberate attempt was made to destroy a human witness.

59. So far as the call records are concerned, it would be evident from the same that they had not been analyzed properly, particularly the call data relating to three senior police officers either in relation to Sohrabbuddin's case or in Prajapati's case. It also appears from the charge sheet as well as from the eight Action Taken Reports that the motive, which is very important in the investigation reports was not properly investigated into as to the reasons of their killing. The motive of conspiracy cannot be merely fame and name. No justification can be found for the investigating officer Ms. Johri walking out the investigation with respect to Tulsiram Prajapati's death without even informing this Court. That apart, the charge sheet was filed in the court of Chief Metropolitan Magistrate, Ahmedabad against 13 persons who were charge sheeted for criminal conspiracy, abduction, wrongful confinement and murder etc. 13 were arrested. One of the 13 accused whose names had

been listed is one Mr.N.V.Chauhan, PSI who in the previous Action Taken Report, was mentioned as yet to be arrested. However, in the 5th Action Taken Report, the name of Mr.Jadeja, driver (Police Constable) who was also supposed to be arrested as per previous Action Taken Report was not appearing among the names of the accused who were arrested. Evidently, he had not been charge sheeted. From the above factual discrepancies appearing in eight Action Taken Reports and from the charge sheet, we, therefore, feel that the police authorities of the State of Gujarat had failed to carry out a fair and impartial investigation as we initially wanted them to do. It cannot be questioned that the offences the high police officials have committed was of grave nature which needs to be strictly dealt with. We have observed that from the record, it was found that Mr.V.L.Solanki, an investigating officer, was proceeding in the right direction, but Ms.Johri had not been carrying out the investigation in the right manner, in view of our discussions made herein above. It appears that Ms.Johri had not made any reference to the second report of Solanki, and that though his first report was attached with one of her reports, the same was not forwarded to this Court. Therefore, we are of the view that her mentioning the criminal background of Sohrabbuddin and the discussion among the accused officers concerning Sohrabbuddin was meant to obfuscate the enquiry.

60. In our view , the investigation of crime was carried out de hors the mandate contained in the Cr.P.C. and particularly Chapter XII containing Section 154-176 of the Code. There had been no fresh FIR filed despite primary investigation No. 66 to make the same the basis for investigation and trial. In the case of *Sheikh Hasib alias Tabarak v. The State of Bihar* [(1972) 4 SCC 773], it was held that the object of FIR, from the point of view of the investigating authorities, is to obtain information of the alleged criminal activity so as to take suitable steps for tracing and bringing to book the guilty party. Admittedly, the FIR dated 16th of November, 2005 which was filed following the alleged encounter was a fabricated one and, therefore, it could

not have formed the basis of the real investigation to find the truth. Ms. Geeta Johri herself in her report dated 7th of December, 2006 had conceded that ATS was not a regular police station in which FIR should have been filed. It was further submitted that the investigation and charge sheet were silent on the motive behind the 'killings'. The only motive stated is fame. In the cases of *Babu Lodhi v. State of UP* (1987) 2 SCC 352 and *Prem Kumar and Anr. v. State of Bihar,* (1995) 3 SCC 228, it was held that motive assumes greater significance in case where the case rests on circumstantial evidence, as in the present case. That apart, from the Action Taken Reports submitted by the State Police Authorities, we also find that the State Police Authorities of the Gujarat had to take help from the other police officials of other States, namely, Andhra Pradesh and Rajasthan. If the investigation is transferred to the CBI Authorities it would be fair and proper that the other State police officials should also help the CBI Authorities in coming to a final conclusion on the allegations made by the writ petitioner and also on the offences alleged to have committed by some of them.

61. Mr.Rohatgi, learned senior counsel appearing for the State of Gujarat sought to argue that when the State of Gujarat had completed free and professional investigation, and also had filed periodical Action Taken Reports and since the elaborate charge sheet had also been filed by the State including all documentary, oral and scientific evidence, along with the papers pertaining to the preliminary inquiry including the periodical interim reports submitted by the Inquiry officer to the Supervisory officer during such inquiry, it would not be proper for this Court to transfer the investigation to any other agency. According to Mr.Rohatgi, if this Court finds that the investigation is incomplete in respect of lacunae in respect of which other remedies are available, in that case it would be open to this court to direct further investigation in respect of lacunae to be filled up by further investigation. This was not the position in the present case. According to Mr.Rohatgi, a detailed charge sheet

has been filed and subsequent to the filing of the said detailed charge sheet, a supplementary charge sheet has also been filed on 10th of December, 2007 with complete evidence including oral, documentary and scientific evidence to bring home the guilt of the accused before the Competent Court. Mr.Rohatgi further submitted that the findings in the Charge-sheet have already been summarized in the affidavit and the Investigating Agency has collected voluminous oral & documentary evidence to ensure that the charges leveled against them are adequately proven. Further, the investigating agency has also taken steps including Crime Scene Reconstruction, taking Expert Advice and Video Recording.

62. Mr.Rohatgi, further submitted that in order to enable this Court to decide what could be in the interests of justice, the criminal antecedents of the Sohrabuddin, his father, and his brother have also been enumerated. It was further submitted that assistance from the Dept. of Police, Andhra Pradesh was also received as ordered by this Court. However, the Andhra Pradesh Police Officers had not been identified. It was urged that this would not affect the conviction of the accused in any manner. Similarly, it was submitted that non-identification of the third person who was abducted along with Sohrabuddin and Kausarbi would also not affect the prosecution case.

63. Mr.Rohatgi further submitted that since the charge-sheet has already been filed, it would not be necessary to go into the preliminary inquiry conducted prior to the registration of the offence. Giving the aforesaid particulars on the question of investigation by the State Police Authorities, Mr.Rohatgi submitted that the enquiry was conducted in an independent and impartial manner and the investigating team has been given complete independence with respect to such an enquiry.

64. It was further contended by Mr.Rohatgi that the writ petitioner approached the competent court under Section 173(8) of the Cr.P.C. in accordance with whose directions, further investigation was also conducted. The report on such

investigation could not be submitted before this Court because this Court had stayed the proceedings before the Competent Court and the report is kept sealed with the Registrar General of the High Court of Gujarat. The lacunae that the writ petitioner raised during the oral submissions do not find place in the application that he filed before the Competent Authority. Under these circumstances and in view of the submissions made by Mr.Rohatgi, as noted herein earlier, the jurisdiction of this Court under Article 32 of the Constitution would come to an end as soon as a charge sheet is filed after conducting an investigation under the supervision and monitoring of this Court.

65. In view of our discussions made herein earlier and the submissions of the learned senior counsel for the parties and the Amicus Curiae and keeping in mind the earlier various directions given by this Court to the Police Authorities of the State of Gujarat and the materials on record, we are of the view that although the charge sheet was submitted but considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, the investigation concluded in the present case cannot be said to be satisfactorily held. We have already discussed the decisions cited from the Bar on the question that after the charge sheet being filed whether the investigation could be handed over to the CBI Authorities or to any other independent agency from the State police authorities. We have already distinguished the decisions cited by the State that they related to the power of the court to monitor the investigation after the charge sheet was filed. The scope of this order, however, cannot deal with the power of this Court to monitor the investigation, but on the other hand in order to make sure that justice is not only done, but also is seen to be done and considering the involvement of the State police authorities and particularly the high officials of the State of Gujarat, we are compelled even at this stage to direct the CBI Authorities to investigate into the matter. Since the high police officials of the State of Gujarat are involved and some of them had already

been in custody, we are also of the view that it would not be sufficient to instill confidence in the minds of the victims as well as of the public that still the State Police Authorities would be allowed to continue with the investigation when allegations and offences were mostly against them. In the present circumstances and in view of the involvement of the police officials of the State in this crime, we cannot shut our eyes and direct the State Police authorities to continue with the investigation and the charge sheet and for a proper and fair investigation, we also feel that the CBI should be requested to take up the investigation and submit a report in this Court within six months from the date of handing over a copy of this judgment and the records relating to this crime to them.

66. Accordingly, in the facts and circumstances even at this stage the police authorities of the State are directed to hand over the records of the present case to the CBI Authorities within a fortnight from this date and thereafter the CBI Authorities shall take up the investigation and complete the same within six months from the date of taking over the investigation from the State police authorities. The CBI Authorities shall investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. The report of the CBI Authorities shall be filed in this Court when this court will pass further necessary orders in accordance with the said report, if necessary.

67. We expect that the police authorities of Gujarat, Andhra Pradesh and Rajasthan shall co-operate with the CBI authorities in conducting the investigation properly and in an appropriate manner.

68. The Registry shall send copies of this judgment forthwith to the Director, CBI, the Secretary, Ministry of Home Affairs, Government of India, and the Secretary, Home Ministry, State of Gujarat.

Writ Petition (Crl.) No.115 of 2007:–

So far as W.P.(Crl.) No.115 of 2007 is concerned, let this matter be listed after eight weeks before an appropriate Bench.

Contempt Petition (Crl.) No. 8 of 2007 in Writ Petition (Crl.) No.6/2007:-

So far as contempt petition being Contempt Petition (Crl.) No.8 of 2007 is concerned, we are of the view that in view of our final order passed in the main writ petition being W.P.(Crl.)No.6 of 2007, we do not find any reason to proceed with this contempt application any further. Accordingly, the contempt petition is disposed of. Notice, if there be any, stands discharged.

K.K.T. Writ Petition (Crl.) 6 of 2007, contempt petition disposed of and writ Petition No. Crl. 115 of 2007 adjourned for hearing.

AFTAB AHMAD ANSARI
v.
STATE OF UTTARANCHAL
(Criminal Appeal No. 836 of 2005)

JANUARY 12, 2010

[J.M. PANCHAL AND T.S. THAKUR, JJ.]

Penal Code, 1860 – ss.302, 376 and 201 – Rape and murder of minor girl – Circumstantial evidence – Appreciation of – Appellant seen fleeing away from near the place where dead body of deceased was found – Blood stained frock and underwear of deceased recovered from house of appellant's sister pursuant to voluntary disclosure statement made by appellant while in police custody – Underwear of appellant seized during course of investigation found stained with blood and semen – Appellant made extra judicial confession before PW5 – Conviction of appellant by Courts below – Propriety of – Held: Proper – The chain of circumstantial evidence was complete and showed that, within all human probability, rape and murder of deceased was committed by appellant and none else and he had also caused disappearance of evidence of those offences – When the incriminating circumstances proved were put to appellant while recording his statement under s.313, CrPC, he merely denied the same – Such denial on part of appellant and failure to explain the circumstances proved was an additional link in the chain of circumstances to bring home the charge against appellant – Code of Criminal Procedure, 1973 – s.313 – Evidence Act, 1872 – ss. 26 and 27.

Appellant alongwith another person was prosecuted for commission of rape and murder of the five year old daughter of PW1 and for causing disappearance of evidence of those offences. The prosecution case rested on circumstantial evidence. The trial court held that the

four circumstances *viz.*, 1) that both the accused were seen by PW-3 fleeing away from near the place where the dead body of the deceased was found; 2) that blood stained frock and underwear of deceased were recovered from the house of appellant's sister pursuant to disclosure statement made by appellant; 3) that underwears of both the accused, seized during course of investigation, were stained with human blood and semen; and 4) that appellant made extra-judicial confession before PW5; were fully established, and accordingly convicted both the accused under ss.302, 376 and 201 of IPC and sentenced them to death. The High Court acquitted the other accused, but confirmed the conviction of appellant under ss.302, 376 and 201 IPC, though it modified the sentence to life imprisonment. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total

cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. [Para 4] [1043-E-H; 1044-A-B]

1.2. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and

some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case. [Para 4] [1044-A-G]

2.1. So far as the circumstance, namely, that the accused were seen fleeing away from near the place where the dead body of the deceased was lying is concerned, the prosecution relied upon the testimony of PW3. A fair reading of the evidence tendered by this witness makes it evident that though he is relative of PW1, he has stated the facts seen by him in a simple manner and without any noticeable embellishments. If this witness wanted to implicate the appellant falsely in the case because of his relationship with PW1 (the first informant), nothing prevented him from stating before the police and the court that he had seen the appellant carrying the dead body of the deceased and throwing the same. However, he has not made any false claim/ exaggeration in his testimony at all and stated that he had seen the appellant fleeing from near the place where the dead body was lying. The reason as to why in the early morning he was out of his house is stated by him (i.e. he was going to *jungle* for answering the call of nature), which this Court finds to be most natural. It could not be even remotely suggested by the defence that a constructed latrine was available in the house of PW3 and, therefore, it was not necessary for him to move out of his house in the early morning to go to *jungle* for answering call of nature. On facts, the claim made by PW3 that he had seen the appellant hurriedly entering the house of his sister sounds probable. The Trial Court, which had the advantage of observing demeanour of this witness, found him to be truthful. [Paras 9, 10 and 11] [1046-F; 1048-B-H; 1049-A-B]

2.2. The plea that PW3 maintained silence at the time when the inquest on the dead body of the deceased was held and did not tell the Investigating Officer that he had seen the appellant running away from near the place where the dead body was lying would indicate that he had not seen the appellant running away, is merely stated to be rejected. The occasion for this witness to tell the Investigating Officer that he had seen the appellant running away from near the place where the dead body was lying would arise only when the Investigating Officer was to record his statement under Section 161, CrPC. The basic purpose of holding inquest on the dead body is to ascertain *prima facie* the nature of death and to find out whether there are injuries on the dead body or not. The inquest panchnama cannot be treated as statement of the witness recorded under Section 161 CrPC wherein he is supposed to narrate the facts seen by him. Therefore, it is not true to say that PW3 had maintained silence and had not told the Investigating Officer at the time of holding of the inquest that he had seen the appellant running away from near the place where the dead body was lying. The so called silence on the part of this witness cannot be considered to be unnatural at all nor the same makes his testimony doubtful in any manner. [Para 11] [1049-D-H; 1050-A-C]

2.3. The 'running away' part attributed to the appellant could not be explained by him. In his further statement, it could not be explained by the appellant as to what made him run away from near the place where the dead body was found and hurriedly entering into the house of his sister. On reappraisal of the evidence of this witness, this Court finds that neither the Trial Court nor the High Court committed any error in placing reliance on the testimony of PW3 for coming to the conclusion that one of the incriminating circumstances, namely, that the appellant was found fleeing from near the place where the dead body was found lying was satisfactorily proved. [Para 11] [1050-C-E]

3.1. Another circumstance sought to be relied upon by the prosecution is that the appellant had made voluntary disclosure statement pursuant to which blood stained clothes of the deceased were discovered. The disclosure statement was made by the appellant in presence of PW4. The testimony of PW7, the Investigating Officer, makes it more than clear that after arrest, the appellant had made disclosure statement and willingness to show the place where the clothes of the deceased were concealed by him. This fact is also mentioned in the document prepared contemporaneously i.e. seizure memo of the deceased's clothes. According to the Investigating Officer, he had made efforts to summon local witnesses but none agreed to be a witness and, therefore, PW4 and another person were summoned to be panch witnesses on way to the house of the appellant's sister from where the clothes of the deceased were recovered. The part of the disclosure statement, namely, that the appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act, 1872 because the same relates distinctly to the discovery of the clothes of the deceased from that very place. [Paras 12 and 13] [1050-F-G; 1052-B-C; 1054-E]

3.2. The contention that even if it is assumed that the clothes of the deceased were recovered from the house of the appellant's sister pursuant to the voluntary disclosure statement made by appellant, the prosecution failed to prove that the clothes so recovered belonged to the deceased and, therefore, recovery of the clothes should not be treated as an incriminating circumstances

is devoid of merits. First of all, in the missing report, it was mentioned by PW1 that his daughter aged five years, who was wearing frock and underwear, was missing from near the house while playing; thus, the wearing of the frock and underwear was mentioned by the father of the girl at the first available opportunity. The statement by PW1, as well as statement made by PW2, that there were no clothes on the dead body of the deceased has gone unchallenged. Naturally, therefore, it was necessary for the Investigating Officer to find out as to where the clothes put on by the deceased were concealed. Though the sister of appellant (examined as DW1) mentioned in her testimony before the Court that the police had taken into custody the clothes belonging to her daughter, however, the record of the case shows that the frock and the underwear recovered from her house pursuant to disclosure statement made by the appellant were blood stained. It was never the case of the appellant's sister that the frock and underwear recovered or seized by the police were blood stained and belonged to her daughter. Further, the clothes were recovered pursuant to the voluntary disclosure statement made by the appellant on February 9, 1998 whereas the appellant's sister made claim that the clothes, which belonged to her daughter, were recovered and seized on September 30, 2003 when she was examined by the appellant as one of the defence witnesses. If the police had seized the clothes belonging to her daughter, the appellant's sister would not have maintained tacit silence for roughly about more than five years and would have made grievance before higher police officers or court within reasonable time. A bare reading of her testimony makes it more than clear that she had come to depose before the Court to save the appellant who is her real brother and stated wrong facts for the first time before the Court. Her case that the police personnel had given 2 to 4 blows of stick to her and threatened her that she and her husband would be implicated in the case, does not inspire confidence of this Court. On overall view of the matter, this Court finds that it was satisfactorily proved by the prosecution that the frock and underwear, recovered from the house of DW1 pursuant to the voluntary disclosure statement made by the appellant, belonged to the deceased. [Para 13] [1054-F-H; 1055-A-H; 1056-A-C]

Pulukuri Kottaya & Ors. vs. Emperor **AIR 1947 PC 67, referred to.**

4. Yet another circumstance relied upon by the prosecution is that the underwear of the appellant was stained with blood and semen. In normal course, the underwear would not have blood stains at all and, therefore, it was for the appellant to offer explanation as to under what circumstances stains of blood were found on his underwear, seized by the police during the course of investigation. The fact that the underwear of the appellant seized by the police had human blood stains is sufficiently proved by the contents of report of Chemical Analyst. The fact that the blood stained underwear put on by the appellant was seized after four days does not make any dent in the prosecution case on the ground that a person would not move with such blood stained underwear for 3 – 4 days. One cannot lose sight of the fact that those stains were not visible and even the Investigating Officer had stated that on examination the underwear put on by the appellant appeared to be stained with semen at some places. If blood stains are found on the shirt or pant of a person then normally such person would not move in the village with those clothes on, because stains of blood would be visible and noticed by anyone. However, it is almost difficult for anyone to notice stains of blood on underwear worn by a person. Further, the sense of cleanliness of a rustic villager cannot be ignored by the Court. While

recording the statement of the appellant under Section A
313 CrPC, it was put to him by the Judge that during the
course of investigation his blood stained underwear was
seized by the Police and his explanation was sought. In
answer to the said question, it was never claimed by the
appellant that the underwear seized was not blood B
stained and that another underwear was substituted in
place of his underwear which was seized. [Para 14]
[1056-A-H; 1057-A-C]

5. Another circumstance sought to be relied upon by
the prosecution is that the appellant made extra judicial C
confession before PW5, one of the panchas when
inquest on the dead body of the deceased was held.
What is asserted by the witness is that the appellant had
come to Court premises and told him near the shops that
he and the other accused had killed PW1's daughter after D
committing rape on her. The witness further asserted that
the reason for making extra judicial confession by the
appellant was that he was ex-pradhan of the village and
the appellant was under an impression that the witness
would be able to help him by approaching the police. This E
witness in no uncertain terms asserted before the court
that he had told the Investigating Officer about the extra
judicial confession made by the appellant. The Court, on
re-appreciation of evidence, finds that it is not brought on
the record of the case that this witness was on inimical F
terms with the appellant. In fact, this witness does not
belong to the community of the appellant and belongs to
another community. There was no earthly reason for this
witness to come to the court and depose falsely about
the extra judicial confession made by the appellant. G
Though extra judicial confession is considered to be a
weak piece of evidence by the courts, this Court finds
that there is neither any rule of law nor of prudence that
the evidence furnishing extra judicial confession cannot
be relied upon unless corroborated by some other H

