SUDHIR KUMAR

v.

STATE OF PUNJAB

(Criminal Appeal No. 1327 of 2003)

JANUARY 14, 2010

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

PENAL Code, 1860:

s. 304-B – Dowry death – Death of bride by 95% burn injuries in her matrimonial home in 4 month after marriage – Husband, in-laws and sisters-in-law of deceased prosecuted – Husband convicted and others acquitted – Plea of husband that since prosecution case was disbelieved in respect of other accused, presumption u/s 113-B of Evidence Act stood rebutted and he was also entitled to acquittal – HELD: Prosecution case has been fully proved by oral and medical evidence – It is for the defence to dispel the presumption u/s 113-B – It is true that four of the five accused have been acquitted and some of them on benefit of doubt – But primary evidence is against the husband – A reading of the evidence shows that it was the husband who had, just a few days before the incident, threatened his wife with dire consequences if his demand for dowry was not fulfilled – He was seen again beating his wife and threatening that if the demands were not satisfied the deceased would pay dearly for it – It is true that in a case where the prosecution evidence has been discarded with respect to four of the five accused, the presumption u/s 113-B could to some extent be said to be dispelled, but in the instant case, on an over view the primary role and the weight of the evidence has been on the husband-accused– Evidence Act, 1872 – s.113-B.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1327 of 2003.

From the Judgment & Order dated 7.4.2003 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 55-SB of 1990.

A. Sharan, Bimal Roy Jad, Vikram Rathore, Anurag Sharma, Sharmila Upadhyay for the Appellant.

Kuldip Singh for the Respondent.

The following Order of the Court was delivered

O R D E R

The prosecution story is as under:

Kamlesh Rani deceased, daughter of PW.3-Tej Ram was married to Sudhir Kumar, the appellant herein, on 28th July, 1989 at Maur Mandi, District Bhatinda. At the time of marriage, ornaments and cash befitting the status of the families, were given in dowry. A month after the marriage, however, the appellant and his parents Angoori Lal and Kaushalya Devi and sisters Neelam Kumari and Urmila Devi started maltreating Kamlesh Rani for having brought insufficient dowry. Sudhir Kumar also demanded a scooter for himself and a gold ring each for his sisters Neelam and Urmila. The demand was duly conveyed by Kamlesh Rani to her parents at Maur Mandi. Tej Ram promised to fulfill the demand on which Kamlesh Rani returned to her matrimonial home and was immediately questioned by her mother-in-law as to the scooter and the gold rings. Bhim Sain, brother of Kamlesh Rani, however, told them that the family was not in a position to fulfill the demand on account of financial difficulties. He, however, returned to Maur Mandi after leaving Kamlesh Rani in the matrimonial home. About 10 days prior to the incident Ramji Das-PW.2, Tej Ram's younger brother, came to Maur Mandi and told Tej Ram that the accused had given slaps to Kamlesh Rani in his presence on which he had promised that the demand for a scooter and gold rings would be fulfilled within a few days. Sudhir Kumar also came to Maur Mandi and once again reiterated the demands

to his father-in-law failing which he threatened dire consequences for Kamlesh Rani. On 30th November, 1989, Bhim Sain went to the house of the accused and found the outer gate shut. On persistent ringing of the bell, Angoori Lal came out but moved away and when Bhim Sain entered the house he noticed Kamlesh Rani's dead body lying in the latrine. Bhim Sain immediately came to the house of his uncle Ramji Das PW.2, and the two then went to the police station where the former lodged the report Exh. PD on the basis of which an FIR was registered. Sub-Inspector Santokh Singh thereupon reached the place of incident and made the necessary inquiries. On completion of the investigation a challan was duly presented against Angoori Lal, Kaushalya Devi and Neelam and Urmila for an offence punishable under Sections 302/34 of the IPC and the matter was brought for trial to the Court of Sessions. The Court of Sessions, however, charged the accused under Sections 302/149 IPC read with Section 304(B) of the IPC in the alternative.

The prosecution in support of its case relied on the evidence of PW.1 Dr. S.S. Malik who had performed the post-mortem on the dead body, the three primary witnesses PW.2-Ramji Das, PW.3-Tej Ram and PW.4-Sat Paul, also an uncle of the deceased, in addition to the formal evidence of Santokh Singh the I.O. The statements of the accused were thereafter recorded under Section 313 of the Cr.P.C. and they denied the allegations simplicitor. Sudhir Kumar, however, took up additional plea:

> "I am innocent. I have been falsely involved. This occurrence has taken place before noon time and at that time myself and my father Angoori Lal were present at our medical store while my sister Neelam Kumari was teaching at private school and Urmila was at her in-laws house. I was suffering from Epilepsy and used to be treated by Dr. Sohan Lal Grover and other senior doctors before and after marriage and due to the effect of the drugs I was unable

> to perform the sexual intercourse and for that reason my wife used to remain under depression. After the occurrence we were summoned from the shop. I never maltreated or demanded dowry from the parents of the deceased."

They also produced some evidence in defence. The trial Court on an appreciation of the evidence convicted the appellant and Kaushalya Devi, his mother under Section 304-B of the IPC and sentenced them to R.I. of seven years. Angoori Lal, Urmila and Neelam were, however, acquitted. An appeal was thereafter taken to the High Court which in its judgment dated 7th April, 2003, which has been impugned in the present proceedings, allowed the appeal of Kaushalya Devi as well. This appeal by way of special leave is, therefore, confined only to Sudhir Kumar, the husband of the deceased.

We have heard Mr. A. Sharan, the learned senior counsel for the appellant and Mr. Kuldip Singh, the learned counsel for the State of Punjab. We find that the prosecution story is fully proved by the evidence of PW.2- Ramji Das, the uncle of the deceased, PW.3 Tej Ram, her father and PW.4. Sat Paul, another uncle of the deceased. The medical evidence shows that the deceased had suffered 95% burn injuries and the dead body had been found in the bathroom of the house. Keeping in view the fact that the presumption under Section 113-B of the Evidence Act has to be raised in such matters, it is for the defence to dispel the presumption. We find that the trial Court and the High Court have gone through the evidence and given the benefit of doubt to three of the accused while maintaining the conviction only against one i.e. the husband of the deceased. We also see from the evidence that the marriage had been performed on 28th July, 1987 and death had occurred on 30th November, 1987, that is just four months after the marriage.

Mr. Sharan, the learned counsel for the appellant has, however, submitted that in the light of the fact that the

prosecution story had been disbelieved with respect to four of the five accused, the presumption under Section ˇ113-B of the Evidence Act had been rebutted and as such the appellant was entitled to acquittal on parity with the other accused. It is true that four of the five accused have been acquitted but we find that primary evidence is against Sudhir Kumar, the appellant herein. A reading of the evidence shows that it was the appellant who had, just a few days' before the incident, visited the house of his father-in-law and threatened Kamlesh Rani with dire consequences if his demand for a scooter and two gold rings was not fulfilled and Bhim Sain, the brother of the deceased had told him that his father Tej Ram was not in a position to meet the demands on account of financial difficulties. A few days later Ramji Das (PW.2) too had visited Kamlesh Rani's in-law's home and had also informed Tej Ram thereafter that the appellant had been found beating his wife at that time and had once again threatened that if the demands were not satisfied Kamlesh Kaur would pay dearly for it. It is true, as contended by Mr. Sharan, that in a case where the peculiar evidence has been discarded with respect to four of the five accused, the presumption under Section 113-B could to some extent be said to be dispelled, but on an over view we find that the primary role and the weight of the evidence has been on the appellant herein.

We, accordingly, find no merit in this appeal.

Dismissed.

N.J. Appeal dismissed.

STATE BANK OF PATIALA & ORS.
v.
VINESH KUMAR BHASIN
(Civil Appeal No. 1718 of 2010)

JANUARY 22, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Persons with disabilities (equal opportunities, protection of rights and full participation) Act, 1995:

Applicability of the Act –Bank employee, three days prior to his completing the age of retirement, filing application for being relieved under the 'Exit Policy Scheme' of the Bank – On the request not being accepted, employee filing complaints before the Commissioner for Persons with Disabilities, Dehradun, and the Chief Commissioner for Persons with Disabilities, New Delhi – Employee filing writ petition and contempt petition before Allahabad High Court – HELD: The conduct of the employee requires to be commented upon – Though he retired at Dehradun, he filed a writ petition in Allahabad High Court to enforce an interim order issued at New Delhi – He filed successive complaints, writ petition and contempt petition within a span of less than three months, without giving opportunity to the Bank to appear and show cause – He succeeded in evoking sympathy and securing ex parte interim orders repeatedly by highlighting his position as a person with disability, but failed to disclose full or correct facts – The grievances and complaints of persons with disabilities have to be considered by courts and authorities with compassion, understanding and expedition – But the provisions of the Act cannot be pressed into service to seek any relief or advantage where the complaint or grievance relates to an alleged discrimination, which has nothing to do with the disability of person – Nor do all grievances of persons with disabilities relate to discrimination

based on disability – The fact that the employee claimed to be person with disability appears to have swayed the Deputy Chief Commissioner and the High Court, to ignore the absence of any legal right, and to grant an interim remedy which in the normal course would not have been considered – Issuing interim orders when not warranted, merely because the petitioner is a person with disability, is as insidious as failing to issue interim orders when warranted – Administration of justice – Conduct of litigant – Non disclosure of correct facts—Interim orders. [Para 18 and 19]