A **credible evidence. The evidence relating to extra judicial**
confession can be acted upon if the evidence about extra
judicial confession comes from the mouth of a witness
who appears to be unbiased and in respect of whom
even remotely nothing is brought out which may tend to
B **indicate that he may have a motive for attributing an**
untruthful statement to the accused. Here, in this case, it
is proved by the prosecution that PW5, was not on
inimical terms with the appellant at all. After subjecting his
evidence to a rigorous test on the touchstone of
C **credibility, this Court finds that extra judicial confession**
referred to by the witness is reliable and is rightly
accepted by the Trial Court and the High Court. The
contention that when the appellant was being brought to
the court, he was in custody and, therefore, the extra
D **judicial confession referred to by PW5 would be hit by the**
provisions of Section 26 of the Evidence Act and could
not have been received in evidence, cannot be accepted.
On the facts and in the circumstances of the case, it is
not probablised by the defence that the appellant was in
custody of police officer while he had made extra judicial
E **confession before PW5. The evidence relating to extra**
judicial confession inspires confidence of this Court.
[Para 15] [1057-D-H; 1059-A-D; G-H; 1060-A-D]

State of U.P. vs. M.K. Anthony **AIR 1985 SC 48, relied**
F **on.**

6. In the facts and circumstances of the case, the
prosecution has proved satisfactorily and beyond
shadow of doubt following facts: (1) The deceased went
G **missing in the evening of February 5, 1998 when she**
was playing near her house; (2) Her naked dead body
was found at about 6 a.m. on February 8, 1998 lying on
public way; (3) She was subjected to rape and died a
homicidal death; (4) The appellant was seen fleeing away

H

from near the place where the dead body of the deceased was lying at about 4.30 a.m. on February 8, 1998; (5) Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant, were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody; (6)Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen and (7) The appellant made extra judicial confession before PW5. The cumulative effect of the abovementioned facts taken together is conclusive in establishing the guilt of the appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences. Where circumstances proved are put to the accused through his examination under Section 313, CrPC and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. It is proved by cogent and reliable evidence that the appellant had committed rape on the deceased and thereafter murdered her. Here in this case, the incriminating circumstances proved were put to the appellant while recording his statement under Section 313, CrPC. In his further statement, recorded under Section 313, the appellant has merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt

of the appellant beyond reasonable doubt. [Paras 16 and 17] [1061-E-H; 1061-A-H; 1062-A-B]

Vasa Chandrasekhar Rao vs. Ponna Satyanarayana & Anr. **(2000) 6 SCC 286 and** *Geetha vs. State of Karnataka* **(2000) 10 SCC 72, relied on.**

Case Law Reference:

AIR 1947 PC 67	**referred to**	**Para 13**
AIR 1985 SC 48	**relied on**	**Para 15**
(2000) 6 SCC 286	**relied on**	**Para 17**
(2000) 10 SCC 72	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 836 of 2005.

From the Judgment & Order dated 17.12.2004 of the High Court of Uttaranchal at Nainital in Criminal Appeal No. 36 of 2004.

J.C. Gupta, Rajesh, Dharm Singh, V.K. Agrawal for the Appellant.

S.S. Shamshery, Jatinder Kumar Bhatia for the Resondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. The appellant and one Mumtaz were prosecuted for commission of rape and murder of Yasmeen aged five years daughter of Nayeem Ahmad and for causing disappearance of evidence of those offences. The learned Additional District and Sessions Judge, First FTC Court, Nainital, by judgment dated January 7, 2004, rendered in Sessions Trial No.252 of 1998, convicted the appellant and Mumtaz under Sections 302, 376 and 201 of Indian Penal Code

(IPC) and imposed penalty of death sentence for commission of offence punishable under Section 302 IPC as well as R.I. for life for commission of offence punishable under Section 376 IPC and a fine of Rs.10,000/- in default R.I. for one year and R.I. for seven years and a fine of Rs.5,000/- in default R.I. for one year for commission of offence punishable under Section 201 IPC.

2. Feeling aggrieved, the appellant and Mumtaz preferred Criminal Appeal No. 36 of 2004 whereas Reference made under Section 366 of the Code of Criminal Procedure by the learned Additional Sessions Judge in view of death sentence passed against both the accused was registered as Criminal Reference 1 of 2004 before the High Court of Uttaranchal at Nainital. The Division Bench of the High Court, by judgment dated December 17, 2004, has rejected the Reference and partly allowed the appeal by acquitting accused Mumtaz but affirmed the conviction of the appellant under Sections 302, 376 and 201 IPC. The death penalty awarded to the appellant for commission of offence punishable under Section 302 IPC is modified and the appellant is sentenced to R.I. for life for commission of the offence punishable under Section 302 IPC. The High Court has further maintained sentence imposed on the appellant under Sections 376 and 201 IPC. The confirmation of the conviction of the appellant under Sections 302, 376 and 201 IPC by the High Court and imposition of different punishments for those offences, has given rise to the instant Appeal by Special Leave.

3. Mr. Nayeem Ahmad is resident at Mundia Pistor Village, Bajpur, District Udham Singh Nagar, Uttaranchal. His daughter Yasmeen aged five years having fair complexion and round face, wearing frock, underwear and sleepers was playing near his house at about 5.00 p.m. in the evening of February 5, 1998. It was noticed that she was missing from the place where she was playing and, therefore, Nayeem Ahmad made frantic search about Yasmeen at the places of all his relatives but she

could not be traced. As search made by him did not yield any result, he filed a missing report on February 6, 1998 at Bajpur Police Station mentioning, inter alia, that his daughter had disappeared while playing near his house and, therefore, steps be taken to trace her out. On February 8, 1998, Report (Exhibit Ka.2) was lodged at Bajpur Police Station by Shamim Ahmad who is real brother of Nayeem Ahmad stating, inter alia, that Yasmeen aged about five years daughter of his elder brother Nayeem Ahmad while playing near the house of Nayeem Ahmad had disappeared at about 5.00 p.m. in the evening of February 5, 1998 for which Nayeem Ahmad had lodged a missing report at the Police Station, but at about 6.00 a.m. on February 8, 1998, her dead body was found lying on the public way in front of the house of Haji Khursheed, son of Bashir Ahmad of village Bajpur and, therefore, legal action be taken. On receiving this information, concerned police personnel reached the place where dead body of the deceased was lying. The inquest on the dead body of the deceased was held and necessary arrangements were made for sending the dead body for post mortem examination. The post mortem examination was carried out on February 8, 1998. The examination revealed that the deceased was subjected to rape and thereafter strangulated. On February 9, 1998, the Investigating Officer, on the basis of the information given by the informer, arrested both the accused persons under Sections 302, 376 and 201 IPC. While in custody, the appellant and Mumtaz made disclosure statements to the Investigating Officer pursuant to which the appellant discovered one frock with blood marks, one white cotton underwear with black stripes having blood stains and one bed sheet of light green colour with plenty of blood marks from the house of sister of the appellant. The articles discovered were seized under a panchnama and sent to forensic science laboratory for analysis. The Investigating Officer recorded the statement of those persons who were found to be conversant with the facts of the case. On receipt of report from the analyst and on completion of investigation, the appellant and Mumtaz were charge-sheeted in the Court of learned Judicial Magistrate, First Class for commission of offences punishable under Sections 302, 376 and 201 IPC.

The offences punishable under Sections 302 and 376 IPC are exclusively triable by a Court of Sessions. Therefore, the case was committed to the Court of learned Additional District and Sessions Judge, Nainital for trial. The learned Judge framed necessary charges against the appellant and Mumtaz for commission of offences punishable under Section 302, 376 and 201 IPC. The same were read over to them. They pleaded not guilty to the same and claimed to be tried. Therefore, prosecution examined seven witnesses and produced documentary evidence to prove its case against the appellant and Mumtaz. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant and Mumtaz the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In the further statements, the appellant and Mumtaz pleaded ignorance in respect of certain facts whereas in relation to some other facts their claim was that they were false. The appellant and Mumtaz had expressed desire to examine defence witnesses which was granted by the learned Judge. The appellant, therefore, examined DW1, Ms. Bilkis and DW2, Lakhbinder Singh alias Lakha in defence. The learned Judge noticed that the case was entirely resting upon circumstantial evidence. After holding that the deceased died a homicidal death, the learned Judge appreciated the evidence and held that four circumstances, namely, that (1) both the accused were seen by PW-3, Naseed Ahmad, at about 4.30 a.m. on 8.2.1998 fleeing away from near the place where the dead body of deceased Yasmeen was found after some time; (2) on the disclosure statement made by the appellant, blood stained frock and underwear of the deceased and blood stained bed sheet were recovered; (3) underwears of both the accused, seized, were stained with human blood and semen;

and (4) extra-judicial confession was made by the appellant before PW-5, Anand Swaroop, are firmly established, to bring home guilt of the accused under Sections 302, 376 and 201 IPC. The learned Judge noticed that the chain of circumstances established was complete, cumulative effect of which was indicating that in all human probability, the offences were committed by the appellant and Mumtaz and by none other. In view of abovementioned conclusions, the learned Judge convicted the appellant and Mumtaz under Section 302, 376 and 201 IPC. Thereafter, the learned Judge heard the appellant and Mumtaz on the question of sentence to be imposed on them for commission of abovementioned offences. The learned Judge noticed that this was the rarest of rare case falling within the purview of guidelines laid down by this Court in *Maulai & Anr. Vs. State of M.P.* AIR 2000 SC 177 and imposed death penalty on both the accused for commission of offence punishable under Section 302 IPC. The learned Judge further imposed punishment of R.I. for life and a fine of Rs.10,000/- and in default R.I. for one year for commission of offence punishable under Section 376 IPC. The learned Judge further imposed sentence of R.I. for seven years and a fine of Rs.5,000/- and in default R.I. for one year for commission of offence punishable under Section 201 IPC by judgment dated January 7, 2004. The imposition of death sentence resulted into Criminal Reference under Section 366 of the Code of Criminal Procedure, 1973. The appellant and Mumtaz also being aggrieved by the judgment of the Trial Court preferred Criminal Appeal No.36 of 2004 before the High Court of Uttaranchal at Nainital. The reference and appeal were heard together. The High Court on re-appreciation of evidence came to the conclusion that three circumstances were proved by the prosecution, namely, (1) both the appellants were seen by PW3, Naseem Ahmad at about 4.30 a.m. on February 8, 1998 fleeing from near the place where the dead body of the deceased was found; (2) blood stained frock and underwear of the deceased and blood stained bed sheet were recovered pursuant to voluntary disclosure statement made by the appellant; and (3) extra judicial confession was made by the appellant before PW-5, Anand Swaroop. The Division Bench by judgment dated December 17, 2004 has partly allowed the appeal. The High Court has set aside the conviction of Mumtaz recorded by the Trial Court but confirmed the conviction of the appellant recorded by the Trial Court under Sections 302, 376 and 201 IPC. The High Court has further modified the sentence of death imposed on the appellant for commission of offence punishable under Section 302 IPC and awarded R.I. for life whereas sentences awarded for commission of offences punishable under Sections 376 and 201 have been confirmed.

4. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal. It is relevant to notice that the prosecution has not claimed that the rape and murder of the deceased was witnessed by anyone and no direct evidence regarding the same is adduced before the court. Admittedly, the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that “men may tell lies, but circumstances do not”. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in

establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case.

5. Having noticed the relevant principles governing a case based on circumstantial evidence, this Court proposes to consider the question whether the case against the appellant

is proved. The appellant, at the time of incident was in his early 20's. He is resident of village Patia Nagla, P.S. Gatpur, Tehsil Thakurdwara, District Muradabad. His sister Ms. Bilkis, DW-1, was married to Kabir Ahmad of village Bajpur where the first informant is residing. The appellant used to visit and stay at the house of his sister. It may be mentioned that the Trial Court was of the view that four circumstances mentioned above were proved by the prosecution.

6. The fact that deceased Yasmeen was subjected to rape and died a homicidal death is not disputed before this Court by the appellant. This fact stands amply proved by the reliable testimony of Dr. J.S. Rawat, who performed autopsy on the dead body of the deceased and contents of post mortem produced at Exhibit Ka.5.

7. Similarly the fact that naked dead body of deceased Yasmeen with injuries was found lying at about 6.00 a.m. on 8.2.1998 in front of the house of Haji Khursheed is amply borne out from the trustworthy testimony of PW-1, Nayeem Ahmad, PW-2, Shamim Ahmad, inquest report Exhibit Ka.4 etc.

8. According to the Sessions Court and the High Court, one of the incriminating circumstances proved by the prosecution is that witness Naseem Ahmad had seen the appellant and another fleeing from near the place where the dead body of the deceased was found lying at about 4.30 am on February 8,1998. The learned counsel for the appellant submitted that the only witness produced by the prosecution to prove this circumstance is PW-3, Naseem Ahmad but the said witness does not speak of any source of light and his silence of not telling this fact to the Investigating Officer at the time of holding of inquest is most unnatural and, therefore, the High Court had erred in placing reliance on his evidence. Elaborating this argument, it was submitted that the statement of Naseem Ahmad under Section 161 was recorded on February 9, 1998 after the arrest of the appellant and Mumtaz was effected and he does not say that he had seen the accused carrying dead

body or dropping any object in front of the house of Haji Khursheed. It was pointed out that he is a close relative of the complainant who asserted that before the report of recovery of dead body was lodged by Shamim, he had told Nayeem and Shamim that he had seen the appellant and Mumtaz running away from near the place where the dead body was found lying but no such fact was stated in the report made by witness Shamim Ahmad and, therefore, his claim that he had seen the appellant fleeing from near the place where the dead body was found lying should have been disbelieved. What was stressed was that according to the said witness, he and Jakir were going to *jungle* for answering the call of nature and seen the appellant entering into the house of his sister but for the same reason, the appellant could have been out of his sister's house and, therefore, the appellant entering into the house of his sister could not have been treated as an incriminating circumstance. What was claimed was that neither this circumstance sought to be relied upon by the prosecution stands proved beyond doubt by witness Naseem Ahmad nor the same can be characterised as an incriminating circumstance and, therefore, the same should be ignored while appreciating the evidence against the appellant.

9. So far as the circumstance, namely, that the appellant and Mumtaz were seen fleeing away from near the place where the dead body of the deceased was lying is concerned, this Court finds that the prosecution has relied upon the testimony of PW2, Naseem Ahmad. After mentioning that younger daughter of his brother Nayeem had disappeared on February 5, 1998, the witness has mentioned that in the morning of February 8, 1998 at about 4.30 a.m. he himself and one Jakir were going towards *jungle* and when they reached near the house of Haji Khursheed, they had seen the appellant and Mumtaz running from near the house of Haji Khursheed and entering into the house of Kabir. It may be stated that Kabir is brother-in-law of the appellant, i.e., husband of Ms. Bilkis who

is sister of the appellant. The witness has claimed in his evidence that he was knowing Aftab, i.e., the appellant and Mumtaz before the incident. According to this witness, when they came back from the *jungle* at that time, they learnt that on the same day, dead body of daughter of Nayeem Ahmad was found near the house of Haji Khursheed.

This witness was subjected to searching cross-examination by the defence. In his cross examination, the witness stated that his house was located after two houses from the house of Haji Khursheed. According to him Jakir who is his brother-in-law had come to his house from village Mudia Kalan. During this cross-examination, the witness also explained that Jakir was real brother-in-law of Nayeem and, thus, deceased was niece of Jakir. What was maintained by the said witness was that both of them had proceeded to *jungle* at about 4.30 a.m. for answering the call of nature and had seen the appellant and Mumtaz while they were going to *jungle*. According to this witness, the Investigating Officer had recorded his statement on the next day of recovery of the dead body. It was further stated by this witness in his cross-examination that the deceased was missing since February 5, 1998 whereas her dead body was found on February 8, 1998. The witness has further mentioned that by the time they had come back from the *jungle*, the dead body had already been found and one missing report was written on February 6, 1998 which was scribed and lodged by Shamim after the dead body was found. It was stated by him that he was not present at the time of writing of the report by Shamim but before the report was written, Shamim and Nayeem were told by him and Jakir that they had seen the appellant and Mumtaz running away from near the place where the dead body was lying. The witness further mentioned in his cross-examination that the report was scribed after arrival of sniffer dog called by the police. It was explained by the witness that sniffer dog had been brought at 7.30 a.m. The suggestion made by the defence that he had not seen anyone running away from near the place where the dead body was lying and

was deposing falsely on account of relationship with Nayeem was emphatically denied by him.

10. A fair reading of the evidence tendered by this witness makes it evident that though he is relative of Nayeem, he has stated the facts seen by him in a simple manner and without any noticeable embellishments. If this witness wanted to implicate the appellant falsely in the case because of his relationship with the first informant, nothing prevented him from stating before the police and the court that he had seen the appellant carrying the dead body of the deceased and throwing the same near the house of Haji Khursheed.

11. However, this Court finds that he has not made any false claim/exaggeration in his testimony at all and stated that he had seen the appellant fleeing from near the place where the dead body was lying. The reason as to why in the early morning he was out of his house is stated by him, which this Court finds to be most natural. It could not be even remotely suggested by the defence that a constructed latrine was available in the house of witness Naseem Ahmad and, therefore, it was not necessary for him to move out of his house in the early morning of February 8, 1998 to go to *jungle* for answering call of nature. What is relevant to notice is that at the time when this witness had seen the appellant running away from near the place where the dead body was found, he had not learnt that the dead body was already found. Further, his house is located after two houses from the house of Haji Khursheed and the house of Ms. Bilkis, who is sister of the appellant and with whom the appellant was residing at the relevant point of time, is quite near to the house of Haji Khursheed. Therefore, the claim made by the witness that he had seen the appellant hurriedly entering the house of his sister sounds probable. No major contradiction and/or omission with regard to his earlier statement recorded before the police nor any other material could be brought on record by the defence to impeach his credibility. Merely because Shamim did not

refer to the fact that he was told by Naseem Ahmad that Naseem Ahmad had seen the appellant running away from near the place where the dead body was lying in his report to the police, cannot be a ground to disbelieve this witness. The learned Judge of the Trial Court who had advantage of observing demeanour of this witness has found the witness to be truthful. The assertion made by the witness that the appellant and Mumtaz were known to him could not be disputed by the defence at all. It was claimed by this witness in terms before the Court that he had seen the appellant running away from near the place where the dead body was lying. When it was stated by PW-3 Naseem Ahmad that he had seen the appellant running away from near the place where the dead body was lying, it was for the defence to suggest that in the early morning of February 8, 1998, no source of light was available and, therefore, he could not have seen the appellant so running away. However, this Court finds that even remotely it was not suggested to the witness that there was no source of light and, therefore, he could not have seen the appellant running away from near the place where the dead body was lying. The plea that this witness maintained silence at the time when the inquest on the dead body of the deceased was held and did not tell the Investigating Officer that he had seen the appellant running away from near the place where the dead body was lying would indicate that he had not seen the appellant running away, is merely stated to be rejected. The occasion for this witness to tell the Investigating Officer that he had seen the appellant running away from near the place where the dead body was lying would arise only when the Investigating Officer was to record his statement under Section 161. The basic purpose of holding inquest on the dead body is to ascertain prima facie the nature of death and to find out whether there are injuries on the dead body or not. The inquest punchnama cannot be treated as statement of the witness recorded under Section 161 of the Code of Criminal Procedure wherein he is supposed to narrate the facts seen by him. Therefore, it is not true to say that he had maintained silence and had not told the

Investigating Officer at the time of holding of the inquest that he had seen the appellant running away from near the place where the dead body was lying. The so called silence on the part of this witness cannot be considered to be unnatural at all nor the same makes this testimony doubtful in any manner. It is true that the appellant who was staying in the house of his sister cannot be said to have committed any unnatural conduct by entering into the house of his sister. However, it is not the case of witness Naseem Ahmad that he had seen the appellant calmly entering into the house of his sister. What is mentioned by the witness is that he had seen the appellant running away from near the place where the dead body was found and hurriedly entering house of his sister. The ‘running away’ part attributed to the appellant could not be explained by him. In his further statement, it could not be explained by the appellant as to what made him running away from near the place where the dead body was found and hurriedly entering into the house of his sister. On reappraisal of the evidence of this witness, this Court finds that neither the Trial Court nor the High Court committed any error in placing reliance on the testimony of this witness for coming to the conclusion that one of the incriminating circumstances, namely, that the appellant was found fleeing from near the place where the dead body was found lying was satisfactorily proved.