ss. 47,58,59,61,62 and 63 r/w r.42 – Power of authorities under the Act to issue mandatory/prohibitory injunction – HELD: Neither the Chief Commissioner nor any Commissioner functioning under the Act has power to issue any mandatory or prohibitory injunction or other interim directions – The fact that the Disabilities Act clothes them with certain powers of a civil court for discharge of their functions (which include power to look into complaints), does not enable them to assume the other powers of a civil court which are not vested in them by the Act – In the instant case, the order of the Deputy Chief Commissioner, not to implement the order of retirement was illegal and without jurisdiction – Besides, the claimant filed application for grant of benefit of 'Exit Policy Scheme' three days prior to his completing the age of retirement – He was not entitled, as of right, to continue beyond thirty yeas of service – In fact, he did not want to continue in service, as his grievance was that he ought to have been permitted to retire under the 'Exit Policy Scheme' – The grievance of the employee had nothing to do with his being a person with a disability – Prima facie neither s.47 nor any provision of the Act was attracted – The Deputy Chief Commissioner while issuing the ex parte direction, overlooked and ignored the fact that the retirement from service was on completion of the prescribed period of service as per the service regulations, which was clearly mentioned in the letter of retirement dated 17.11.2006, and that when an employee

was retired in accordance with the regulations, no interim order can be issued to continue him in service beyond the age of retirement – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 – r.42 – State Bank of Patiala (Officers) Service Regulations, 1979 – Regulation 19 – State Bank of Patiala – 'Exit Policy Scheme' – Interim Injunction/Directions – Service Law. [Para 11 and 13]

All India Indian Overseas Bank SC and ST Employees' Welfare Association vs. Union of India **1996 (8) Suppl. SCR 295** =**1996(6) SCC 606, relied on.**

Constitution of India, 1950:

Article 136 – Appeal against interim order passed by High Court – Ordinarily Supreme Court would not interfere with an ex parte interim order of the High Court, as the respondent in a writ or contempt proceedings can appear and seek vacation, or discontinuance, or modification of such ex parte order – But where there are special and exceptional features or circumstances resulting in or leading to abuse of process of court, the Court, may interfere – The instant case falls under such special and rare category – The employee, though retired in accordance with the rules of the Bank, using the tag of 'person with disability', has attempted to virtually terrorise the Bank and its senior officers by initiating a series of proceedings and securing ex parte interim orders by misrepresenting the facts – The Chief Commissioner acting under the Disabilities Act, the High Court in its writ jurisdiction and the High Court in its contempt jurisdiction, have passed ex parte interim orders, requiring the Bank and its officers to act contrary to the Bank's Rules when no prima facie was made out. [Para 10]

Article 226 – Writ jurisdiction of High Court – Interim orders – Bank employee retired in accordance with Regulations – On the complaints by employee to Chief

Commissioner for Persons with Disabilities, that his request for being relieved under 'Exit Policy Scheme' had not been accepted, show cause notice and interim directions issued to the Bank – In writ petition, the High Court on 12.1.2007 ordered the Bank for implementation of interim directions passed by Deputy Chief Commissioner – HELD: Mandatory interim orders are issued in exceptional cases, only where failure to do so will lead to an irreversible or irretrievable situation – In service matters relating to retirement, there is no such need to issue ex parte mandatory directions – In the instant case, when the writ petition disclosed that the employee was retired after 30 years of service in accordance with the Bank's regulations, there was no question of any irreparable injury or urgency – On the facts and circumstances, the High Court while directing notice on the writ petition ought not to have issued an ex parte order which virtually amounts to allowing the writ petition without hearing the Bank – The appropriate course would have been to give an opportunity to the Bank to explain its stand, particularly, because the court itself felt a doubt about the jurisdiction of the Chief Commissioner and its own jurisdiction – Besides, the Deputy Chief Commissioner issued the order at New Delhi, whereas the employee was working at Dehradun and was retired from service at Dehradun – Apparently no part of cause of action arose in the State of Uttar Pradesh – The order dated 12.1.2007 is, therefore, unsustainable – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – State Bank of Patiala (Officers) Service Regulations, 1979 – Regulation 19 – Interim orders – Cause of action – Territorial jurisdiction of High Court. [Para 14-15]

Contempt of Court:

Writ petition by Bank employee – On the grounds that he was denied benefit of 'Exit Policy Scheme' and the interim directions passed by Deputy Chief Commissioner, for

Persons with Disabilities were not implemented – Show cause notices issued by High Court returnable on 15.2.2007 – But on 13.2.2007, High Court issued contempt notice to Branch Manager of Bank – HELD: Before issuing any interim direction in contempt proceedings, or proposing to hold anyone guilty of contempt, the High Court should at least satisfy itself that the person to whom the notice is issued is responsible to implement the order – The order retiring the respondent was not passed by the Branch Manager and obviously he was not the officer who could implement the interim direction of the Deputy Chief Commissioner or the High Court –The contempt petition was, therefore, premature – That apart, the High Court at the stage of issuing notice, could not have assumed that there was wilful disobedience – At all events, as the order dated 12.1.2007 was unwarranted, the direction for personal appearance on failure to comply with the said order cannot be sustained – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – Constitution of India, 1950 – Article 226. [Para 16-17]

Case Law Reference:

1996 (8) Suppl. SCR 295 relied on para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1718 of 2010.