12. Another circumstance sought to be relied upon by the prosecution is that the appellant had made voluntary disclosure statement pursuant to which blood stained clothes of the deceased were discovered. The disclosure statement was made by the appellant in presence of PW4, Rais Ahmad. To prove the recovery of clothes of the deceased, the prosecution has relied upon the testimony of two witnesses, namely, PW4, Rais Ahmad and PW7, Praveen Kumar Tyagi, the Investigating Officer. PW4, Rais Ahmad has stated that on February 8, 1998 Police had come to village Bajpur at about 3.30 p.m. and they had brought with them the appellant and Mumtaz. According to this witness, he and Lakhvinder Singh were standing at the

place where the appellant was brought by the police. It is mentioned by the witness that police had called him and Lakhvinder Singh and asked them to accompany them. What is stated by the witness is that the appellant and Mumtaz led them to the house of Kabir and the appellant took out one sleeveless frock, one underwear and one green coloured bed sheet from the foodgrains room of the house of Kabir. The witness further stated that the abovementioned articles were kept hidden under the leaves and after taking out those articles, the appellant had told that these were the clothes of Yasmeen which he had concealed. It was further stated by the witness that seizure memo was prepared by the Investigating Officer on the spot and his signature was obtained thereon after it was read over to him. The witness identified his signature on the memo (Exhibit Ka.3). In his cross-examination, the witness stated that Shamim who is his elder brother was brother-in-law of the complainant. According to this witness, the appellant used to live in the house of his sister. What was mentioned by the witness was that Shabnam, daughter of sister of the appellant, was of the age group of Yasmeen and he was not remembering correctly whether Kabir, i.e., brother-in-law of the appellant was living with his family in the house from which the appellant had taken out the clothes of the deceased. It was mentioned by the witness that the sniffer dog had first smelt the dead body and then the said dog had entered into house of Kabir and picked up the appellant. It was further stated by the witness that the dog did not pick up Mumtaz and after the smelling by sniffer dog, the police had arrested the appellant and Mumtaz in his presence**.** What is testified by the witness is that many persons had gone up to the police station and he had also gone to the police station where his signatures were obtained on Exhibit Ka.3 at about 4.00 p.m. The suggestion made to the witness by the defence that no clothes were recovered in his presence and that he was deposing falsely was emphatically denied by him.

13. The testimony of Investigating Officer makes it more than clear that after arrest, the appellant had made disclosure statement and willingness to show the place where the clothes of the deceased were concealed by him. This fact is also mentioned in Exhibit Ka.3 which was prepared contemporaneously. According to the Investigating Officer, he had made efforts to summon local witnesses from Akari Pistor but none had agreed to be a witness and, therefore, Rais Ahmad and Lakhvinder Singh were summoned to be panch witnesses on way to the place to be pointed out by the appellant where he had concealed the clothes of the deceased. According to this witness, the appellant and Mumtaz led the police party and the appellant took out clothes of the deceased, i.e., blood stained frock and underwear as well as one bed sheet from *Kuria* meant for storing foodgrains. The witness further stated that clothes of the deceased and bed sheets were kept in the western corner of the room. The witness also informed the Court that underwears of both the accused were seized and they appeared to be stained with semen at some places. The argument that witness Rais Ahmad has not stated about the disclosure statement at all and, therefore, discovery of the clothes of the deceased should be disbelieved cannot be accepted. As explained by the Investigating Officer, the appellant and Mumtaz had made disclosure statement when they were at the police station. The said fact is mentioned in the document prepared contemporaneously. As explained by the Investigating Officer, he had made efforts to summon two independent witnesses to act as panchas but none had shown willingness to do so and, therefore, he had requisitioned services of Rais Ahmad and another on way to the house of sister of the appellant from where the clothes of the deceased were recovered. The contention that that part of the disclosure statement showing that recovered frock and underwear were of the deceased and the bed sheet was one over which rape was committed cannot be read in evidence has no substance. In the leading case of *Pulukuri Kottaya & Ors. Vs. Emperor*

AIR 1947 PC 67 what would be admissible in a disclosure statement has been explained by the Privy Council giving illustration as under :

> "The statements to which exception is taken in this case are first a statement by accused No.6 which he made to the police sub-Inspector and which was reduced into writing, and is Exhibit "P." It is in these terms :
>
> > 'The mediatornama written at 9 a.m. on 12.1.1945, in front of Maddineni Verrayya's choultry and in the presence of the undersigned mediators.
> >
> > Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya.'
>
> (Signed) Potla China mattayya.
>
> (") Kotta Krishnayya.
>
> 12th January, 1945. (Sgd.) G. Bapaiah,
>
> Sub-Inspector of Police.
>
> The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In

> the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said "I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya" must be omitted.
>
> A confession of accused 3 was deposed to by the police Sub-Inspector, who said that accused 3 said to him:
>
> > 'I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place."
>
> The first sentence must be omitted. This was followed by a Mediatornama, Ex.Q.I, which is unobjectionable except for a sentence in the middle,
>
> > 'He said that it was with that spear that he had stabbed Boddapati Sivayya,'
>
> which must be omitted."

Thus, the part of the disclosure statement, namely, that he was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place.

The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and, therefore, the recovery of the clothes should not be treated as an incriminating circumstances is devoid of merits. First of all, what is relevant to notice is that in the missing report, it was mentioned by Nayeem Ahmad that his daughter aged five years, who was wearing frock and underwear, was missing from near the house while playing.; Thus, the wearing of the frock and underwear was mentioned by the father of the girl at the first available opportunity. The statement by Nayeem, PW1, as well as statement made by Shamim, PW2, that there were no clothes on the dead body of the deceased has gone unchallenged. Naturally, therefore, it was necessary for the Investigating Officer to find out as to where the clothes put on by the deceased were concealed. What is relevant to notice is that Ms. Bilkis who is sister of the appellant and who is examined as DW1 mentioned in her testimony before the Court that the police had taken into custody the clothes belonging to her daughter Shabnam. However, the record of the case shows that the frock and the underwear recovered from the house of Ms. Bilkis pursuant to disclosure statement made by the appellant were blood stained. It was never the case of Ms. Bilkis that the frock and underwear recovered or seized by the police were blood stained and belonged to her daughter Shabnam. Further, the clothes were recovered pursuant to the voluntary disclosure statement made by the appellant on February 9, 1998 whereas Ms. Bilkis made claim that the clothes, which belonged to her daughter, were recovered and seized on September 30, 2003 when she was examined by the appellant as one of the defence witnesses. If the police had seized the clothes belonging to her daughter, Ms. Bilkis would not have maintained tacit silence for roughly about more than five years and would have made grievance before higher police officers or court within reasonable time. A bare reading of her testimony makes it more than clear that she had come to depose before the Court to save the appellant who is her real brother and stated wrong facts for the first time before the Court. Her case that the police personnel had given 2 to 4 blows of stick to her and threatened her that she and her husband would be implicated in the case, does not inspire confidence of this Court. Further, Exhibit Ka.3 which is seizure memo of the clothes of the deceased recovered from the house of Ms. Bilkis pursuant to the disclosure statement made by the appellant, mentions that the frock recovered was made of terry-cotton fabric and its upper portion was white whereas lower portion was brown coloured and there were prints of flowers. The

panchnama further indicates that it was sleeveless and stained with blood marks. Similarly, underwear discovered was made of cotton. It was white in colour with black stripes having blood stains. Though Bilkis who was examined as DW1 claimed that the clothes recovered from her house belonged to her daughter Shabanam, she could not give description of either frock or the underwear seized during the course of her testimony before the court. On overall view of the matter, this Court finds that it was satisfactorily proved by the prosecution that the frock and underwear, recovered from the house of DW1 Ms. Bilkis pursuant to the voluntary disclosure statement made by the appellant, belonged to the deceased.

14. Yet another circumstance relied upon by the prosecution is that the underwear of the appellant was stained with blood and semen. The fact that underwear put on by the appellant was seized under a panchnama is not disputed on behalf of the appellant at all. The High Court ignored this circumstance stating that the appellant was young and, therefore, find of semen stains was natural. However, the High Court ignored the material fact that in normal course, the underwear would not have blood stains at all and, therefore, it was for the appellant to offer explanation as to under what circumstances stains of blood were found on his underwear, seized by the police during the course of investigation. The fact that the underwear of the appellant seized by the police had human blood stains is sufficiently proved by the contents of report of Chemical Analyst. The fact that the blood stained underwear put on by the appellant was seized after four days does not make any dent in the prosecution case on the ground that a person would not move with such blood stained underwear for 3 – 4 days. One cannot lose sight of the fact that those stains were not visible and even the Investigating Officer had stated that on examination the underwear put on by the appellant appeared to be stained with semen at some places. If blood stains are found on the shirt or pant of a person then normally such person would not move in the village with those clothes

on, because stains of blood would be visible and noticed by anyone. However, it is almost difficult for anyone to notice stains of blood on underwear worn by a person. Further, the sense of cleanliness of a rustic villager cannot be ignored by the Court. While recording the statement of the appellant under Section 313 of the Code, it was put to him by the learned Judge that during the course of investigation his blood stained underwear was seized by the Police and his explanation was sought. In answer to the said question, it was never claimed by the appellant that the underwear seized was not blood stained and that another underwear was substituted in place of his underwear which was seized. Thus, this Court finds that the High Court was not justified at all in ignoring the circumstance sought to be relied upon by the prosecution that blood stained underwear of the appellant was recovered during the course of investigation.

15. Another circumstance sought to be relied upon by the prosecution is that the appellant made extra judicial confession before PW5, Anand Swaroop. The evidence of this witness shows that he was one of the panchas when inquest on the dead body of the deceased was held. During the course of his testimony, the witness identified his signature on the inquest report which was produced by the prosecution at Exhibit Ka.4. According to this witness, on February 23, 1998, he had been to Kasipur Court in connection with some work. What is asserted by the witness is that the appellant who is brother-in-law of Kabir had come to Court premises and told him near the shops that he and Mumtaz had killed Yasmeen after committing rape on her. The witness further asserted that the reason for making extra judicial confession by the appellant was that he was ex-pradhan of the village and the appellant was under an impression that the witness would be able to help him by approaching the police. This witness in no uncertain terms asserted before the court that he had told the Investigating Officer about the extra judicial confession made by the appellant.

In his cross-examination, the witness stated that police had recorded his statement only once. According to the witness, police had recorded his statement sometime between 23 to 29th February, 1998 in the village. What is mentioned by the witness in his cross-examination is that the appellant had come after February 23, 1998 and, therefore, he had not thought it necessary to tell the police about the extra judicial confession made by the appellant. The suggestion made by the defence that the police used to visit house of this witness daily or that the witness used to go to the police station daily, is denied by the witness. The manner in which this suggestion is made to the witness indicates that the appellant was entertaining a notion that the witness would be in a position to help him because the witness that the witness was going to the Police Station daily and policemen were also visiting him. In the cross-examination also, the witness maintained that the appellant had met him on February 23, 1998 in the court premises and neither the appellant nor Mumtaz was in the lockup nor inside the court room and that the appellant had made the confession near the shops. The witness explained to the court as to why he had gone to the court and according to him he had gone to the court premises to meet one Ashish Sharma, legal adviser of the bank for getting his brother's NOC prepared. The witness further mentioned before the Court that the appellant and Mumtaz had met him between 11.30 and 12 noon. The suggestion made by the defence that it was wrong to say that the appellant had made any confessional statement was emphatically denied by him. It may be mentioned that this witness in the cross-examination had stated that the appellant was not on talking or visiting terms with him before February 23, 1998 and, therefore, it was argued that there was no reason for the appellant to confide in this witness. However, what is relevant to notice is that the witness was ex-pradhan of Bajpur village. Ex-Pradhan certainly enjoys a status in a small village. The case of the defence was that the appellant was knowing that the witness was close to the police and was going to the Police Station daily. Under the circumstances, thinking that the witness would be able to render some help to him, the appellant had made extra judicial confession. The Court, on re-appreciation of evidence, finds that it is not brought on the record of the case that this witness was on inimical terms with the appellant. In fact, this witness does not belong to the community of the appellant and belongs to another community. There was no earthly reason for this witness to come to the court and depose falsely about the extra judicial confession made by the appellant. Though extra judicial confession is considered to be a weak piece of evidence by the courts, this Court finds that there is neither any rule of law nor of prudence that the evidence furnishing extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. The evidence relating to extra judicial confession can be acted upon if the evidence about extra judicial confession comes from the mouth of a witness who appears to be unbiased and in respect of whom even remotely nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused. In *State of U.P. vs. M.K. Anthony* AIR 1985 SC 48, this Court, while explaining the law relating to extra judicial confession, ruled that if the word spoken by the witness are clear, unambiguous and unmistakable one showing that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra judicial confession can be accepted and can be the basis of a conviction. According to this Court, in such a situation, to go in search of corroboration itself tends to cause a shadow of doubt over the evidence and if the evidence of extra judicial confession is reliable, trustworthy and beyond reproaching, the same can be relied upon and a conviction can be founded thereon. Here, in this case, it is proved by the prosecution that PW5, Anand Swaroop was not on inimical terms with the appellant at all. After subjecting his evidence to a rigorous test on the touchstone of credibility, this Court finds that extra judicial confession referred to by the witness is reliable and is rightly accepted by the Trial Court and

the High Court. The contention that when the appellant was being brought to the court, he was in custody and, therefore, the extra judicial confession referred to by PW5 would be hit by the provisions of Section 26 of the Evidence Act and could not have been received in evidence, cannot be accepted. As observed earlier, the record shows that the appellant and another were produced before the Court for extension of judicial remand. The appellant could not probablise his defence that he was in custody of police officer. He could not name the police officer who had brought him with Mumtaz to the Court premises for extension of judicial remand nor it is his case that to the hearing of the police officer who brought him to the court premises, he had made confessional statement before PW5. On the facts and in the circumstances of the case, This Court is of the opinion that it is not probablised by the defence that the appellant was in custody of police officer while he had made extra judicial confession before PW5. The evidence relating to extra judicial confession inspires confidence of this Court. On this point, there is concurrent finding by the courts below and no case is made out by the appellant to interfere with the said finding in the present appeal.

16. The net result of the above discussion is that the prosecution has proved satisfactorily and beyond shadow of doubt following facts:

(1) The deceased went missing in the evening of February 5, 1998 when she was playing near her house.

(2) Her naked dead body was found at about 6 a.m. on February 8, 1998 lying on public way in front of house of Haji Khursheed.

(3) She was subjected to rape and died a homicidal death.

(4) The appellant was seen fleeing away from near the

place where the dead body of the deceased was lying at about 4.30 a.m. on February 8, 1998.

(5) Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant, were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody.

(6) Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen.

(7) The appellant made extra judicial confession before PW5, Anand Swaroop.

17. The cumulative effect of the abovementioned facts taken together is conclusive in establishing the guilt of the appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences. This Court further notices that this Court in *Vasa Chandrasekhar Rao vs. Ponna Satyanarayana & Anr.* [(2000) 6 SCC 286] and *Geetha vs. State of Karnataka* [(2000) 10 SCC 72] while explaining the law relating to circumstantial evidence has ruled that where circumstances proved are put to the accused through his examination under Section 313 of the Code and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier, it is proved by cogent and reliable evidence that the appellant had committed rape on the deceased and thereafter murdered her. Here in this case, the incriminating circumstances proved were put to the appellant while recording his statement under Section 313 of the Code of Criminal

Procedure. In his further statement, recorded under Section 313, the appellant has merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt of the appellant beyond reasonable doubt.

18. Thus, this Court does not find any substance in the appeal and the same is liable to be dismissed. Accordingly, the appeal fails and is dismissed.

B.B.B. Appeal dismissed.

DINESH JAISWAL
v.
STATE OF M.P.
(Criminal Appeal No. 956 of 2005)

JANUARY 12, 2010

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860:

ss. 376, 323 and 506 – Rape – Conviction on the basis of evidence of prosecutrix – HELD: The test always is whether the given story prima facie inspires confidence – In the instant case, the story given by prosecutrix that the accused after giving tangi blows on her head and hand raped her and when the accused was leaving she snatched tangi from him and caused injuries to him does not inspire confidence – Her son and another relative who had reached the spot did not support her and were declared hostile – Even her husband who had accompanied her to the police station was not examined in court – Doctor was unable to confirm the factum of rape – Prosecution story that the accused, a youngman of 31 years was overpowered by the prosecutrix, a much older woman of 42 years, is rather difficult to believe – Three injuries found on hands of prosecutrix are simple in nature whereas out of 6 injuries found on hand and head of accused, one is a grievous injury – The case of the accused that he had gone to the house of the complainants to recover his cow and in a quarrel both received injuries was not verified by investigating officer – In the circumstances, some corroboration for the statement of the prosecutrix was required – In this view of the matter, judgments of courts below convicting and sentencing the accused are set aside and he is acquitted – Evidence – Testimony of prosecutrix – Reliability of.

Motilal vs. State of Madhya Pradesh **2008 (10) SCR 983 = (2008) 11 SCC 20, referred to.**

Case Law Reference:

2008 (10) SCR 983	**referred to**	**para 3**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 956 of 2005.

From the Judgment & Order dated 24.11.2003 of the High Court of Madhya Pradesh Bench at Jabalpur in Criminal Appeal No. 1365 of 1998.

Rameshwar Prasad Goyal for the Appellant.

C.D. Singh, Sunny Choudhary and Shashank S. Parihar for the Respondent.