From the Judgment & Order dated 12.1.2007 of the High Court of Judicature at Allahabad, Lucknow in W.P. No. 40 of 2007.

WITH

Crl. A. No. 170 of 2010.

Vishnu Mehra, Sakshi Gupta and Pramod Dayal for the Appellants.

Arvind Kumar Gupta, Bipin B. Singh, Assem Chandra, Vinod Kumar and Joydeep Mazamudar for the Respondent.

The Order of the Court was delivered by

O R D E R

R. V. RAVEENDRAN J. 1. Leave granted. Heard.

2. The respondent was an employee of the State Bank of Patiala ('Bank' for short). Regulation 19 of the State Bank of Patiala (Officers) Service Regulations, 1979 provides that an officer shall retire from the service of the Bank on attaining the age of 58 years or upon the completion of thirty years service whichever occurs first. It also provides that an officer will retire on the last day of the month in which he completes the stipulated service or age of retirement. As respondent completed thirty years of service on 17.11.2006, the Bank made an order dated 17.11.2006 retiring the respondent with effect from 30.11.2006 under Regulation 19 of the said Regulations.

3. The Bank had formulated an 'Exit Option Scheme' on 1.12.2005 with the object of bringing down the staff strength of the Bank by providing an exit route to eligible officers who may be demotivated due to lack of career prospects. The release of an officer from service under the said scheme becomes effective only after the approval of the request of an employee by the designated authority, is communicated to such officer. The respondent who joined the Bank's service on 18.11.1976, and due to retirement on 17.11.2006, made an application dated 14.11.2006 for being relieved under the said scheme. As the said application was made hardly three days before the completion of thirty years of service, there was obviously no time to process it, and before it could be processed, he retired from service. According to the Bank, accepting such a request a few days before the due date of retirement does not arise, as there is no question of an employee feeling demotivated at that

stage due to lack of career prospects.

4. Alleging that the non-acceptance of his request for being relieved under the 'Exit Option Scheme' was illegal, the respondent made two complaints - the first dated 17.11.2006 to the Commissioner for Persons with Disabilities, Dehradun, and a second dated 20.11.2006 to the Chief Commissioner for Persons with Disabilities, New Delhi ('Chief Commissioner' for short) seeking a direction to the Bank to grant him relief under the 'Exit Option Scheme' of the Bank. He claimed in the said application that he was involved in a road accident on 26.5.1997 and as a result, became a person with disability; and that the Bank, by not accepting his application for retirement under the Exit Policy Scheme, discriminated him on account of his disability.

5. The Deputy Chief Commissioner, New Delhi issued a show-cause notice dated 22.11.2006 to the Bank stating that the Chief Commissioner had directed issue of a show-cause notice under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, ('Disabilities Act' for short) calling upon the Bank to show cause why it should not be directed to accept the respondent's request under 'Exit Option Scheme', instead of being retired under Regulation 19, with a further direction that the decision of the Bank to retire the respondent from service should not be implemented until further orders.

6. The Bank filed objections dated 23.12.2006 contending that the complaint was not maintainable and did not have any merit. The Bank also pointed out that the show cause notice dated 22.11.2006 sent by the Dy. Chief Commissioner, was not accompanied by either a copy of the complaint or a copy of the order said to have been made by the Chief Commissioner. We are informed that the Chief Commissioner has not passed any further order in the matter.

7. On the ground that the Bank did not comply with the

interim direction of Chief Commissioner, the respondent approached the Allahabad High Court on 10.1.2007 (by filing WP No. 40 (SB) of 2007) seeking a direction to the Bank to obey the order of the Chief Commissioner and a mandamus commanding the Bank and its officers (that is the Dy. General Manager, Delhi Zone, Additional General Manager, III (D) Lucknow, and Branch Manager, Dehradun who are appellants 2 to 4 herein), to pay him salary and allow him to work. The High Court on 12.1.2007 ordered notice to the appellants and also issued an ex parte interim order that the direction of the Chief Commissioner be complied with, with an observation that the question of jurisdiction, if raised by the Bank, will be considered when the matter is next listed. No date was fixed for compliance with the said interim order.

8. On the ground that the said ex parte order dated 12.1.2007 was not complied, the respondent again rushed to the High Court with a Contempt Petition. In that petition, the High Court made an ex parte order dated 13.2.2007 directing the Branch Manager of the Dehradun Branch of the Bank to appear in person on 3.4.2007 if the interim order dated 12.1.2007 issued in the writ petition was not by then compiled with.

9. Aggrieved by the order dated 12.1.2007, the Bank and its officers have filed SLP (C) No. 6124 of 2007. Aggrieved by the order of the High Court in the Contempt Proceedings, the two officers of the Bank to whom notice has been issued filed SLP (Crl.) No.1870 of 2007. This Court on 23.4.2007 directed issue of notice in both the special leave petitions. As respondent appeared through counsel at the time of preliminary hearing, this Court also noted that the respondent had retired on completion of 30 years of service in November, 2006 and recorded the submission of the respondent that he was prepared to accept the retiral benefits without prejudice to his rights. Accordingly, the retiral benefits have been released to the respondent and the contempt proceedings were stayed on 18.8.2008.

10. Ordinarily this Court would not interfere with an ex parte interim order of the High Court, as the respondent in a writ or contempt proceedings can appear and seek vacation, or discontinuance, or modification of such ex parte order. But where there are special and exceptional features or circumstances resulting in or leading to abuse of process of court, this Court, may interfere. This case falls under such special and rare category. The respondent, though retired in accordance with the rules of the Bank, using the tag of 'person with disability', has attempted to virtually terrorise the Bank and its senior officers by initiating a series of proceedings and securing ex parte interim orders by misrepresenting the facts. The Chief Commissioner acting under the Disabilities Act, the High Court in its writ jurisdiction and the High Court in its contempt jurisdiction, have passed ex parte interim orders, requiring the Bank and its officers to act contrary to the Bank's Rules when no prima facie was made out. Let us deal with each of these successive ex parte interim orders.

Interim direction of the Chief Commissioner

11. Under the Rules, an officer of the Bank, shall retire on completion of 30 years of service. The respondent was accordingly retired on completion of thirty years. He was not denied any retiral benefits. He was not entitled, as of right, to continue beyond thirty years of service. In fact, he did not want to continue in service, as his grievance was that he ought to have been permitted to retire under the Exit Policy Scheme. The grievance of the respondent had apparently nothing to do with his being a person with a disability. Prima facie neither section 47 nor any other provision of the Disabilities Act was attracted. But, the Chief Commissioner chose to issue a show cause notice on the complaint and also issued an ex parte direction not to give effect to the order of retirement. He overlooked and ignored the fact that the retirement from service was on completion of the prescribed period of service as per the service regulations, which was clearly mentioned in the letter

of retirement dated 17.11.2006; and that when an employee was retired in accordance with the regulations, no interim order can be issued to continue him in service beyond the age of retirement. The Chief Commissioner also overlooked and ignored the fact that as an authority functioning under the Disabilities Act, he has no power or jurisdiction to issue a direction to the employer not to retire an employee. In fact, under the Scheme of the Disabilities Act, the Chief Commissioner (or the Commissioner) has no power to grant any interim direction.

12. The functions of the Chief Commissioner are set out in Sections 58 and 59 of the Act. Section 58 provides that the Chief Commissioner shall have the following functions:-

(a) coordinate the work of the Commissioners;

(b) monitor the utilisation of funds disbursed by the Central Government;

(c) take steps to safeguard the rights and facilities made available to persons with disabilities;

(d) submit reports to the Central Government on the implementation of the Act at such intervals as the Government may prescribe.

Section 59 provides that without prejudice to the provisions of Section 58, the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints and take up the matter with the appropriate authorities, any matters relating to (a) deprivation of rights of persons with disabilities; and (b) non- implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities. The Commissioners appointed by the State Governments also have similar powers under Section

61 and 62. Section 63 provides that the Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a court under the Code of Civil Procedure while trying a suit, in regard to the following matters: (a) summoning and enforcing the attendance for witnesses; (b) requiring the discovery and production of any document; (c) requisitioning any public record or copy thereof from any court or officer; (d) receiving evidence on affidavits; and (e) issuing commissions for the examination of witnesses or documents. Rule 42 of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Rules, 1996 lays down the procedure to be followed by the Chief Commissioner.

13. It is evident from the said provisions, that neither the Chief Commissioner nor any Commissioner functioning under the Disabilities Act has power to issue any mandatory or prohibitory injunction or other interim directions. The fact that the Disabilities Act clothes them with certain powers of a civil court for discharge of their functions (which include power to look into complaints), does not enable them to assume the other powers of a civil court which are not vested in them by the provisions of the Disabilities Act. In *All India Indian Overseas Bank SC and ST Employees' Welfare Association vs. Union of India* - 1996 (6) SCC 606, this Court, dealing with Article 338 (8) of the Constitution of India (similar to section 63 of the Disabilities Act), observed as follows :

> "It can be seen from a plain reading of clause (8) that the Commission has the power of the civil court for the purpose of conducting an investigation contemplated in sub-clause (a) and an inquiry into a complaint referred to i sub-clause (b) of clause (5) of Article 338 of the Constitution. All the procedural powers of a civil court are given to the Commission for the purpose of investigating and inquiring into these matters and that too for that limited purpose only. The powers of a civil court of granting

injunctions, temporary or permanent, do no inhere in the Commission nor can such a power be inferred or derived from a reading of clause (8) of Article 338 of the Constitution."