The following Order of the Court was delivered

O R D E R

The facts leading to the appeal are as under :

At about 4.00 P.M. on 8th July, 1987 the prosecutrix (PW-1) was alone in her house situated in Village Magrohar, Police Station Rampur Naiken. The appellant, who was known to her, entered the house and after having inflicted three tangi blows on her head and hands, raped her. The prosecutrix also, in defence, snatched the tangi from the appellant and caused several injuries on his head while he was leaving the room. As a result of the injuries suffered, both became unconscious. In the meanwhile, Sampat the husband of the prosecutrix, arrived at the scene and she told him about what had happened. She also called Babulal (PW-2) her son and Shivbalak (PW-3) a distant relative, and they along with several other persons reached the spot. The prosecutrix thereafter accompanied by her husband Sampat, Babulal and the others afore referred lodged the First Information Report (Exhibit P-1) at Police

Chowki Khaddi on the same day at about 7.30 p.m. The prosecutrix was also sent for a medical examination which was carried out the next day by Dr. Kalpana Ravi (PW-5), who found three injuries on her and further recorded that as she was a married woman of 42 years, it had not been possible to give a categoric opinion about any recent sexual encounter. The appellant was also examined by Dr. S.B. Khare (PW-6) and his report Ex. P-6/A revealed six injuries, several of them on the head including Injury No. 6, which was grievous as his teeth had been knocked out. On the completion of the investigation a charge for offences punishable under Sections 376, 323 and 506 of the Indian Penal Code was framed. The appellant denied the charge and was brought to trial. During the course of the trial, PWs 2 and 3, Babulal and Shivbalak the son and relative of the prosecutrix who had reached the place of incident, soon after the alleged rape, were declared hostile and they gave a version contrary to what had been deposed to by the prosecutrix. The trial court also found, endorsing the view of Dr. Kalpana Ravi (PW-5), that as the prosecutrix was a married woman, it was impossible to give a categoric opinion about any recent sexual intercourse but relying on the sole testimony, of the prosecutrix, sentenced the appellant to undergo rigorous imprisonment for 10 years under Section 376 of Indian Penal Code and to other terms of imprisonment for the other offences. The High Court dismissed the appeal and confirmed the sentence. The matter is before us after the grant of special leave.

The learned counsel for the appellant has raised three arguments during the course of hearing. He has first pointed out that the two primary witnesses, both relatives of the prosecutrix, including Babulal her son had been declared hostile and had not supported the prosecutrix's case and as the story preferred by her was far fetched, it could not be believed. It has also been submitted that the medical evidence which could be a corroborating factor, too was uncertain, as

Dr. Kalpana Ravi had stated that the factum of rape could not be ascertained. The learned counsel has finally emphasised that the defence version that the appellant had reached the house of the prosecutrix to recover his cow and in a quarrel between them that followed, both had suffered injuries and that he had thereafter been falsely implicated in a case of rape. To highlight this argument, the learned counsel has referred us to the medical evidence of Dr. S.B. Khare (PW-6).

Mr. C.D. Singh, the learned counsel for the respondent State has however submitted that the prosecutrix case was liable to be believed and has relied upon the judgment of this court in in [*Motilal vs. State of Madhya Pradesh*] 2008 SCC (Vol.11) 20. It has also been submitted that the evidence clearly showed that the appellant had been arrested from the house of the prosecutrix which proved the factum of rape.

We have heard the learned counsel for the parties at length. We find that this case is rather an unusual one. The fact that the appellant was in the house of the prosecutrix is admitted on both sides. The prosecution story that the appellant a young man of 31 years had been overpowered by a much older woman is rather difficult to believe. The injuries received by the appellant are given below :-

1. Parted wound, whose shape is 1.5 c.m. X 1/5 c.m. on the right side of the hand.

2. Swelled injury, whose shape is 1.5 c.m. X 1 inch, which is on the upper side of the right hand.

3. Swelled injury, whose shape is 1/2" X 1/2", which is on the elbow of the left hand.

The injury of accused are given below :-

1. Parted wound, whose shape is 1 ½ inch X 1/2 c.m. X 1 c.m. on the middle of the head.

2. Parted wound, whose shape is 1" X 1/2 c.m. X 3 m.m. on the front side of the head.

3. Parted wound, whose shape is 1/2" X 1/2" c.m. X 3 m.m. on the right of the head.

4. Swelled injury, whose shape is 1/2" X 1/2".

5. Swelled injury, whose shape is 1" X 1/2" on the chin.

6. Two central incisers tooth and right canine tooth of upper jaw were broken and the enamles were swelled.

Injury No. 6 is a grievous one. As per the prosecutrix she had caused these injuries to the appellant during the time of rape and thereafter that the accused had caused her three minorinjuries as well whereas the case of the appellant is that he had gone to her house to recover his cow and in a quarrel that followed both had received injuries. In any case as the investigating officer had not verified the statement of the appellant some corroboration for the prosecutrix's story was required. As already mentioned, her son Babulal and Shivbalak, a relative, who had reached the place of incident, were both declared hostile and did not support the prosecutrix. We find that even her husband Sampat who had accompanied her to the police station to lodge the report did not come into the witness box and the doctor was also unable to confirm the factum of rape.

Mr. C.D. Singh has however placed reliance on *Moti Lal's* case (supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The

test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one.

As already mentioned above, in our opinion, the story given by the prosecutrix does not inspire confidence. We thus allow this appeal, set aside the impugned judgments and direct that the appellant be acquitted.

R.P. Appeal allowed.

VIJAY KUMAR ARORA
v.
STATE GOVT. OF NCT OF DELHI
(Criminal Appeal No. 125 of 2009)

JANUARY 13, 2010

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860 – s. 302 – Murder of wife – Death due to more than 90% burn injuries – Circumstantial evidence – Verbal dying declaration of deceased before five witnesses implicating the accused – Parents and sister of deceased alleging physical and mental cruelty meted out to deceased by accused – Extra marital relations of accused also proved – Defence case that the death was either suicidal or accidental – Conviction by courts below – Held: Conviction justified – The facts and circumstances of the case prove that the case was neither suicidal nor accidental, it was homicidal – Physical and mental cruelty against the deceased is proved – Motive of the accused for the murder is also proved – Testimony of the witnesses establish that the deceased made the dying declaration – These witnesses are truthful – Medical evidence also proves that the case was homicidal – The circumstances from which conclusion of guilt is to be drawn are proved conclusively – Circumstantial evidence.

Evidence – Circumstantial evidence – Yardsticks for reliance on – Discussed.

The appellant-accused was prosecuted for causing death of his wife. The prosecution case was that the injured wife who had sustained burn injuries, was admitted to the hospital by (appellant-accused) at 2.30 a.m. on the fateful night. On the information of the Duty Constable posted at the said hospital, Daily Diary entry was made in the police station and one ASI was deputed.

He collected MLC of the injured, wherein it was mentioned that she died due to exploding of stove; that her clothes were smelling of kerosene. As per the MLC, the injured was declared unfit to make statement at about 4.30 a.m. and 11.00 a.m. The injured ultimately succumbed to the burn injuries.

Thereafter, father of the deceased gave a written complaint to police, mentioning that his daughter was burnt to death by her husband and mother-in-law and other family members. He stated that the victim had, at 12.15 p.m., declared before him that the appellant-accused and his mother and his other relatives had set her on fire.

Case was registered against the appellant-accused and his mother u/s. 302/34 IPC. Plea of the appellant-accused was that the deceased died as the stove exploded when the deceased had gone to boil the milk for their infant daughter. On hearing the cry, he got up and tried to extinguish the fire to save the deceased. In the process, he also received burn injuries on his palms.

Trial court held that the deceased had neither committed suicide nor received the injuries accidentally, but was set ablaze. The court convicted the appellant-accused u/s. 302 IPC. However, his mother was acquitted in absence of sufficient evidence against her.

High Court dismissed the appeal against the trial court judgment confirming the conviction. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion,

however strong, cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances can not fail. [Para 9] [1083-G-H; 1084-A]

1.2. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle, a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them, on the other. [Para 9] [1084-A-C]

1.3. With regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although, there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is

conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis, except the one sought to be proved. [Para 9] [1084-C-G]

1.4. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. [Para 9] [1084-G-H; 1085-A-B]

2. On overall view of the circumstances of the case, the Court is of the opinion that the deceased did not die a suicidal death. A critical analysis of the paragraphs from the diary relied on by the accused to suggest suicidal death of the deceased, does not indicate any suicidal tendencies on the part of the deceased. No suggestion was made by the defence to any of the prosecution witnesses that the deceased had developed suicidal tendencies. The paragraphs make it more than clear that the relations between the deceased on the one hand and her husband and members of his family on the other, were strained one. However, those paragraphs do not indicate that the deceased was of feeble mind and had developed tendency to commit suicide. It is also nobody’s case that the deceased was not a caring mother. The

testimony of the father of the deceased makes it more than clear that the behaviour of the father-in-law of the deceased towards the newly born child was not good at all. Under the circumstances, if the deceased had decided to put an end to her life by committing suicide, in normal course, she would have left her daughter to the care of her own parents but no attempt, at any point of time, was made by the deceased to leave the infant child to the care of her parents. Normally, a woman committing suicide will leave a suicidal note. But it is nobody's case that any suicidal note written by the deceased was found after she had received burn injuries. Further, if the deceased had been fed up with her life and had decided to commit suicide, she would not have failed to inform the appellant that because of lack of love and affection on his part, she had set herself ablaze. [Para 12] [1087-G; 1086-G-H; 1087-A-F]

3.1. The circumstances proved by the prosecution establish beyond pale of doubt that the deceased had died a homicidal death and not an accidental death as suggested by the defence. [Para 13] [1091-G]

3.2. The panchnama of the place of incident establishes that the place suggested by the defence where the deceased was found engulfed in fire is a narrow passage where several articles were lying. The panchnama does not indicate that any article was burnt except a towel which was found partially burnt. Further, the story put forth by the appellant that at midnight the deceased had got up for boiling milk for the infant itself does not inspire confidence of the Court. Even if it is assumed for the sake of argument that the deceased had got up at 2.00 am for boiling milk for the infant, it does not sound reasonable to believe that she would attempt to light a kerosene stove in the dingy and cramped passage normally used for washing clothes, utensils etc.

and would not go in the kitchen and use gas connection for the purpose of heating the milk. [Para 13] [1088-A-D; F-H]

3.3. As the record does not show that other articles lying in the narrow passage were extensively burnt, it becomes highly doubtful whether the incident in question had at all taken place in the passage as suggested by the appellant. [Para 13] [1089-C-D]

3.4. The presence of kerosene oil on the body of the deceased and clothes put on by her, rules out the theory of accidental fire, as suggested by the defence. The medical evidence on record makes it evident that soot particles were present in the stomach of the deceased. This indicates that the injuries could have been sustained by the deceased only in a conflagration and that too in a closed area. [Para 13] [1089-G-H; 1090-A]

3.5. In this case, the record does not indicate that any attempt was made by the deceased to run towards any open space and positively establishes that she was found at the end of the passage which hardly admeasures 12? x 3? [Para 13] [1090-B-C]

3.6. Even if it is assumed for the sake of argument that in the instant case, the appellant had made an attempt to extinguish fire with his bare hands, it is reasonable to infer that he would have received extensive burn injuries because the whole body of the deceased was on fire and ultimately it was found that she had received almost 100% burn injuries. The medical evidence on record indicates that the appellant had sustained first to second degree burns over the dorsum and wrist of his right hand with blisters at places, some of which had already burst. The case of the appellant that the deceased had informed him that she had sustained burn injuries because the kerosene oil stove had burst

into a vaporized flame does not inspire the confidence at all. [Para 13] [1090-D-G]

3.7. The established facts of the case abundantly indicate that kerosene oil stove was planted at the site in a fake attempt to hide the homicidal death. The presence of extensive burns with more than 90% burn injuries rules out the theory of accidental fire. [Para 13] [1091-B-E]

Surinder Kumar v. State (Delhi Administration) **AIR 1987 SC 692, relied on.**

4.1. The evidence of father of the deceased would indicate that the deceased was subjected to physical and mental cruelty for bringing insufficient dowry. The testimony of the father regarding physical and mental cruelty meted out to his daughter gets corroboration from the testimony of the mother and the sister of the deceased. The record further shows that 22 letters were recovered from the tenanted premises of the appellant. Those letters were written by a woman. Some of the letters show that the appellant was simultaneously carrying affairs with two/three girls. The evidence relating to cruelty meted out by the appellant to the deceased for bringing insufficient dowry and his extra-marital relations would show that he had a strong motive to do away with the deceased. Thus, the second circumstance of motive sought to be relied upon by the prosecution is also firmly established. [Para 14] [1091-H; 1092-A-D-H]

4.2. Yet another circumstance relied upon by the prosecution against the appellant is that the deceased had made a verbal dying declaration. The evidence of six of the witnesses would indicate that the deceased had stated before them that she was held by her husband, and her mother-in-law had poured kerosene oil over her before she was set on fire. The father of the deceased,

the mother of the deceased, PW 6 and PW 11 would indicate that each of them had entreated and implored different authorities to get the statement of the deceased recorded. The testimony of father of the deceased would show that he had requested Assistant Commissioner of Police to record the statement of the deceased but he had refused to oblige saying that on her MLC, it was mentioned that she was unfit to make a statement. The witness has further stated that thereafter he had met Doctor who was in- charge of Burns Ward and requested him to record the statement of the deceased but he had refused to record the same saying that he had to attend some operation. The evidence of mother of the deceased shows that she had beseeched Sub-Inspector to record the statement of her daughter but he refused to record the same saying that the doctor had declared the deceased unfit to make the statement. The testimony of PW6 would indicate that he had gone to the extent of visiting Tees Hazari Courts in the company of one Sub-Inspector and had gone to the hospital with an SDM to record the statement of the deceased. The testimony of PW 11 satisfactorily establishes that when the Assistant Sub-Inspector sitting inside the Burns Ward had refused to record the statement of the deceased, he had immediately gone to the shop to bring a tape recorder and had returned to the hospital with tape recorder but the hospital staff and nurses on duty had prevented him from taking the tape recorder inside the burns ward and, therefore, he could not record the dying declaration of the deceased. The statements made on oath by these witnesses would indicate that the deceased was in a fit state of mind to make a statement and was talking and, therefore, the four witnesses had made frantic efforts and craved different authorities to record the statement of the deceased. [Para 15] [1093-A, F-H; 1094-A-H; 1095-A-C; 1096-E-H; 1097-A]

Sunder Singh vs. State of Punjab **AIR 1962 SC 1211, referred to.**

4.3. It is true that the police statements of PWs 6, 10 and 11 before whom the deceased had made dying declarations, were recorded after one month from the date of the death of the deceased. However, neither an explanation was sought from any of the witnesses as to why their police statements were recorded after a delay of one month nor the Investigating Officer was questioned about the delay in recording statements of those witnesses. Unless the Investigating Officer is asked questions about delay in recording statements and explanation is sought from the witnesses as to why their statements were recorded late, the statements by themselves did not become suspicious or concocted. The evidence of the above-mentioned witnesses would indicate that though they are neighbours of the father of the deceased, they were neither got up nor concocted witnesses. No enmity is suggested to any of the witnesses with the appellant. Under the circumstances, their evidence could not have been rejected on the ground stated by the High Court unless the same was found suffering from inherent improbability. [Para 15] [1095-F-H; 1096-A-C]

4.4. It is true that on MLC of the deceased, it was endorsed that she was unfit to make a statement at about 4.30 am and 11.00 am on April 6, 1983. However, keeping in view the statements on oath made by the above-named witnesses which are not seriously challenged in their searching cross-examination, it would be safe to infer and conclude that medical record at about 12.00 Noon or 12.30 pm did not mention at all that the deceased was not in a fit state of mind to make a statement. [Para 15] [1097-C-D]

4.5. On the facts and in the circumstances of the

case, this Court has no hesitation in relying upon the truthful testimony of the relatives and neighbours of the deceased which unerringly establishes that the deceased had made dying declaration before those witnesses implicating the appellant. The circumstance, namely, deceased had made dying declaration before six witnesses implicating the appellant is firmly established. [Para 15] [1097-D-F]

4.6. On reappraisal of the evidence adduced by the prosecution, the circumstances from which the conclusion about the guilt of the appellant is to be drawn are fully proved. The circumstances proved are conclusive in nature. All the facts so established are consistent only with the hypothesis of guilt of the appellant and inconsistent with his innocence. The circumstances proved exclude the possibility of guilt of any person other than the appellant. [Para 16] [1097-F-G]

4.7. The defence that the deceased had received burn injuries accidentally, is disbelieved by the trial court and the High Court as well as by this Court. This false plea/ defence of the appellant is called into aid only to lend assurance that the circumstances taken in cumulative, suggest that it was the appellant who had murdered his wife. No error is committed either by the trial court or the High Court in convicting the appellant under Section 302 IPC for committing murder of his wife. [Paras 16 and 17] [1097-H; 1098-A-C]

Case Law Reference:

AIR 1987 SC 692	**Relied on.**	**Para 13**
AIR 1962 SC 1211	**Referred to.**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 125 of 2009.

From the Judgment & Order dated 15.5.2008 of the High

Court of Delhi at New Delhi in Criminal Appeal No. 183 of 1992.

Shashi Kumar Dubey, Sanjeev K. Bhardwaj, Yash Pal Chopra Yogesh Tiwari, Sunil Roy for the Appellant.

P.P. Malhotra, ASG, Sadhna Sandhu, Naresh Kaushik, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. This appeal by special leave, questions the legality of Judgment dated May 15, 2008 rendered by Division Bench of High Court of Delhi in Criminal Appeal No.183 of 1992 by which Judgment dated September 29, 1992 passed by the Learned Additional Sessions Judge, Delhi in Sessions Case No.100 of 1989 convicting the appellant under Section 302 IPC and sentencing him to R.I. for life and fine of Rs.2000/-in default R.I. for one year, is confirmed.

2. The facts emerging from the record of the case are as under:

The marriage of deceased Shashi was solemnised with the appellant on January 30, 1982. After marriage, the deceased started living with the appellant at his place of residence situated at Chandigarh.

3. During the subsistence of the marriage, the deceased gave birth to a girl child on January 2, 1983 at New Delhi. Thereafter, the deceased went to Chandigarh to reside with the appellant. On April 4, 1983, the appellant with his wife and child came to Delhi from Chandigarh. After visiting the parents of the appellant, they went to the house of the parents of the deceased and took dinner there. After taking dinner, the appellant and the deceased with the child returned to the house of parents of the appellant at about 11.30 pm and retired to bed. At about 2.30 am on April 6, 1983, shrieks of the deceased were heard and she was found engulfed in the flames. At about 2.45 am on the

night intervening between April 5 and April 6, 1983, the deceased was admitted to Lok Nayak Jai Prakash Narain Hospital, New Delhi (LNJPN Hospital, for short) with burn injuries. The Duty Constable posted at the said hospital sent a telephonic message at about 3.00 am that Shashi, aged about 26 years, with burn injuries sustained in her house was admitted by her husband, i.e., the appellant. This message was recorded at DD No.6A. On receipt of the message, ASI Hans Raj along with Constable Umrao Singh went to the hospital. He collected MLC of injured Shashi wherein it was mentioned that the injured was got admitted at 2.45 am by her husband and Dr. S.K. Bindal. It was also mentioned therein that the accident occurred due to the exploding of the stove. It was further mentioned in the said certificate that her clothes were smelling of kerosene oil and she had received extensive burns all over the body and face.