The order of the Chief Commissioner, not to implement the order of retirement was illegal and without jurisdiction.

The interim order in the writ proceedings.

14. The principles relating to grant of interim ex parte orders by the High Court in writ jurisdiction are well settled. Courts should not grant interim orders in a mechanical manner, on the assumption that the aggrieved party can always seek vacation. Grant of ex parte interim orders, that too mandatory orders, routinely or merely for the asking, on ground of sympathy or otherwise, will interfere with justice leading to administrative chaos, rather than serving the interests of justice. Where the writ petition does not make out a prima facie case or where there is any doubt about the maintainability of the writ petition or the jurisdiction of the court or the tenability of the claim, the High Court will not issue any interim order, that too when there is no irreparable loss or injury. At all events, the High Court will desist from issuing an ex parte mandatory injunction or direction which virtually has the effect of allowing the petition ex parte without hearing the respondents. Mandatory interim orders are issued in exceptional cases, only where failure to do so will lead to an irreversible or irretrievable situation. In service matters relating to retirement, there is no such need to issue ex parte mandatory directions. When the writ petition disclosed that the respondent was retired after 30 years of service in accordance with the Bank's regulations, there was no question of any irreparable injury or urgency.

15. On the facts and circumstances we are of the view that the High Court while directing notice on the writ petition filed by the respondent for implementation of the interim direction of the Chief Commissioner for Persons with Disabilities ought

not to have issued an ex parte order which virtually amounts to allowing the writ petition without hearing the Bank. The appropriate course would have been to give an opportunity to the Bank to explain its stand, particularly because the court itself felt a doubt about the jurisdiction of the Chief Commissioner and its own jurisdiction. The Chief Commissioner issued the order at New Delhi. The respondent was working at Dehradun and was retired from service at Dehradun. Apparently no part of cause of action arose in the State of Uttar Pradesh. Be that as it may. We therefore held that the order dated 12.1.2007 is unsustainable.

The interim order in the contempt proceedings.

16. The respondent's complaint in the contempt petition was that the Bank had disobeyed the ex parte interim order granted by the High Court on 12.1.2007. No period was prescribed by the High Court for compliance with its interim order. The show cause notice in the writ petition was issued on 22.1.2007 returnable on 15.2.2007. But even before that date, the respondent filed the contempt petition complaining of non-compliance. Instead of issuing notice and giving an opportunity to the Bank or the Bank's officers, the High Court passed the following orders on 13.2.2007 :

"Issue notice to Opposite Party No.2 (Branch Manager of the Bank) to show cause as to why he may not be punished under section 2 of the Contempt of Courts Act for disobeying the order passed by this Court on 12.1.2007,which has so far not been complied with in letter and spirit. In case the order is not complied with, he shall appear on 3rd April, 2007 along with record."

Before issuing any interim direction in contempt proceedings, or proposing to hold anyone guilty of contempt, the High Court should at least satisfy itself that person to whom the notice is issued is the person responsible to implement the order. The order retiring the respondent was not passed by the Branch

Manager and obviously he was not the officer who could implement the interim direction of theChief Commissioner or the High Court.

17. We are of the view that the contempt petition was premature. We are also of the view that the High Court at the stage of issuing notice, could not have assumed that there was wilful disobedience. At all events, as a consequence of our decision that the order dated 12.1.2007 was unwarranted, the direction for personal appearance on failure to comply with the order dated 12.1.2007 cannot be sustained.

Remarks warranted by the conduct of the respondent

18. The conduct of the respondent requires to be commented upon. He was retired with effect from 30.11.2006, by order dated 17.11.2006 after 30 years of service. He gave a complaint to the Commissioner for Persons with Disabilities at Dehradun, Uttarakhand, on 17.11.2006. He made another complaint to Chief Commissioner, New Delhi, on 20.11.2006. Though he retired at Dehradun, he filed a writ petition in Allahabad High Court to enforce an interim order issued at New Delhi. He filed successive complaints, writ petition and contempt petition within a span of less than three months, without giving opportunity to the Bank to appear and show cause. He succeeded in evoking sympathy and securing ex parte interim orders repeatedly by highlighting his position as a person with disability, but failed to disclose full or correct facts.

19. The grievances and complaints of persons with disabilities have to be considered by courts and Authorities with compassion, understanding and expedition. They seek a life with dignity. The Disabilities Act seeks to provide them a level playing field, by certain affirmative actions so that they can have adequate opportunities in matters of education and employment. The Act also seeks to ensure non-discrimination of persons with disabilities, by reason of their disabilities. But the provisions of the Disabilities Act cannot be pressed into

service to seek any relief or advantage where the complaint or grievance relates to an alleged discrimination, which has nothing to do with the disability of the person. Nor do all grievances of persons with disabilities relate to discrimination based on disability.