4. As per the endorsement recorded on the MLC, the injured was declared unfit to make statement at about 4.30 am and 11 am on April 6, 1983. Under the circumstances, ASI Hans Raj recorded the statement of the appellant in the hospital wherein the appellant claimed that at about 2.15 am, his wife Smt. Shashi had got up for boiling the milk for their three months' old child and he had got up from the bed on hearing her shouts "*Raje Raje*". In his statement, the appellant mentioned that he immediately rushed and found his wife Shashi in flames in the kitchen and that her clothes had caught fire while Shashi was boiling the milk on the stove. It was also mentioned by the appellant in his statement that he had received burn injuries on palm when he had made attempt to extinguish the fire to save his wife. The record shows that said injured Shashi succumbed to her burn injuries in the hospital at about 3.15 pm on April 6, 1983. On the same day, Mr. Ram Nath Mehra, the father of the deceased submitted a written complaint before the Police mentioning that his daughter was burnt to death by Beena Arora who was her mother in law as well as by V.K. Arora who was her husband and by other family

members on the night intervening between April 5 and April 6, 1983. It was mentioned by Mr. Mehra in his complaint that injured Shashi had regained her senses in the hospital at about 12.15 pm on April 6, 1983 and had declared weepingly in his presence and in the presence of his other relatives that she had been set on fire by her mother-in-law, the appellant and his other family members. On the basis of the complaint, offences punishable under Section 302 read with Section 34 IPC were registered and investigation commenced. On completion of investigation, the appellant and his mother Mrs. Beena Arora were chargesheeted for commission of offence punishable under Section 302 read with Section 34 IPC. As the offence punishable under Section 302 is exclusively triable by the Court of Sessions, the case was committed to Sessions Court, Delhi for trial.

5. The learned Additional Sessions Judge, to whom the case was made over for trial, framed charge against the appellant and his mother under Section 302 read with Section 34 of the Indian Penal Code. The same was read over and explained to them. The appellant and his mother did not plead guilty to the same and claimed to be tried. Therefore, the prosecution examined several witnesses and produced documents in support of its case against the appellant and his mother. On completion of recording of evidence of prosecution witnesses, the learned Sessions Judge explained to the appellant and his mother the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. As far as the mother of the appellant is concerned, she claimed that she was falsely involved in the case and was innocent. The appellant in his further statement claimed that when he was asleep, he was awakened by the shrieks of his wife and, therefore, had come out in the *verandah* and had seen his wife in flames. According to him, he tried to extinguish the fire with his hands and water and in that process received burn injuries on his hands. What

was claimed by the appellant was that he called a doctor and rang up his father-in-law but he was not remembering the exact time at which the information about the deceased having sustained burn injuries was conveyed to his father-in-law. It was stated by him that he told the family of his father-in-law to come to the hospital and that his injured wife herself had told him that she had caught fire while she was boiling milk on the stove. It was also mentioned by him in his further statement that he was informed by his wife that the stove had inflamed (*bhabhak gaya*). He claimed in his statement that he would file a written statement if so advised.

6. On appreciation of evidence adduced by the prosecution, the learned Judge of Trial Court held that ASI Mr. Hans Raj to whom DD report was marked at about 3 am on the night intervening April 5 and April 6, 1983 conducted himself in the most dishonest and partisan manner in making enquiry and in conducting investigation after registration of the first information report. The learned Judge further noticed that the conduct of Mr. V.P. Gupta, who was the then SHO of P.S. Moti Nagar and presently ACP was not above board. According to the learned Judge, the then SHO Mr. V.P. Gupta had passed on his entire burden on the shoulders of ASI Hans Raj without doing absolutely anything in the name of fair investigation. After noticing that the deceased had sustained accidental burns leading to her death on the night intervening April 5 and April 6, 1983 at her matrimonial home located at F-503, Karam Pura, Delhi, the learned Judge held that the case against the appellant and his mother was based on circumstantial evidence. The learned Judge considered the circumstances established by the prosecution and held that the deceased had neither committed suicide nor received burn injuries accidentally but was set ablaze by the appellant. According to the learned Judge, the circumstances brought on record were inconsistent with the innocence of the appellant and established that, in all human probability, the act of murder of the deceased was committed by the appellant. The learned

Judge noticed that no satisfactory evidence could be adduced by the prosecution to establish the guilt of original accused No.2 who was mother of the appellant. In view of the said conclusions, the learned Judge, by judgment dated September 29, 1992, convicted the appellant under Section 302 IPC and sentenced him to rigorous imprisonment for life and a fine of Rs.2,000/- (Rupees two thousand only) in default rigorous imprisonment for one year and acquitted his mother.

7. Feeling aggrieved, the appellant filed Criminal Appeal No.183 of 1992 before Delhi High Court. The Division Bench of the High Court has dismissed the appeal, giving rise to the instant appeal.

8. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the appeal.

9. It is not in dispute that the case against the appellant rests on circumstantial evidence. It would be advantageous to restate the well settled law relating to appreciation of circumstantial evidence. The evidence tendered in a court of law is either 'direct' or 'circumstantial'. Evidence is said to be 'direct' if it consists of an eye-witness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or *factum probandum*. Essential ingredients to prove the guilt of an accused by circumstantial evidence are :

The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing

picturisation of actual incident, but the circumstances can not fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle, a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them, on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although, there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis, except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

10. Having noticed the principles governing the case based on the circumstantial evidence, this Court proposes to consider the circumstances relied upon by the prosecution.

11. The first circumstance sought to be relied upon by the prosecution is that the deceased died a homicidal death. A human death may be a natural one or homicidal one or accidental or suicidal one. It is not the case of anyone that the deceased Shashi had died a natural death. Therefore, the question which falls for determination of this Court is whether she died a homicidal death or a suicidal death or an accidental death. The medical evidence on record shows that after the deceased had succumbed to her burn injuries, post mortem examination was conducted by Dr. G.K. Sharma on April 7, 1983 at 12 noon. On external examination, the doctor found that there were superficial burns all over the body except patches over scalp, lower front of abdomen, perineum, left buttock and inner part of right buttock. According to the doctor, the approximate area of burn was about 90%. When the post mortem was being performed, the doctor could not smell kerosene oil. On internal examination, it was found by the doctor that all the organs were congested. According to the doctor, the death of the deceased was due to shock and toxemia due to burns by fire. What is important to notice is that the defence had not cross-examined Dr. G.K. Sharma at all.

12. Having regard to the nature of injuries noticed by Dr. G.K. Sharma, who had performed autopsy on the dead body of the deceased, the Court will have to examine the question whether those injuries were received by the deceased while

committing suicide. It may be mentioned that in the further statement recorded under Section 313 of the Code of Criminal Procedure, 1973, the case of the appellant is that the deceased had died accidentally while boiling milk for the infant and it was never claimed by him in his further statement that the deceased had committed suicide. However, it was argued by the learned counsel for the appellant that personal diary maintained by the deceased indicates that she was a highly sensitive woman who expected wholehearted love and affection from the appellant but having been thoroughly disappointed, out of sheer disgust, frustration and depression, she might have chosen to end her life. The relevant passage from the diary of the deceased relied upon by the defence has been quoted in paragraph 24 of the impugned judgment. A critical analysis of those paragraphs from the diary does not indicate any suicidal tendencies on the part of the deceased. No suggestion was made by the defence to any of the prosecution witnesses that the deceased had developed suicidal tendencies. It is well to remember that the deceased was well educated and a teacher by profession. She had a three months old child. The paragraphs from the diary quoted in the impugned judgment make it more than clear that the relations between the deceased on the one hand and her husband and members of his family on the other, were strained one. However, those paragraphs do not indicate that the deceased was of feeble mind and had developed tendency to commit suicide. It is relevant to notice that it is nobody's case that the deceased was not a caring mother. The lingering doubt about the uncertain future of the infant aged three months would surely deter the deceased from committing the suicide. As noticed earlier, the deceased in the company of the appellant and her child had come to the house of the parents of the appellant from the house of her parents after taking dinner. It could not even be remotely suggested on behalf of the appellant either to the father or to the mother or to the sister of the deceased that when the deceased, in the company of the appellant, had come for dinner, she was found to be disheartened or gloomy or nervous or depressed. The passages quoted in the impugned judgment from the diary maintained by the deceased indicate a firm resolve on the part of the deceased to lead a life for herself away from her husband and her in-laws. The testimony of the father of the deceased makes it more than clear that the behaviour of the father-in-law of the deceased towards the newly born child was not good at all. Under the circumstances, if the deceased had decided to put an end to her life by committing suicide, in normal course, she would have left her daughter to the care of her own parents but no attempt, at any point of time, was made by the deceased to leave the infant child to the care of her parents. The evidence of the father of the deceased on the contrary makes it very clear that the appellant wanted to leave the infant daughter with the parents of the deceased but the deceased had not agreed to the said suggestion. Further, what is normally found in a case of suicide by a recently married woman who has given birth to a child shortly before the suicide is that she would bolt herself in a room or a kitchen or a bathroom to see that no one makes any attempt to save her and would commit suicide along with the child. However, the facts of the present case do not indicate that the deceased had locked herself inside a room or kitchen or bathroom nor the record shows that any attempt was made by her to commit suicide with her infant. As noticed earlier, the deceased was highly educated lady and was blessed with motherhood. Normally, a woman committing suicide will leave a suicidal note. But it is nobody's case that any suicidal note written by the deceased was found after she had received burn injuries. Further, if the deceased had been fed up with her life and had decided to commit suicide, she would not have failed to inform the appellant that because of lack of love and affection on his part she had set herself ablaze.

On overall view of the circumstances brought on the record of the case, this Court is of the firm opinion that the deceased did not die a suicidal death.

13. The next question which falls for consideration of the

Court is whether the deceased died an accidental death. As observed in the earlier part of this judgment, the case of the appellant is that while boiling milk for the infant, the clothes of the deceased caught fire accidentally because of the flames emanating from the stove as a result of which she died. The panchnama of the place of incident establishes that the place suggested by the defence where the deceased was found engulfed in fire is a narrow passage where several articles were lying. If the deceased had died because of the flames emanating from the stove, the other articles lying nearby would have been found to be burnt. However, admittedly the panchnama of place of incident does not indicate that any article was burnt except a towel which was found partially burnt. Further, the story put forth by the appellant that at midnight the deceased had got up for boiling milk for the infant itself does not inspire confidence of the Court. The deceased who was a teacher by profession and well educated must be breastfeeding her three months old infant and it would not be reasonable to infer that the infant was being fed buffalo or any other milk. It may also be mentioned that the deceased in the company of the appellant had left her parental home between 11 pm to 11.15 pm on April 5, 1983 and must not have gone to sleep before 11.30 pm. From this fact, it would be reasonable to hold that before going to the sleep, the young infant child must have been fed and the child would not have required another feed within two hours. Thus, the story that deceased got up at 2.00 am in the night to boil the milk for the infant does not inspire confidence of the Court. The panchnama of the place of incident also makes it clear that there was a kitchen in which there was a gas cylinder. Therefore, even if it is assumed for the sake of argument that the deceased had got up at 2.00 am for boiling milk for the infant, it does not sound reasonable to believe that she would attempt to light a kerosene stove in the dingy and cramped passage normally used for washing clothes, utensils etc. and would not go in the kitchen and use gas connection for the purpose of heating the milk. Further, as per the panchnama of place of the incident, the milk container without any handle was lying near the kerosene stove but no pliers or tangs were found. It is difficult to comprehend or entertain a belief by a prudent man that an educated lady like the deceased would use such a milk pot without a handle for boiling the milk. The photograph of the place of occurrence brought on the record of the case makes it more than clear that a small aluminium milk container was lying near the stove and a partially burnt towel hanging on a peg at a height of about 5½" from the floor level of the gallery was also found. But as noticed earlier, no other article lying nearby was damaged due to the burns. As the record does not show that other articles lying in the narrow passage were extensively burnt, it becomes highly doubtful whether the incident in question had at all took place in the passage as suggested by the appellant. What is claimed by the appellant is that because of the *bhabhak* of the stove, the cotton garments put on by the deceased had caught fire. However, a brief burst of flames, i.e., *bhabhak* at the time when the stove is ignited first time would cause at the best first degree burns and could not have been sufficient to totally and completely ignite the cotton garments. Normally, it is inconceivable that the deceased would have received 90% burns in spite of the fact that she was wearing a cotton nightgown. Further, the evidence of prosecution witnesses establishes beyond pale of doubt that when the deceased was removed to the hospital, her clothes and her body were smelling of kerosene. It is also inconceivable that due to initial *bhabhak*, the clothes and body of the deceased would be soiled with kerosene unless it had burst. The CFSL report on the record shows that kerosene oil stove was found in normal working order. Therefore, the presence of kerosene oil on the body of the deceased and clothes put on by her, rules out the theory of accidental fire as suggested by the defence. The medical evidence on record makes it evident that soot particles were present in the stomach of the deceased. According to Dr. Bernard Knight who has authored 'Medical Jurisprudence and Toxicology' if soot particles are found in Larynx Trachea or into stomach, it is commonly a case of conflagration. The presence

of soot particles in the stomach indicates that the injuries could have been sustained by the deceased only in a conflagration and that too in a closed area. The instinct of survival would have made the deceased to run into an open place but in this case, the record does not indicate that any such attempt was made by the deceased to run towards any open space and positively establishes that she was found at the end of the passage which hardly admeasures 12' x 3'. The case of the appellant is that on hearing shrieks of the deceased, he was woken up and he found that the deceased was engulfed in the fire. It is also his case that he had made an attempt to extinguish fire on her and had received burn injuries on the dorsum and wrist of the right hand. Having regard to the common course of natural events and human conduct in their relation, when a loving husband finds his wife engulfed in fire, he try his best to extinguish the fire either with the help of a gunny bag or blanket or sheet of cloth and would not make any attempt to extinguish the fire with bare hands. Even if it is assumed for the sake of argument that in the instant case, the appellant had made an attempt to extinguish fire with his bare hands, it is reasonable to infer that he would have received extensive burn injuries because the whole body of the deceased was on fire and ultimately it was found that she had received almost 100% burn injuries. The medical evidence on record indicates that Dr. R.P. Saraswat had examined the appellant on April 8, 1983 and found that the appellant had sustained first to second degree burns over the dorsum and wrist of his right hand with blisters at places, some of which had already burst. The case of the appellant that the deceased had informed him that she had sustained burn injuries because the kerosene oil stove had burst into a vaporized flame does not inspire the confidence at all. Any one who is little conversant with operation of a kerosene stove would understand that the brief inflammation which may be caused during the initial ignition of the stove is because of little excess oil escaping through the feeder hole and not for any other reason. The so called *bhabhak* of the stove would not result into release of kerosene from the stove in such a large quantity so as to fully drench the whole body and the clothes of the deceased with kerosene. As observed earlier, a gas cylinder and a gas stove were available in the kitchen. Therefore, the use of kerosene stove by the deceased becomes highly improbable and doubtful. Mr. M.R. Kundal, PW5, has mentioned in his testimony that he had visited the site on April 8, 1983 and found the gas cylinder and the gas stove in working order with no gas leakage. The established facts of the case abundantly indicate that kerosene oil stove was planted at the site in a fake attempt to hide the homicidal death. The record of the case, as noticed earlier, establishes beyond pale of doubt that the deceased had suffered more than 90% burns of 3rd to 5th degree category. If the deceased had suffered extensive burns because of her clothes catching fire accidentally, she would have run for her life either in the open backyard or rolled on the floor or would have wrapped a curtain or any mattress around herself to extinguish the fire. However, the record does not indicate that any such attempt was made by the deceased. The presence of extensive burns with more than 90% burn injuries out the theory of accidental fire. Applying the principle laid down in *Surinder Kumar* v. *State (Delhi Administration)* AIR 1987 SC 692 to the facts of the present case, it becomes clear that if the stove had burst as suggested by the defence, the deceased would not have sustained burns on the face, neck, trunk, upper limbs etc. and her clothes would not have been found containing kerosene oil. Further, at no point of time, any complaint was made either by the appellant or his family members to the company which had manufactured the stove or the owner of the stove from which the store was purchased that the stove was defective or faulty or had burst causing death of the deceased. Thus, the circumstances proved by the prosecution establish beyond pale of doubt that the deceased had died a homicidal death and not an accidental death as suggested by the defence.

14. The evidence of Ram Nath Mehra who is father of the deceased would indicate that the deceased was subjected to

physical and mental cruelty for bringing insufficient dowry. According to the said witness, he had given dowry worth Rs.75,000/- to the appellant and his family members at the time of marriage of the deceased. On one occasion, the deceased was asked to bring gold set for her mother in law but the witness was not able to make arrangement of the funds for gold set and had, therefore, purchased a gold chain and given it to the appellant. His evidence further shows that the appellant had demanded scooter from the deceased and he was not able to meet the said demand of the appellant because of his weak financial conditions. The evidence of B.L. Sharma, PW6, who is friend of the father of the deceased shows that in order to fulfil the demands made by the appellant, the father of the deceased had sought financial assistance from him but he could not render any financial help to the father of the deceased because of his own weak financial conditions. The testimony of the father of the deceased regarding physical and mental cruelty meted out to his daughter gets corroboration from the testimony of the mother of the deceased and the sister of the deceased. The record further shows that 22 letters were recovered from the tenanted premises of the appellant. Those letters were written by one Ms. Chhaya from Bangalore. A close analysis of those letters makes it very clear that the appellant was very much fond of and infatuated with Ms. Chhaya. The very fact that the appellant had preserved all these letters even after one year and two months of his marriage with the deceased persuades this Court to infer that he was carrying on and wanted to carry on a quite affair with Ms. Chhaya notwithstanding his marriage with the deceased. Some of the letters show that the appellant was simultaneously carrying affairs with two/three girls. The evidence relating to cruelty meted out by the appellant to the deceased for bringing insufficient dowry and his extra-marital relations with Ms. Chhaya would show that he had a strong motive to do away with the deceased. Thus, the second circumstance of motive sought to be relied upon by the prosecution is also firmly established.

15. Yet another circumstance relied upon by the prosecution against the appellant is that the deceased had made a verbal dying declaration to (1) Ram Nath Mehra, her father; (2) Ravi Kanta Mehra, her mother; (3) Meena Mehra, her sister; (4) B.L. Sharma; (5) Kamlesh Sharma; and (6) Sudarshan Lal at about 12.00 Noon in Burns Ward of LNJP Hospital on April 6, 1983. It may be stated that the Trial Court found that deceased was conscious and had made statements. The Trial Court further held that the quality of evidence lead to establish the oral dying declaration was insufficient to record conviction but the same could be used as a corroborative piece of evidence. From the impugned judgment, it becomes evident that the High Court considered the question whether acquittal of mother of the appellant was proper or not in view of the principles laid down in *Sunder Singh vs. State of Punjab* AIR 1962 SC 1211. After considering the evidence led by the prosecution to prove oral dying declaration of the deceased, the High Court has come to the conclusion that the oral dying declaration is not reliable. On the facts and in the circumstances of the case, this Court also proposes to consider the evidence led by the prosecution witnesses for the purpose of satisfying whether the deceased had made oral dying declaration before her close relatives and others.

The evidence of above witnesses would indicate that the deceased had stated before them that she was held by her husband, i.e., the appellant and her mother-in-law had poured kerosene oil over her before she was set on fire.

Witness Ravi Kanta Mehra, the mother of the deceased, stated before the Court that she had met her daughter Shashi at about 12.00 Noon who had told her that her husband had caught hold of her while her mother-in-law had sprinkled kerosene oil on her. Her evidence further shows that she had beseeched Sub-Inspector Bakshi to record the statement of her daughter but Sub-Inspector Bakshi refused to record the same saying that the doctor had declared Shashi unfit to make the

statement. Her evidence also shows that thereafter she in the company of her relative had searched for the doctor and some quarrel had ensued between them and the doctor.