Illustration :

Let us assume a case where the age of retirement in an organisation is 58 years for all class II˘ officers and 60 years for all class I officers. When a class II officer, who happens to be a person with disability, raises a dispute that such disparity amounts to discrimination, it has nothing to do with disabilities. Persons with disability as also persons without disability may contend in a court of law that such a provision is discriminatory. But, such a provision, even if it is discriminatory, has nothing to do with the person's disability and there is no question of a person with disability invoking the provisions of the Disabilities Act, to claim relief regarding such discrimination.

Persons with disabilities are no less afflicted by human frailties like ego, pride, jealousy, hate or misunderstanding, when compared with persons without disabilities. Many of their grievances and disputes may have nothing to do with disability. The fact that respondent claimed to be person with disability appears to have swayed the Chief Commissioner and the High Court, to ignore the absence of any legal right and grant an interim remedy which in the normal course would not have been considered. Issuing interim orders when not warranted, merely because the petitioner is a person with disability, is as insidious as failing to issue interim orders when warranted.

Conclusion

20. We therefore allow these appeals and set aside the interim directions contained in the order dated 12.1.2007 of the High Court in WP No. 40(SB) of 2007 and the order dated

13.2.2007 in Crl. Misc. Case No.420(C) of 2007. We request the High Court to hear the appellants herein (Bank and its officers) and then dispose of the WP No. 40 (SB) of 2007 and Crl. Mis. Case No.420(C) of 2007 in accordance with law.

21. It is made clear that acceptance of retiral benefits by the respondent during the pendency before this court will not come in the way of his pursuing any remedy, in accordance with law by establishing that he is a person with disability and that he was discriminated, before a forum competent to consider his grievance/complaint.

R.P. Appeals allowed.

VIKRAM SINGH & ORS.
v.
STATE OF PUNJAB
(Criminal Appeal Nos. 1396-1397 of 2008)

JANUARY 25, 2010

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

Penal Code, 1860:

ss. 302, 364A, 201 and 120-B – Kidnapping for ransom – Poisoning young boy to death – Conviction u/ss. 302, 364A, 201 and 120-B and award of death sentence by courts below – Propriety of – Held: Kidnapping must be dealt with in the harshest possible manner and obligation rests on courts too – On facts, boy was not only kidnapped for ransom but was murdered in the process – Eye witness to the kidnapping by two accused – Witnesses not chance witnesses – Medical evidence that the cause of death was over dose of chloroform and pentazocine – Evidence to the effect that conspiracy hatched between accused – Attempt by lady accused to destroy the evidence relating to kidnapping – Recovery of various articles including telephone call details, medical equipment and car used as also dead body of deceased – Thus, award of death sentence to two accused upheld – However, death sentence awarded to lady accused, commuted to life imprisonment as she apparently acted under pressure of her husband.

s. 364-A – Provision for death or life imprisonment for offences relating to kidnapping – Purpose of amendment – Held: Is to act as a deterrent on such offenders due to increasing number of such cases and also in cases where kidnapping does not result in the death of the victim.

Evidence Act, 1872: s. 27 – Scope and applicability of –

Held: s. 27 reveals that a 'person must be accused of any offence' and that he must be 'in the custody of a police officer' and it is not essential that such an accused must be under formal arrest – Accused taken in custody day before the formal arrest, has no adverse effect on recoveries made on disclosure statement, when accused were taken in custody.

Evidence: Circumstantial evidence vis-s-vis eye witness account – Evaluation of – Standard to be applied – Explained.

Sentence/Sentencing: *Death sentence – Award of – Validity and propriety of.*

According to the prosecution case, the two appellants-VS and JS, kidnapped AV-a school boy aged 16 years from his school in the car for ransom. During the negotiations, the kidnappers administered heavy doses of chloroform and fortwin injections to the boy which resulted in his death. The appellants-VS and JS had attempted to run away and the appellant S-wife of JS, was in the process of destroying the evidence, when they were apprehended by the police. The appellant VS was known to the family of the deceased. The trial court convicted the appellants for offences punishable u/ss. 302, 364A, 201 and 120-B of the Penal Code, 1860 and sentenced them to death. The High Court upheld the order of death sentence. Hence the present appeals.

Disposing of the appeals, the Court

HELD: 1. In the instant case, not only was the deceased-young boy kidnapped for ransom which acts would by itself attract the death penalty but he was murdered in the process. There is the direct and eye witness evidence of PW-BS who had seen VS and JS (whom he knew earlier) kidnapping AV from outside the school. The balance sheet has been drawn up by the High Court and the same is accepted. However, there is

some reason in favouring S-the lady appellant, wife of JS. Keeping in view the overall picture and the fact that at the time when AV was kidnapped from outside the School, S was not present and that she may have got embroiled in the conspiracy with her husband and VS on account of having come under their pressure, some leniency must be shown to her. Therefore, regarding S, her death sentence ought to be converted into one of life. [Paras 20, 26, 29 and 30] [55-H; 56-A; 67-F-G-H; 64-D]