The reliable testimony of Mr. B.L. Sharma shows that he had enquired with injured Shashi as to what had happened whereupon Shashi had told him that she had been set on fire by the accused and other family members. The witness has asserted before the court that on seeing Shashi's condition, he felt that she was not likely to survive for a long and thought that it would be proper to call a Magistrate to record her statement. What is mentioned by the witness is that he, therefore, rushed to Moti Nagar Police Station and met the SHO and took along with him one Sub-Inspector in a jeep to reach Tees Hazari Courts and contacted the SDM whose name perhaps was Mr. Mathai. The witness has further mentioned that from the court premises, they reached the hospital at about 3.15 pm by which time Shashi had expired.

The assertion made by witness Sudarshan Lal on oath is that he had rushed to LNJP Hospital on learning that the deceased was admitted in the said hospital with burn injuries. According to him, he had met Shashi and Shashi told him about the incident implicating the appellant. What this witness has asserted is that thereupon he had requested one Assistant Sub-Inspector who was sitting inside the ward to record the statement of Shashi but the said Assistant Sub-Inspector had refused to do so and, therefore, he immediately had left the hospital and gone to the shop where he was serving which is situated in Canaught Place to bring a tape recorder. The witness has, further stressed before the Court that he had reached the hospital at about 1.30 pm with tape recorder to record the statement of injured Shashi but the hospital staff and nurses had not permitted him to take a tape recorded inside the burns ward.

The reliable testimony of witness Ram Nath Mehra, father of the deceased shows that the deceased had made a statement to him in trembling voice that the appellant, his mother and other members had set her on fire. His testimony would further show that thereafter he had requested Mr. Khan, Assistant Commissioner of Police to record the statement of Shashi but the Assistant Commissioner of Police had refused to oblige saying that on her MLC, it was mentioned that she was unfit to make a statement. The witness has further stated that thereafter he had met Doctor Tiwari who was in charge of Burns Ward and requested him to record the statement of the deceased but he had refused to record the same saying that he had to attend some operation.

The High Court, while disbelieving the evidence adduced by the prosecution to prove oral dying declaration of the deceased held that "ASI Hans Raj, it is plain to us, is both an untrustworthy witness and also an incompetent investigator". Having held so, it was noticed by the High Court that he was not suggested by the prosecution that Shashi was conscious at various times and periods and that she had spoken to several members of her family and her neighbour who had entered the room where she was being treated. Therefore, the High Court held that the assumption that Shashi was conscious to make a statement would run foul to court's duty. The High Court further concluded that the evidence of four witnesses before whom oral dying declaration was allegedly made did not indicate as to who had set the deceased on fire whereas Police statements of Mr. B.L. Sharma PW6, Mrs. Kamlesh Sharma PW10 and Sudarshan Lal PW11, were recorded after the passage of about one month from the date of the death of Shashi and, therefore, the evidence adduced by the prosecution to prove dying declaration was not satisfactory. On reappraisal of the evidence, this Court finds that it is true that the police statements of the above-named three witnesses were recorded after one month from the date of the death of the deceased. However, neither an explanation was sought from any of the witnesses as to why their police statements were recorded after a delay of one month nor the Investigating Officer

was questioned about the delay in recording statements of those witnesses. The law on the point is well settled. Unless the Investigating Officer is asked questions about delay in recording statements and explanation is sought from the witnesses as to why their statements were recorded late, the statements by themselves did not become suspicious or concocted. The evidence of the above-mentioned witnesses would indicate that though they are neighbours of the father of the deceased, they were neither got up or concocted witnesses. Even remotely, it was not suggested to any of the witnesses that the witness was close to the father of the deceased and, therefore, out of love and affection for him, he was falsely deposing before the Court. No enmity is suggested to any of the witnesses with the appellant. Under the circumstances, this Court is of the opinion that their evidence could not have been rejected on the ground stated by the High Court unless the same was found suffering from inherent improbability. The evidence of Ram Nath Mehra, the father of the deceased, Ravi Kanta Mehra, the mother of the deceased, B.L. Sharma and Sudershan Lal would indicate that each of them had entreated and implored different authorities to get the statement of the deceased recorded. The testimony of B.L. Sharma would indicate that he had gone to the extent of visiting Tees Hazari Courts in the company of one Sub-Inspector deputed by the SHO of Moti Nagar Police Station and had gone to the hospital with an SDM to record the statement of the deceased. The testimony of Sudershan Lal satisfactorily establishes that when the Assistant Sub-Inspector sitting inside the Burns Ward had refused to record the statement of the deceased, he had immediately gone to the shop being run in the name of M/s. Bright Electricals situated at Cannaught Place to bring a tape recorder and had returned to the hospital with tape recorder but the hospital staff and nurses on duty had prevented him from taking the tape recorder inside the burns ward and, therefore, he could not record the dying declaration of the deceased. The statements made on oath by these witnesses as well as Kamlesh Sharma and Meena Mehra would indicate that the deceased Shashi was in a fit state of mind to make a statement and was talking and, therefore, the four witnesses had made frantic efforts and craved different authorities to record the statement of the deceased. There is no manner of doubt that if the deceased was not talking and was not in a fit state of mind to make statement, these witnesses would not have run helter skelter or contacted different authorities to get the statement of the deceased recorded. This aspect of the matter has been totally lost sight of by the Trial Court and the High Court. It is true that on MLC of the deceased, it was endorsed that she was unfit to make a statement at about 4.30 am and 11.00 am on April 6, 1983. However, keeping in view the statements on oath made by the above-named witnesses which are not seriously challenged in their searching cross-examination, it would be safe to infer and conclude that medical record at about 12.00 Noon or 12.30 pm did not mention at all that the deceased was not in a fit state of mind to make a statement. On the facts and in the circumstances of the case, this Court has no hesitation in relying upon the truthful testimony of the relatives and neighbours of the deceased which unerringly establishes that the deceased had made dying declaration before those witnesses implicating the appellant. This Court, on reappraisal of the evidence on record, comes to the conclusion that the circumstance, namely, deceased had made dying declaration before six witnesses implicating the appellant is firmly established.

16. On reappraisal of the evidence adduced by the prosecution, this Court finds that the circumstances from which the conclusion about the guilt of the appellant is to be drawn are fully proved. The circumstances proved are conclusive in nature. All the facts so established are consistent only with the hypothesis of guilt of the appellant and inconsistent with his innocence. The circumstances proved exclude the possibility of guilt of any person other than the appellant. As noticed earlier, the appellant had taken the defence that the deceased had received burn injuries accidentally. The defence is disbelieved

by the Sessions Court and the High Court as well as by this Court. This false plea/defence of the appellant is called into aid only to lend assurance to this Court that the circumstances taken in cumulative suggest that it was the appellant who had murdered his wife.

17. On the facts and in the circumstances of the case, this Court is of the opinion that no error is committed either by the Trial Court or the High Court in convicting the appellant under Section 302 IPC for committing murder of his wife. Therefore, the appeal which lacks merit deserves dismissal.

18. For the foregoing reasons, the appeal fails and is dismissed.

K.K.T. Appeal dismissed.

UNION OF INDIA AND ANR.
v.
KARTICK CHANDRA MONDAL AND ANR.
(Civil Appeal No. 2090 of 2007)

JANUARY 15, 2010

[J.M. PANCHAL AND DR. MUKUNDAKAM SHARMA, JJ.]

Service Law – Re-engagement and regularization – Absorption –Respondents recruited as casual labourers in 1981 – Disengaged in 1983 on ground that they were not recruited through Employment Exchange, the extant policy at the relevant time – Application seeking re-engagement and regularisation – Reliance placed on Government of India notification dated 07-05-1985 which provided for relaxation of condition of recruitment of casual workers through Employment Exchanges – Tribunal directed absorption of respondent in suitable post commensurate with their qualifications – Directions affirmed by High Court – On appeal, held: The notification dated 07-05-1985 was intended to operate prospectively and not with retrospective effect – It could not be made applicable to respondents since they were not working on the date the notification was issued – The internal communications relied upon by respondents, were ex facie, exchanged between officers at the level of board hierarchy only – No official order was passed by competent authority and therefore High Court was not justified in directing absorption of respondents on the basis of said internal communications – Misplaced sympathy was shown in case of respondents though they worked only for two years – If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment – Re-appointment or absorption of respondents would be in violation of the settled law.

Constitution of India, 1950 – Article 14 – Guarantee of equality before law enshrined in the Article is a positive concept – It cannot be enforced in a negative manner.

Interpretation of Statutes – Courts cannot read anything into a statutory provision which is plain and unambiguous – When language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute.

Circulars/Government Orders/Notification – Notification – Retrospective effect of – When permissible – Held: Unless and until there is a clear intention expressed in the notification that it would also apply retrospectively, the same cannot be given a retrospective effect and would always operate prospectively – Administrative Law.

Circulars/Government Orders/Notification – Deemed Government Order – Held: An order would be deemed to be a Government order as and when it is issued and publicized – Internal communications while processing a matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law – Administrative Law.

The respondents, engaged as casual labourers in the Ordnance Factory Board, worked for two years (from 1981 to 1983) whereafter they were disengaged from service on the ground that they were not recruited through the Employment Exchange, the extant policy at the relevant time.

The respondents filed application before the Central Administrative Tribunal, seeking direction to appellant no.1 for their re-engagement and also for regularisation of their service, and in this regard placing reliance upon Government of India notification dated 07-05-1985 issued on the subject of regularisation of casual workers by way of relaxing the condition of recruitment through

Employment Exchanges only.

The Tribunal directed the appellants to absorb the respondents in any suitable post commensurate with their qualifications. Aggrieved, the appellants filed writ Petition in the High Court which affirmed the directions passed by the Tribunal.

In appeal to this Court, the question which arose for consideration was whether the direction to absorb the respondents could have been issued by the Tribunal and the High Court, particularly, in view of the fact that the respondents were engaged on casual basis without having been recruited through the proper procedure and having not been sponsored by the Employment Exchange and having worked with the appellant no. 2 only for two years, i.e., from 1981 to 1983.

Allowing the appeal, the Court

HELD: 1.1. The respondents worked with the appellants only for two years, i.e., from 1981 to 1983 and admittedly on the date when the Notification dated 07-05-1985 was issued, they were not working with the appellant no.2. There is nothing in the contents or in the language of the said notification which would indicate that there was an intention to give a retrospective effect to the contents thereof. Instead, the language used in the aforesaid notification clearly shows that the same was intended to be prospective in nature and not retrospective. Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. [Para 11] [1110-C-F]

1.2. The said notification stated that the same would apply only to those persons who might have been continuing as casual workers for a number of years and who were not eligible for regular appointment and whose services might be terminated at any time. Therefore, it envisaged and could be made applicable to only those persons who were in service on the date when the aforesaid notification was issued. Unless and until there is a clear intention expressed in the notification that it would also apply retrospectively, the same cannot be given a retrospective effect and would always operate prospectively. [Para 12] [1110-G-H; 1111-A-B]

Ansal Properties and Industries Limited v. State of Haryana **(2009) 3 SCC 553, relied on.**

2. As regards the issue pertaining to internal communications relied upon by the respondents and referred to by the Tribunal as well as the High Court, *ex facie*, the said communications were exchanged between the officers at the level of board hierarchy only. An order would be deemed to be a Government order as and when it is issued and publicized. Internal communications while processing a matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law. Besides, the said communications were exchanged after disposal of the Original application by the Tribunal. The note on which reliance has been placed by the High Court specifically, was written by the Deputy Director, Headquarters for Director General, Ordnance Factories dated 20.11.1997 and it refers to the orders passed by the Tribunal as also the order passed in the contempt petition. From a bare perusal of the note it transpires that it was prepared on a representation of respondent no.1, and was submitted to the Ministry of Defence requesting to consider his case

for recruitment/absorption/regularisation of services of casual workers in Group 'D' post. That itself indicates that the proper and competent authority to pass an order for recruitment, absorption and regularisation was the Ministry of Defence and not the Director General, Ordnance Factory. In the said note itself it was clearly mentioned that an early action in the matter was requested, which means that the said order was not the official communication which was issued from the Ordnance Factory Board and that the Director General, Ordnance Factory was himself not the competent authority to pass an order regarding absorption, recruitment and regularisation of service of the respondents. In the said note it was further stated that the Ministry of Defence may pass necessary orders to allow regularisation of the services of respondent nos.1 and 2 in terms of the aforesaid notification dated 07-05-1985 or to accord permission to recruit the respondent nos.1 and 2 for the post of Peon without reference to the Employment Exchange in relaxation of ban. The note of the Legal Adviser culminated in the aforesaid note of the Deputy Director which clearly indicates that no official order was passed by the competent authority and therefore issuing directions to the appellants to absorb the respondents on the basis of the same was unjustified and uncalled for. [Para 13] [1111-B-D]

State of Bihar and Others v. Kripalu Shankar and Others **(1987) 3 SCC 34, relied on.**

3. There is misplaced sympathy shown in the case of the respondents who have worked with the appellants only for two years, i.e., from 1981 to 1983. Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an

appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. If at this distant date an order is passed for reappointment or absorption of the respondents, the same would be in violation of the settled law of the land. The parties also fairly agree that the respondents have not been working with the appellants at any point of time after 1983. There was also a continuing ban on recruitment due to which there was no recruitment or appointment in the Group 'D' posts of the Ordnance Factory Board. The orders passed by the Tribunal as also by the High Court are accordingly set aside. [Paras 16, 17 and 18] [1117-B-C; 1118-A-B; 1118-C]

Secretary, State of Karnataka and Others v. Umadevi (3) and Others **(2006) 4 SCC 1, followed.**

Official Liquidator v. Dayanand and Others **(2008) 10 SCC 1;** *State of Bihar v. Upendra Narayan Singh & Others* **(2009) 5 SCC 69;** *Faridabad CT. Scan Centre v. D.G. Health Services and Others* **(1997) 7 SCC 752; 2)** *South Eastern Coalfields Ltd. v. State of M.P. and Others* **(2003) 8 SCC 648 and** *Maharaj Krishan Bhatt and Another v. State of J&K and Others* **(2008) 9 SCC 24, relied on.**

Case Law Reference:

(2009) 3 SCC 553	**relied on**	**Para 11**
(1987) 3 SCC 34	**relied on**	**Para 13**
(2006) 4 SCC 1	**followed**	**Para 14**
(2008) 10 SCC 1	**relied on**	**Para 15**

(2009) 5 SCC 69	**relied on**	**Para 15**
(1997) 7 SCC 752	**relied on**	**Para 15**
(2003) 8 SCC 648	**relied on**	**Para 15**
(2008) 9 SCC 24	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2090 of 2007.

From the Judgment & Order dated 17.8.2005 of the High Court of Calcutta in WPCT No. 517 of 2004.

June Choudhary, Ajay Sharma, Anil Katiyar for the Appellants.

Somnath Mukherjee for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By filing the present appeal, the appellants have challenged the legality and validity of the order dated 17.08.2005 passed by the Calcutta High Court whereby the Division Bench of the Calcutta High Court upheld the direction given by the Central Administrative Tribunal [for short 'CAT'] to absorb the respondents in any suitable post commensurate with their qualifications.

2. The issue that is, therefore, canvassed before this Court by the appellants is whether such direction to absorb the respondents could have been issued by the CAT and the Calcutta High Court, particularly, in view of the fact that the respondents were engaged as Peons on casual basis without having been recruited through the proper procedure and having not been sponsored by the Employment Exchange and having worked with the appellant no. 2 only for two years, i.e., from 1981 to 1983.

3. The respondents herein, Shri K.C. Mondal and Shri S.K.

Chakraborty, were engaged to work as casual labours in the office of the Ordnance Factory Board, Kolkata without going through the regular process of recruitment of their names being sponsored by the Employment Exchange, which was the extant policy at the relevant point of time. After their engagement as casual labours, they worked for two years with appellant no. 2, i.e., till 1983 and they were disengaged from service in the month of April, 1983 on the ground that their names were not sponsored by the Employment Exchange.

4. The respondents thereupon filed an Original Application before the CAT, registered as O.A. No. 285 of 1990 seeking a direction to the appellant no. 1 for their re-engagement and also for regularisation of their service w.e.f. 1983 or 1985. In support of the said claim, the respondents relied upon the Government of India notification issued by the Ministry of Personnel and Training, Administrative Reforms and Public Grievances and Pension [Department of Pensions and Training] dated 07.05.1985 issued under Office Memorandum No. 49014/18/84-Estt.[G] on the subject of regularisation of the services of the casual workers in Group 'D' posts by way of relaxing the condition of recruitment of casual workers through Employment Exchanges only.

5. The counsel for the respondents had, before the Tribunal, urged that the office memorandum dated 07.05.1985 cannot be said to apply only to those who were in service as casual workers at that time but it was a general policy governing the regularisation of the service of causal workers who were recruited otherwise than through the Employment Exchange. It was submitted that, therefore, the benefit of the office memorandum would belong to the respondents also.

6. After hearing the parties, the Tribunal held that the contention of the learned counsel for the respondents with regard to the applicability of the said office memorandum to the respondents could not be accepted. While coming to the aforesaid conclusion, the Tribunal relied upon the language of

the said Office Memorandum, the relevant part of which is extracted below: -

> "Though these persons may have been continuing as casual workers for a number of years, they are not eligible for regular appointment and their services may be terminated any time. Having regard to the fact that casual workers belong to the worker section of the society and termination of their services will cause undue hardship to them, it has been decided, as a one time measure, in consultation with the DGE&T, that casual workers recruited before the issue of these instructions may be considered for regular appointment to Group 'D' posts, in terms of the general instructions even if they are recruited otherwise than through the employment exchange, provided they are eligible for regular appointment in all other respects."

7. The Tribunal, however, granted the prayer of the respondents on the ground that 10 other similarly placed casual workers of the Ordnance Factory Board were regularised w.e.f. 01.01.1987. It was held by the Tribunal that the aforesaid 10 employees were also casual workers and all of them were similarly situated as the respondents inasmuch as they also were not recruited through the Employment Exchange. Subsequently, the Tribunal held that the respondents could not claim regularisation of their service w.e.f. 1983 or 1985, but keeping in view the fact that they had served the Ordnance Factory Board from 1981 to 1983 with technical breaks, their cases deserved to be considered favourably for re-engagement as casual labours. In light of the aforesaid findings, the Tribunal issued a direction to the appellants to re-engage the respondents as casual labours if there was work/vacancy in preference to freshers and those who rendered lesser length of service as casual labours.

8. The respondents, thereafter, making an allegation that despite the said order passed by the CAT the appellants did not pass any order in favour of the respondents filed a Contempt

Application before the Tribunal which was disposed of by the Tribunal stating that since no time limit was stipulated in the order of the Tribunal, therefore, the appellants could not be held to have committed any contempt of Court. Since, even thereafter, no order was passed by the appellants to re-engage the respondents in terms of the order of the Tribunal, a Writ Petition was filed by the respondents before the High Court which was again disposed of by the High Court with a liberty to the respondents to approach the Tribunal in terms of which the respondents filed a fresh petition before the Tribunal which was registered as O.A. No. 903 of 2000. The said O.A. was heard and disposed of by the impugned judgment and order dated 11.03.2004 passed by the Tribunal with a direction to the appellants to absorb the respondents in any suitable post commensurate with their qualifications. The appellants being aggrieved by the aforesaid judgment and order filed a Writ Petition in the Calcutta High Court which was registered as WPCT No. 517 of 2004 for setting aside and quashing the aforesaid order passed by the Tribunal. The Calcutta High Court heard the parties in the said Writ Petition and by its judgment and order dated 17.08.2005 dismissed the said Writ Petition holding that the directions of the Tribunal are justified and that there is no valid ground for interfering with the aforesaid directions given by the CAT. Being aggrieved by the said judgment and order, the present appeal has been filed by the appellants on which we have heard the learned counsel appearing for the parties.

9. Several contentions were raised by the counsel appearing for the appellants before us to challenge the legality and validity of the orders passed by the Calcutta High Court as also by the CAT. It was submitted that so far as the directions issued by the CAT in O.A. No. 285 of 1990 are concerned, the only direction issued in the said order was to re-engage the respondents as casual labours if there was work/vacancy in preference to freshers and those who rendered lesser length of service as casual labours. It was pointed out

that the respondents could not be appointed as casual labours in terms of the aforesaid direction as there was a total ban on fresh appointments and, therefore, there was no occasion of giving any fresh appointment to any person and that no fresh engagement was made of any casual labour as against any work/vacancy. So far as the notes of Assistant Legal Adviser and Director General are concerned, it was submitted that no reliance could have been placed on the same by the High Court as they were internal communications and that they having not been publicized, the same could not have been treated as official communication made by the competent authority. It was submitted that the same were only official notes in the course of processing of the files of the respondents and that the same could not have been treated by the High Court as orders issued and publicized by the competent authority and, therefore, the disposal of the Writ Petition on the said notes was invalid and unjustified. It was also submitted that neither the CAT nor the High Court has any power to direct absorption of the respondents when they had worked only for two years and on the date when the O.A. No. 285 of 1990 was filed before the CAT they were not even working as casual workers. The further submission of the counsel appearing for the appellant was that the office memorandum which was issued in 1985 could not have been relied upon or made the basis for issuing orders in favour of the respondents, particularly, in view of the fact that on the date when the aforesaid office memorandum was issued the respondents had already been disengaged from service and were not working with the appellant no. 2.

10. The aforesaid submissions of the counsel appearing for the appellants were refuted by the counsel appearing for the respondent contending, *inter alia,* that since the note written by the Director General to which reference has been made by the High Court as also the aforesaid communications between the authorities were in favour of the respondents both the Tribunal and the High Court were justified in relying on the same for issuing necessary directions to the appellants. It was also

submitted by him as has been held by the High Court that there was a clear discrimination, for on the one hand ten persons who were similarly situated as the respondents were absorbed by the appellants whereas the respondents were denied similar benefits without any reasonable explanation for such hostile discrimination.

11. In light of the aforesaid submissions of the counsel appearing for the parties we have considered the entire records. So far as the Office Memorandum dated 07.05.1985 is concerned, the same was issued by way of relaxation of the condition of recruitment of casual workers. But the fact remains that the respondents worked with the appellants only for two years, i.e., from 1981 to 1983 and admittedly on the date when the aforesaid office memorandum was issued they were not working with the appellant no. 2. There is nothing in the contents or in the language of the said office memorandum which would indicate that there was an intention to give a retrospective effect to the contents of the said notification. Instead, the language used in the aforesaid notification clearly shows that the same was intended to be prospective in nature and not retrospective. Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to the recent decision of this Court in *Ansal Properties and Industries Limited v. State of Haryana* [(2009) 3 SCC 553].

12. As has been noted earlier, the said office memorandum stated that the same would apply only to those persons who might have been continuing as casual workers for a number of years and who were not eligible for regular appointment and whose services might be terminated at any

time. Therefore, it envisaged and could be made applicable to only those persons who were in service on the date when the aforesaid office memorandum was issued. Unless and until there is a clear intention expressed in the notification that it would also apply retrospectively, the same cannot be given a retrospective effect and would always operate prospectively.

13. The next issue that we are required to consider pertains to internal communications which are relied upon by the respondents and which were also referred to by the Tribunal as well as by the High Court. *Ex facie*, the aforesaid communications were exchanged between the officers at the level of board hierarchy only. An order would be deemed to be a Government order as and when it is issued and publicized. Internal communications while processing a matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law. In this regard, reliance may be placed on the decision of this Court in *State of Bihar and Others v. Kripalu Shankar and Others* [(1987) 3 SCC 34] wherein this Court observed, in paragraphs 16 and 17, as follows: -

> "16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation. *The notings in a notes file do not have behind them the sanction of law as an effective order. It is only an expression of a feeling by the concerned officer on the subject under review.* To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression of a view in notes file cannot be the sole basis for action in contempt. Business of a State is not done by a single officer. It involves a complicated process. In a democratic set up, it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in notes file at different levels by concerned officers will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not bring it within the vice of sub-section (c) of Section 2 of the Contempt of Courts Act, 1971, which defines civil contempt. *Expression of a view is only a part of the thinking process preceding Government action*. "emphasis supplied"
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> 17. In the case of *Bachhittar Singh v. State of Punjab* a Constitution Bench of this Court had to consider the effect of an order passed by a Minister on a file, which order was not communicated. This Court, relying upon Article 166(1) of the Constitution, held that the order of the Revenue Minister, PEPSU could not amount to an order by the State Government unless it was expressed in the name of Rajpramukh as required by the said article and was then communicated to the party concerned. This is how this Court dealt with the effect of the noting by a Minister on the file:
>
> "The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones.""

Besides, the said communications were exchanged after disposal of the Original Application by the Tribunal. The note on which reliance has been placed by the High Court specifically, was written by the Deputy Director, Headquarters for Director General, Ordnance Factories dated 20.11.1997 and it refers to the orders passed by the Tribunal as also the order passed in the contempt petition. From a bare perusal of the note it transpires that it was prepared on a representation of Shri K.C. Mondal, respondent no. 1 herein, and was submitted to the Ministry of Defence requesting to consider his case for recruitment/absorption/regularisation of services of casual workers in Group 'D' post. That itself indicates that the proper and competent authority to pass an order for recruitment, absorption and regularisation was the Ministry of Defence and not the Director General, Ordnance Factory. In the said note itself it was clearly mentioned that an early action in the matter was requested, which means that the said order was not the official communication which was issued from the Ordnance Factory Board and that the Director General, Ordnance Factory was himself not the competent authority to pass an order regarding absorption, recruitment and regularisation of service of the respondents. In the said note it was further stated that the Ministry of Defence may pass necessary orders to allow regularisation of the services of Shri K.C. Mondal and Shri S.K. Chakraborty in terms of the aforesaid office memorandum dated 07.05.1985 or to accord permission to recruit Shri K.C. Mondal and Shri S.K. Chakraborty for the post of Peon without reference to the Employment Exchange in relaxation of ban. The note of the Legal Adviser culminated in the aforesaid note of the Deputy Director which clearly indicates that no official order was passed by the competent authority and therefore issuing directions to the appellants to absorb the respondents on the basis of the same was unjustified and uncalled for.

14. The next issue that we are now required to consider is whether the aforesaid respondents could have been directed to be so absorbed. Similar issues regarding absorption or regularisation of casual labours are raised time and again in various branches and offices of the Government and this Court

has had the opportunity to deal with such issues in the past in several cases. We attempt to refer to two decisions of this Court which are considered to be the latest decisions and landmark decisions and which are binding on us. We may refer to the constitutional bench decision of this Court in *Secretary, State of Karnataka and Others v. Umadevi (3) and Others* reported in (2006) 4 SCC 1. The relevant portion of the said judgment, viz., paragraphs 43 & 45, are as follows:-

> "43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc

employees who by the very nature of their appointment, do not acquire any right. …………..."

"45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arm's length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. … … … … … … … … … … … … … … … … … . ………………………………………………………………… ……………………………………………. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment

when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

15. Subsequent to the aforesaid decision, the issue again arose for consideration before the 3-Judges Bench of this Court in the *Official Liquidator v. Dayanand and Others* reported in (2008) 10 SCC 1 wherein this Court in paragraphs 68 and 116 observed as follows: -

"68. The abovenoted judgments and orders encouraged the political set-up and bureaucracy to violate the soul of Articles 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoils system which prevailed in the United States of America in the sixteenth and seventeenth centuries got a firm foothold in this country. Thousands of persons were employed/engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system."

"116. In our opinion, any direction by the Court for absorption of all company - paid staff would be detrimental to public interest in more than one ways. Firstly, it will compel the Government to abandon the policy decision of reducing the direct recruitment to various services. Secondly, this will be virtual abrogation of the statutory rules which envisage appointment to different cadres by direct recruitment."

A 16. In our considered opinion, the ratio of both the aforesaid decisions are clearly applicable to the facts and circumstances of the present case. In our considered opinion, there is misplaced sympathy shown in the case of the respondents who have worked with the appellants only for two years, i.e., from 1981 to 1983. Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. However, we intend to refer to a latest decision of this Court on this point in the case of *State of Bihar v. Upendra Narayan Singh & Others* [(2009) 5 SCC 69], the relevant portion of which is extracted hereinbelow: -

> "67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order"

[A reference in this regard may also be made to the earlier decisions of this Court. See also: 1) *Faridabad CT. Scan Centre v. D.G. Health Services and Others* [(1997) 7 SCC 752]; 2) *South Eastern Coalfields Ltd. v. State of M.P. and Others* [(2003) 8 SCC 648] and 3) *Maharaj Krishan Bhatt and Another v. State of J&K and Others* [(2008) 9 SCC 24]].

If at this distant date an order is passed for reappointment or absorption of the respondents, the same would be in violation of the settled law of the land reiterated in the decisions relied

upon in this judgment.

17. Counsels for the parties also fairly agree that the respondents have not been working with the appellants at any point of time after 1983. There was also a continuing ban on recruitment due to which there was no recruitment or appointment in the Group 'D' posts of the Ordnance Factory Board.

18. In view of the aforesaid discussions and conclusions arrived at, we are of the considered opinion, that this appeal should be allowed, which we hereby do. We set aside the orders passed by the Tribunal as also by the High Court. There will be no order as to costs.

B.B.B. Appeal allowed.

SATYANARAYANA SULTANIA & ANR.
v.
STATE OF CHHATTISGARH
(Special Leave Petition (Crl) No. 6289 of 2008)

JANUARY 22, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Madhya Pradesh Schedule Commodity Dealer (Licensing and Restriction on Hoardings) Order, 1991—Clause 11—Confiscation of paddy on account of violation of clause 11—Legality of—Held: It was incumbent on the part of the transporter to carry documents mentioned in Clause 11 along with the consignment—Since the said documents were not carried along with the consignment, there was no illegality in the seizure and confiscation thereof—Madhya Pradesh Essential Commodities (Exhibition of Price and Price control) Order, 1997—Clause 6(2).

Words and phrases: Expression 'dealer'—Meaning of — In the context of Clause 2(e) of Madhya Pradesh Schedule Commodity Dealer (Licensing and Restriction on Hoardings) Order, 1991 and Clause 2(a) of Madhya Pradesh Essential Commodities (Exhibition of Price and Price control) Order, 1997—Discussed.

Hundred bags of paddy transported by truck belonging to petitioner no.2 were seized and thereafter in accordance with Clause 6(2) of the Madhya Pradesh Essential Commodities (Exhibition of Price and Price control) Order, 1997, the seized paddy was confiscated. The confiscation order was upheld by the Sessions Judge and by the High Court.

In Special Leave, it was contended by the petitioner that "dealer" in terms of clause 2(a) includes any person

dealing with any essential commodity included in the Madhya Pradesh Schedule Commodity Dealer (Licensing and Restriction on Hoardings) Order, 1991 and in case dealing with only one commodity under the said Order at any time in quantity of more than 200 (two hundred) quintals; that since the consignment in question comprised of only 100 quintals of paddy, the same did not attract the provisions of the Licensing Order, 1991, and thus the seizure and confiscation thereof, was wholly illegal and without any legal basis.

Dismissing the Special Leave Petition, the Court

HELD: 1. The definition of the expression "dealer" in the Madhya Pradesh Schedule Commodity Dealer (Licensing and Restriction on Hoardings) Order, 1991 was not intended to include only such persons as were dealing in essential commodity in quantities of more than 200 quintals. The intention of the legislature appears to have been that a dealer is a person who would be dealing in Scheduled food grains in quantities more than 200 quintals at a time and was not confined to individual transactions as in the instant case. It was incumbent on the part of the transporter to carry along with the consignment the documents mentioned in Clause 11 of the Licensing Order, 1991, at least for the purpose of identification, so that there was no possibility of the transported commodity being used for any purpose other than for what it was meant. Although, Clause 11 of the Licensing Order, 1991 does not stipulate that the documents indicated therein are to be carried along with the consignment being transported, the documents concerned are safeguards against clandestine dealing in the food grains covered by the Licensing Order, 1991. The receipt or invoice as also the name of the customer and Licence Number, if any, the date of transaction and the quantity of paddy sold, are documents which prove the

authenticity of the transaction entered into by the licence holder in respect of the said consignment. It was necessary for the said documents to accompany the consignment of paddy which was being transported. [Paras 11 and 13] [1125-F-G; 1126-A-B; 1126-D-F]

2. The confiscation proceedings under clause 6(2) of the Control Order, 1997, were dependent on the proceedings relating to the alleged violation of Clause 11 of the Licensing Order, 1991. There is no reason to interfere with the order of the High Court. [Paras 14 and 15] [1126-F-G]

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 6289 of 2008.

From the Judgment & Order dated 18.3.2008 of the High Court of Chhattisgarh at Bilaspur in Criminal Revision No. 459 of 2002.

Saurabh Suman Sinha, Prashant Mishra, Gaurav Agrawal for the Petitioners.

Aniruddha P. Mayee for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Special Leave Petition is directed against the judgment and order dated 18th March, 2008, passed by the Chhattisgarh High Court at Bilaspur in Crl. Revision No.459 of 2002, dismissing the same.

2. Briefly stated, the facts involved are that on 3rd February, 2000, a hundred bags of paddy were being transported by one Ramesh Sahu, the driver of truck No.MP-23DA 2115 belonging to the one Hemant Kumar, the Petitioner No.2 herein. The said driver was transporting the said paddy on the strength of a letter written on the letter pad of Bajrang Rice Mill. En route the truck was searched by the Food Inspector and the paddy was seized. In accordance with Clause 6(2) of the Madhya Pradesh Essential Commodities (Exhibition of Price and Price Control)

Order, 1997, confiscation proceedings were initiated and the seized paddy was ordered to be confiscated by the Collector. An appeal was preferred which was also dismissed by the learned Sessions Judge, Bilsapur, in Crl. Appeal No.65 of 2001, confirming the order dated 13th March, 2001, passed by the Collector and Licensing Authority, Janjgir Champa, in Case No.60 of 2000. The Appellate Order was questioned in revision before the Chhattisgarh High Court at Bilaspur and the same was also dismissed on 18th March, 2009. The said decision is the subject matter of the present Special Leave Petition.

3. Appearing in support of the Special Leave Petition, Mr. Saurabh Suman Sinha, learned Advocate, questioned the order of the High Court on several grounds. It was contended by him that having regard to the definition of “dealer” in the M.P. Essential Commodities (Exhibition of Price and Price Control) Order, 1997, hereinafter referred to as “the Control Order, 1997”, the Petitioners had not committed any illegality in transporting the paddy in question. It was pointed out that clause 2(a) defines “dealer” as a person who carries on the business of selling by retail or wholesale or storing for sale by retail or wholesale any commodity whether or not such business is carried in addition to any other business, but does not include a hawker or a peddler. It was submitted that the said definition of “dealer” was amended by the State Government in prior consultation with the Central Government by notification dated 10th September, 1998, in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955. The amended definition of “dealer” included any person dealing with any essential commodity included in the Schedule to the “Licensing and Restriction on Hoardings) Order, 1991, hereinafter referred to as “the Licensing Order, 1991”, and if dealing with only one commodity under the said Order at any time in quantity of more than 200 (two hundred) quintals.

4. Mr. Sinha also referred to the definition of “dealer” in the Licensing Order, 1991, wherein a “dealer” was described

in clause 2(e) to mean a person who is engaged or intends to engage in the business of purchase, sale or storage for sale of any one food grain specified in Schedule I in quantity of 10 quintals or more at any one time and in respect of all food grains taken together in quantity of 50 quintals or more at any one time. Certain other commodities were also referred to which are not relevant for our purpose. The said Licensing Order, 1991, was amended by a notification dated 27th April, 1998, by the State Government with the prior concurrence of the Central Government, wherein the definition of "dealer" was once again amended to mean a person, partnership firm, association or any registered body engaged in or intends to engage in the business of purchase, sale or storage for sale (not including store of commodities produced by him by personal cultivation) and includes the business of commercial agent, and processor dealing in any or all of the scheduled commodities, other than sugar, of only one of scheduled commodities at any one time in quantity of more than 200 quintals. Mr. Sinha sought to urge that the definition of "dealer", therefore, did not include persons dealing in any one Scheduled commodity at any time in quantities of less than 200 quintals. It was urged that the Licensing Order, 1991, would be attracted only if the transactions involved more than 200 quintals of a Scheduled commodity at any one time.

5. Learned counsel submitted that since the consignment in question comprised 100 quintals of paddy, the same did not attract the provisions of the aforesaid Licensing Order, 1991, and the seizure and confiscation thereof was, therefore, wholly illegal and without any legal basis.

6. Mr. Sinha then urged that there was no compulsion under any of the Licensing Orders for the transporter or the driver of the vehicle carrying the goods to retain with him a copy of the receipt, invoice or bill relating to the goods in question and that Clause 11 of the Licensing Order, 1991, merely provides that the licence holder will give only one copy of receipt or invoice to each customer containing his name,

address, licence number, name of customer and licence number (if any), date of transaction, sold quantity in quintals, total amount received and he will keep second copy with him to show on demand by the licensing authority or by any other officer authorized by him for inspection. Mr. Sinha urged that Clause 11 did not require the transporter of the goods to carry with him any of the aforesaid documents mentioned in the said Clause. In fact, the driver of the vehicle was carrying a letter dated 3rd February, 2000, written by the Petitioner No.1 to Bajrang Rice Mill, Sargaon, informing the said Mill that a hundred bags of paddy, weighing 75 quintals, had been sent by truck No.MP-23DA 2115 and to receive the same and send payment and empty bags of paddy through the driver of the truck Ramesh Sahu. It was also indicated that due to absence of the Mandi Authorities, the Bill and License would be sent to the Mill later. In fact, a Credit Memo also dated 3rd February, 2000, for a sum of Rs.39,375/- in relation to truck was also sent to the buyer Bajrang Rice Mill, Sargaon, for the purpose of payment for the transported goods.

7. Mr. Sinha submitted that in view of the above, the seizure and confiscation of the paddy was wholly arbitrary and was liable to be set aside with a direction for return of the seized goods.

8. On behalf of the State of Chhattisgarh, Mr. Aniruddha P. Mayee, learned Advocate, however, urged that the definition of "dealer" as sought to be interpreted on behalf of the Petitioners was erroneous since under the Licensing Order, 1991, the definition of "dealer" had been amended on 27th April, 1998, to include persons engaged in business of any one Scheduled commodity at any one time in quantities of more than 200 quintals. According to learned counsel for the Respondent, the said definition did not refer to any one transaction as a whole but in respect of the amounts of the scheduled commodity which was being dealt with by the person concerned. Accordingly, a person dealing in any one Scheduled commodity at any time in quantities of more than 200 quintals

would be a "dealer" and would also be considered as a "dealer" for transportation of any goods, even if the same was below 200 quintals. It was submitted it was precisely for such a reason persons dealing in food grains were required to hold a licence for dealing in the said commodity in respect of quantities as indicated in the Licensing Order, 1991.

9. As far as Clause 11 of the Licensing Order 1991, is concerned, it was urged that the said clause merely indicated the procedure that was to be followed in respect of a transaction of buying and selling by a dealer to a customer and it was naturally expected that the documents in question were to accompany the consignment and that the fact that the petitioners were aware of the said requirement would also be evident from the letter written by the Respondent No.1 to Bajrang Rice Mill on 3rd February, 2000, indicating that he would later come with the Bill and Licence in respect of the said consignment.

10. Learned counsel submitted that the transportation of the paddy was in violation of clause 11 of the Licensing Order, 1991, and the consignment had been rightly seized and confiscated in the absence of the documents Learned counsel submitted that no case had not been made out for interference in the impugned judgment of the High Court.

11. We have carefully considered the submissions made on behalf of the respective parties and we are inclined to agree with the submissions made on behalf of Respondent State, since in our view the definition of the expression "dealer" in the Licensing Order, 1991, was not intended to include only such persons as were dealing in essential commodity in quantities of more than 200 quintals. The intention of the legislature appears to have been that a dealer is a person who would be dealing in Scheduled food grains in quantities of more than 200 quintals at a time and was not confined to individual transactions as in the instant case. We are also of the view that it was incumbent on the part of the transporter to carry along with the consignment the documents mentioned in Clause 11 of the

Licensing Order, 1991, at least for the purpose of identification, so that there was no possibility of the transported commodity being used for any purpose other than for what it was meant.

12. For the sake of reference, Clause 11 of the Licensing Order, 1991, is reproduced hereinbelow:-

> "*Clause 11* **-** Licence Holder will give only one copy of Receipt or Invoice to each customer containing his name, address, Licence Number, name of customer and Licence Number (if any), date of transaction, sold quantity in quintals, total paddy and amount received and he will keep its second copy with him to show on demand by Licensing Authority or by any other Officer authorized by him for inspection."

13. Although, the aforesaid clause does not stipulate that the documents indicated therein are to be carried along with the consignment being transported, the documents concerned are safeguards against clandestine dealing in the food grains covered by the Licensing Order, 1991. The receipt or invoice as also the name of the customer and Licence Number, if any, the date of transaction and the quantity of paddy sold, are documents which prove the authenticity of the transaction entered into by the licence holder in respect of the said consignment. We are of the view that it was necessary for the said documents to accompany the consignment of paddy which was being transported.

14. As far as the confiscation proceedings under clause 6(2) of the Control Order, 1997, are concerned, the same are dependent on the proceedings relating to the alleged violation of Clause 11 of the Licensing Order, 1991.

15. In that view of the matter, we see no reason to interfere with the order of the High Court impugned in the Special Leave Petition, which is, accordingly, dismissed.

D.G. Special Leave Petition dismissed.

SRI JEYARAM EDUCATIONAL TRUST AND ORS.
v.
A.G. SYED MOHIDEEN AND ORS.
(Civil Appeal No. 852 of 2010)

JANUARY 22, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Code of Civil Procedure, 1908 – s.92 – Interpretation of, with reference to issuance of notification by State Government – Jurisdiction of District Courts to try suits u/s.92 in pursuance of the said Government notification which empowered Subordinate Courts in the State to entertain suits u/s.92 – Held: The provisions of s.92 do not give room for interpreting the word "or" used in the section as substitutive, so as to lead to an interpretation that when the Government notified any other court, such notified court alone had jurisdiction and not the District Court – Insofar as suits u/s.92 are concerned, District Courts and Sub-ordinate Courts had concurrent jurisdiction without reference to any pecuniary limits – Tamil Nadu Civil Courts Act, 1873 – s.12.

Words and Phrases – Word "or" used in s.92 CPC – Interpretation of – Code of Civil Procedure, 1908 – s.92.

Interpretation of Statutes – Legislative object – Held: A court as an interpreter cannot alter or amend the law – It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity.

Respondents filed suit against the appellants u/s.92 CPC. The suit was filed before the District Court situated in the State of Tamil Nadu. Appellants nos.2 to 4 filed a memo before District Court stating that having regard to an earlier decision of the Madras High Court in the case

of *P.S. Subramanian**, **the District Court did not have jurisdiction to entertain any suit under s.92 CPC and, therefore, the suit be transferred to the Principal Subordinate Judge. The memo was rejected by the District Court which held that it had jurisdiction to entertain the suit as the value of the suit was Rs.10 lakhs. The order passed by the District Court was upheld by the High Court.**

Before this Court, it was contended by the appellants that on a true interpretation of s.92 CPC, the District Court as well as the Principal Civil Court of original jurisdiction in a district had jurisdiction to try suits relating to public trusts till 8th March, 1960, having regard to the provisions of s.92 CPC; but once on 8th March, 1960, the State Government issued a notification in exercise of its powers under s.92 CPC empowering the Courts of Subordinate Judges in the State to entertain suits under s.92, the District Court ceased to have jurisdiction to try suits under the said section.

In support of their contention, the appellants relied upon the decision of the Madras High Court in the case of *P.S. Subramanian** **wherein it was held that the word "or" occurring between the words "may institute a suit in the Principal Civil Court of original jurisdiction" and "in any other court empowered in that behalf by the State Government" in s. 92 CPC, should have to be read as substitutive and not as disjunctive or alternative.**

The question which arose for consideration in the present appeal was whether the District Court had the jurisdiction to try a suit under s.92 CPC.

Dismissing the appeal, the Court

HELD: 1.1. It is now well settled that a provision of a statute should have to be read as it is, in a natural

manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popular meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the Legislature or the Lawmaker, a court should open its interpretation tool kit containing the settled rules of construction and interpretation, to arrive at the true meaning of the provision. While using the tools of interpretation, the court should remember that it is not the author of the Statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be. [Para 6] [1135-F-H; 1136-A-C]

1.2. Section 92 CPC provides that a suit under that section can be instituted "in the Principal Civil Court of original jurisdiction or **in any other court empowered in that behalf by the State Government". When Section 92 CPC is read in a normal manner, it means that the suits under section 92 should be filed in the district court or in the sub-ordinate court. When the language is clear and unambiguous and when there is no need to apply the tools of interpretation, there is no need to interpret the word 'or', nor any need to read it as a substitutive word, instead of its plain and simple meaning denoting an 'alternative'. [Para 7] [1136-C-E]**

1.3. It is clear from section 92 CPC that the legislature

did not want to go by the general rule contained in section 15 CPC that every suit shall be instituted in the court of the lowest grade competent to try it, in regard to suits relating to public Trusts. The intention of the law makers was that such suits should be tried by the District Court. At the same time, the law makers contemplated that if there was heavy work load on the District Court, the State Government should be enabled to empower any other court (within the local limits of whose jurisdiction, the whole or any part of the subject matter is situate), also to entertain such suits. Therefore, the word "or" is used in the ordinary and normal sense, that is to denote an alternative, giving a choice. The provisions of section 92 do not give room for interpreting the word "or" as a substitutive, so as to lead to an interpretation that when the Government notified any other court, such notified court alone will have jurisdiction and not the District Court. If the intention was to substitute the Court empowered by the State Government in place of the Principal Civil Court of Original jurisdiction, instead of the words 'may institute a suit in the Principal Civil Court of original jurisdiction or in any other court empowered in that behalf by the State Government', the following words would have been used in the section: 'may institute a suit in the principal Civil Court of original jurisdiction, or when any other court is empowered in that behalf by the State Government, then in such court empowered by the state government,' or 'may institute a suit in the court notified by the state government.' [Para 8] [1136-F-H; 1137-A-D]

1.4. The provisions of section 12 of the Tamil Nadu Civil Courts Act, 1873 specifying the pecuniary limits of District Courts and Sub-ordinate Courts, is subject to the provisions of the Code of Civil Procedure. In view of the express provisions of section 92 CPC specifying the courts which will have jurisdiction to entertain suits under that section, neither the provisions of sections 15

to 20 of CPC nor the provisions of section 12 of the Civil Courts Act will apply to such suits. Section 92, CPC is a self contained provision, and conferment of jurisdiction in regard to suits under that section does not depend upon the value of the subject matter of the suit. Therefore, insofar as the suits under section 92 are concerned, the District Courts and Sub-ordinate Courts will have concurrent jurisdiction without reference to any pecuniary limits. The District Judge had held that he had jurisdiction because the value of the subject matter was Rs.10 lakhs, apparently keeping in view, section 12 of the Civil Courts Act. It is made clear that the pecuniary limits mentioned in section 12 of the Civil Courts Act, do not apply to suits under section 92 of the Code. In fact, if section 12 of the Civil Courts Act is applied to decide the jurisdiction of courts with reference to suits under section 92 of the Code, it will then lead to the following anomalous position: The District Court will have jurisdiction if the value of the subject matter exceeds Rs.5 lakhs. The Sub-ordinate Court will have jurisdiction where the value of the subject matter exceeds Rs.1 lakh but does not exceed to Rs.5 lakhs. That would mean that a suit under section 92 of the Code, where the subject matter does not exceeds Rs.1 lakh, cannot be filed in any court as section 92 confers jurisdiction only on District Court and Sub-ordinate Courts. This obviously was not intended. Be that as it may. [Para 9] [1137-E-H; 1138-A-D]

1.5. The decision of the High Court in the case of *P.S. Subramanian* **ignores the earlier decisions of that court and decisions of other High Courts which have consistently taken the view that where jurisdiction is also conferred on any other court by the State Government by a notification (under Section 92 CPC or under any similar provision), then that court and the District Court will have concurrent jurisdiction. [Para 10] [1138-D-E]**

* *P.S. Subramanian v. K.L. Lakshmanan,* **2007 (5) Mad. L.J. 921, overruled.**

Annamalai v. Slaiyappa **AIR 1935 Mad. 983;** *Dakor Temple Committee v. Shankerlal* **AIR 1944 Bom. 300;** *R. Rama Subbarayalu Reddiar v. Rengammal* **AIR 1962 Madras 450;** *Pazhukkamattom Devaswom v. Lakshmi Kutty Amma* **1980 Kerala LT 645, approved.**

Case Law Reference:

2007 (5) Mad. L.J. 921	**overruled**	**Para 3**
AIR 1935 Mad. 983	**approved**	**Para 10**
AIR 1944 Bom. 300	**approved**	**Para 10**
AIR 1962 Madras 450	**approved**	**Para 10**
1980 Kerala LT 645	**approved**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 852 of 2010.

From the Judgment & Order dated 25.4.2008 of the High Court of Judicature at Madras in C.R.P. (P.D.) No. 2745 of 2007.

V. Prabhakar, Revathy Raghavan, Ramjee Prasad for the Appellants.

Hema Sampath, Sri Ram J. Thalapathy, V. Adhimoolam, N. Shobha (NP), V. Balachandran, V. Rama Subramaniam, T. Harish Kumar for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted. Heard learned counsel for the appellants and respondents. We have also heard the learned counsel for the State of Tamil Nadu and Registrar General of the Madras High Court to whom notices had been issued in regard to the interpretation of section 92 of the Code of Civil Procedure (‘Code’ for short), with reference to the State Government Notification No. GOM No.727 dated 8.3.1960.

2. The respondents instituted a suit (OS No. 13 of 2006) on the file of the Principal District Judge, Cuddalore against the appellants under Section 92 of Code, seeking a direction to the second appellant to repay all the amounts spent by him after 20.6.2005 contrary to the terms of the supplementary deed of Trust, and also to convene the Trust meeting for approval of the income and expenditure and other consequential reliefs.

3. Appellants 2 to 4 herein filed a memo before the District Court stating that having regard to the decision of the Madras High Court in *P. S. Subramanian v. K. L. Lakshmanan* – 2007 (5) Mad. L.J. 921, the court did not have jurisdiction to entertain any suit under section 92 of the Code and therefore the suit may be transferred to the file of the Principal Subordinate Judge, Cuddalore. The learned District Judge rejected the said memo by order dated 1.8.2007 holding that he had jurisdiction to entertain the suit, as the value of the suit was Rs.10 lakhs. The revision filed by the appellants, challenging the said order of the District Court, was dismissed by the Madras High Court by the impugned order dated 25.4.2008. The said judgment is challenged in this appeal by special leave. The only question that arises for consideration in this appeal is whether a District Court in the State of Tamil Nadu, does not have jurisdiction to try a suit under section 92 of the Code.

4. Section 92 relates to public charities. It enables a suit being filed in the case of any alleged breach of any express or constructive Trust created for public purposes of a charitable or religious nature, ‘*in the Principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the Trust is situate*’.

(4.1) Section 2(4) of the Code extracted below, while defining the term ‘district’, in effect defines the terms ‘district court’ :

> “2(4). ‘district’ means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a “District Court”), and includes the local limits of the ordinary original civil jurisdiction of a High Court.”

(4.2.) Section 9 of the Code provides that the courts shall (subject to the provisions of the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Sections 15 to 19 of the Code deal with place of suing. Section 15 requires every suit to be instituted in the court of the lowest grade competent to try it.

(4.3.) Section 6 of the Code deals with pecuniary jurisdiction and provides as follows :

> “6. Pecuniary jurisdiction : Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.”

(4.4.) Section 10 of the Tamil Nadu Civil Courts Act, 1873 (for short ‘Civil Courts Act’) empowers the state government to fix, and from time to time vary, the local limits of the jurisdiction of any District Court or Sub-ordinate Judge’s court under that Act. Section 12 of the Civil Courts Act (as amended by Amendment Act No.1 of 2004), deals with the jurisdiction of the District Judge and the Subordinate Judge is extracted below:

> “12. The jurisdiction of a District Judge extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature, of which the amount or value of the subject matter exceeds five lakh rupees. The jurisdiction of a Sub-ordinate Judge extends,

subject to the rules contained in the Code of Civil Procedure, to all like original suits and proceedings, of which the amount or value of the subject matter exceeds one lakh rupees but does not exceed five lakh rupees."

(4.5.) By a notification dated 8.3.1960 issued in exercise of power under section 92(1) of the Code, in supersession of the Judicial Department Notification No.719 dated 17.10.1910, the Governor of Madras invested all courts of Subordinate Judges in the State of Madras with jurisdiction under the Code in respect of suits relating to Trusts created for public purposes of a charitable and religious nature.

5. The appellants submit that on a true interpretation of section 92 of the Code, the District Court as the Principal Civil Court of original jurisdiction in a district had jurisdiction to try suits relating to public Trusts till 8.3.1960, having regard to the provisions of section 92 of the Code; and that once the State Government issues a notification in exercise of power under section 92 empowering courts of the Sub-ordinate Judges to entertain suits under section 92, the District Court ceased to have jurisdiction to try suits under the said section. In support of their contention, they strongly relied upon the decision of a learned Single Judge in the case of *P.S. Subramanian* (supra) wherein it was held that the word "or" occurring between the words "may institute a suit in the Principal Civil Court of original jurisdiction" and "in any other court empowered in that behalf by the State Government" in section 92 of the Code, should have to be read as substitutive and not as disjunctive or alternative.

6. It is now well settled that a provision of a statute should have to be read as it is, in a natural manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popular meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to

ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the Legislature or the Lawmaker, a court should open its interpretation tool kit containing the settled rules of construction and interpretation, to arrive at the true meaning of the provision. While using the tools of interpretation, the court should remember that it is not the author of the Statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be.

7. Section 92 provides that a suit under that section can be instituted "in the Principal Civil Court of original jurisdiction **or** in any other court empowered in that behalf by the State Government". When it is read in a normal manner, it means that the suits under section 92 should be filed in the district court or in the sub-ordinate court. When the language is clear and unambiguous and when there is no need to apply the tools of interpretation, there is no need to interpret the word 'or', nor any need to read it as a substitutive word, instead of its plain and simple meaning denoting an 'alternative'.

8. Assuming that there was any need for applying the principles of interpretation, let us next consider whether the word 'or' was used in section 92 of the Code in a substitutive sense. It is clear from section 92 of the Code that the legislature did not want to go by the general rule contained in section 15 of the Code that every suit shall be instituted in the court of the lowest grade competent to try it, in regard to suits relating to public Trusts. The intention of the law makers was that such suits should be tried by the District Court. At the same time, the law makers contemplated that if there was heavy work load on the District Court, the State Government should be enabled to empower any other court (within the local limits of whose

jurisdiction, the whole or any part of the subject matter is situate), also to entertain such suits. Therefore, the word "or" is used in the ordinary and normal sense, that is to denote an alternative, giving a choice. The provisions of section 92 do not give room for interpreting the word "or" as a substitutive, so as to lead to an interpretation that when the Government notified any other court, such notified court alone will have jurisdiction and not the District Court. If the intention was to substitute the Court empowered by the State Government in place of the Principal Civil Court of Original jurisdiction, instead of the words 'may institute a suit in the Principal Civil Court of original jurisdiction or in any other court empowered in that behalf by the State Government', the following words would have been used in the section :

> '*may institute a suit in the principal Civil Court of original jurisdiction, or when any other court is empowered in that behalf by the State Government, then in such court empowered by the state government*,'
>
> OR
>
> 'may institute a suit in the court notified by the state government.'

9. The provisions of section 12 of the Civil Courts Act specifying the pecuniary limits of District Courts and Sub-ordinate Courts, is subject to the provisions of the Code of Civil Procedure. In view of the express provisions of section 92 specifying the courts which will have jurisdiction to entertain suits under that section, neither the provisions of sections 15 to 20 of the Code nor the provisions of section 12 of the Civil Courts Act will apply to such suits. Section 92 is a self contained provision, and conferment of jurisdiction in regard to suits under that section does not depend upon the value of the subject matter of the suit. Therefore, insofar as the suits under section 92 are concerned, the District Courts and Sub-ordinate Courts will have concurrent jurisdiction without reference to any pecuniary limits. We find that the learned District Judge had

held that he had jurisdiction because the value of the subject matter was Rs.10 lakhs, apparently keeping in view, section 12 of the Civil Courts Act. We make it clear that the pecuniary limits mentioned in section 12 of the Civil Courts Act, do not apply to suits under section 92 of the Code. In fact, if section 12 of the Civil Courts Act is applied to decide the jurisdiction of courts with reference to suits under section 92 of the Code, it will then lead to the following anomalous position: The District Court will have jurisdiction if the value of the subject matter exceeds Rs.5 lakhs. The Sub-ordinate Court will have jurisdiction where the value of the subject matter exceeds Rs.1 lakh but does not exceed to Rs.5 lakhs. That would mean that a suit under section 92 of the Code, where the subject matter does not exceeds Rs.1 lakh, cannot be filed in any court as section 92 confers jurisdiction only on District Court and Sub-ordinate Courts. This obviously was not intended. Be that as it may.

10. We do not therefore approve the decision of the learned Single Judge of the Madras High Court in *PS Subramanian* which ignores the earlier decisions of that court and decisions of other High Courts which have consistently taken the view that where jurisdiction is also conferred on any other court by the state government by a notification (under section 92 of the Code or under any similar provision), then that court and the District Court will have concurrent jurisdiction. We may in this behalf refer to the decisions in *Annamalai vs. Slaiyappa* - AIR 1935 Mad. 983, *Dakor Temple Committee vs. Shankerlal* - AIR 1944 Bom. 300, *R. Rama Subbarayalu Reddiar vs. Rengammal* – AIR 1962 Madras 450, and *Pazhukkamattom Devaswom vs. Lakshmi Kutty Amma* – 1980 Kerala LT 645.

11. In view of the above, the appeal is dismissed. The learned District Judge will proceed to decide the suit expeditiously.

B.B.B. Appeal dismissed.