2.1. Regarding the submission that it was doubtful as to whether the Alto belonging to NK had actually been used, it is true that the colour of the car is said to be Miami Gold but it is significant that in the cross-examination of all the witnesses and in particular PW3, PW13 and PW19 who had deposed that the colour was silver grey not a single question had been put as to the fact that the car was gold in colour and not grey. The only inference that can flow from the cross-examination is that "Miami Gold" was in fact a trade name and not an indication of the actual colour of the car. PW's NK, BS and SK had absolutely no animosity against the appellants which could motivate them to give a false statement as to the colour of the vehicle. NK in fact deposed that the car had been taken by VS, his son's friend, at about 7.30 a.m. and had been returned at about 10.30 a.m. or so the same morning. This circumstance fits in with the prosecution story that VS and JS had been seen by PW-BS with the deceased and a short while later PW-SK had heard the noise of "bachao bachao" and on looking in that direction had seen a silver grey coloured car being driven away from the School at a very high speed with one human foot protruding outside the car window. It is significant that this information had been conveyed on telephone to the police as well. [Para 5] [41-E-H; 42-A-D]

2.2. The presence of PW-BS and SK was natural at

the places they professed to be in and they cannot, therefore, be dubbed as chance witnesses. BS gave a cogent explanation as to the circumstances under which he had seen AV being kidnapped and taken away in the Alto Car. It is also relevant that when BS had seen the Alto Car driven being away, it appeared to be a normal transaction as the boy appeared to be going willingly with VS and JS-kidnappers. Therefore, it is obvious that his suspicion about anything amiss could not have been raised at any stage prior to his return from Chintpurni. It is also extremely significant that this witness was in a position to recognize VS as VS was running a computer centre where S was undergoing training. Likewise, he knew JS and S from those days as they too would often visit VS in the computer centre. Criticism of PW-SK is equally misplaced. SK was the owner of a bakery shop at Shimla Pahari and it was while he was outside the shop that he had heard the screams of "Bachao Bachao" and on looking in that direction had seen a car being driven away at a high speed and a human foot protruding out of the car window and on seeing this unusual activity, SK's neighbour, had informed the Police on telephone. It is also significant that SK was not in any way connected with RV-complainant, and that they were not even known to each other. [Paras 6 and 7] [42-E, G-H; 43-C-G]

Rana Partap & Ors. vs. State of Haryana **1983(3) SCC 327, referred to.**

2.3. The medical evidence is the material circumstance with regard to this incident. It is another link in the chain of circumstances. The dead body had been recovered on the morning of 15.02.2005 and had been subjected to a post-mortem by a Board of Doctors. The post-mortem did not indicate any of the allegatons, the viscera was taken from the body and sent to the chemical examiner. On the receipt of the chemical

examiner's report the Board opined that the cause of death was Chloroform and Pentazocine poisoning. [Paras 8 and 9] [44-G-H; 45-A-B]

2.4. PW4, owner of a shop called Scientific Sales Corporation deposed that he knew the appellants as they were all residing near his house. He further stated that he had sold a bottle of 500 ml Chloroform manufactured by Glaxo and also issued Bill dated 11.02.2005 pertaining to the sale. He also produced the purchase bill indicating that the Chloroform had earlier been purchased by him for sale in his shop and after a comparison of the batch number on the bottle with the Bills testified that it was the same bottle of Chloroform that had been sold to the appellants. Some insignificant questions had been put to him and no material circumstance could be elicited by the defence. The evidence of PW5, another shop keeper, is equally significant as the 5 Fortwin injections of 1 ml. each had been purchased by the appellants vide Bill dated 11.02.2005 on the basis of a prescription from a veterinary Doctor that had been produced by them. PW5 also brought the original bill whereby he had purchased the injections. The fact that the prescription for Fortwin injection had been produced on account of a prescription from a veterinary Doctor is fortified by the fact that on the Bill the word "Dog" has been written. Further, not a single question was put to both the shop keepers as to their association with the complainant party. The factum of the over dose of Chloroform and pentazocine administered to the deceased is clear from the fact that the recoveries show that almost the entire bottle of Chloroform (500 ml.) and all five Fortwin injections i.e. 5 ml. had been used by the kidnappers and that this lethal combination of Chloroform and an over dose of pentazocine was the cause of death. [Para 9] [45-F-H; 46-A-F]

2.5. The evidence reveals that the conspiracy had

been hatched by the three appellants and the first step towards the execution of the conspiracy was taken on 11.02.2005 at 11.00 a.m. when the Fortwin injections were purchased from PW5, the second step was the purchase of Chloroform at 4.00 p.m. the same afternoon from PW 4 and the third the borrowing of the Alto car from NK on the morning of 12.02.2005. These three transactions are intimately connected with the kidnapping and subsequently the murder of AV. [Para 10] [46-G-H; 47-A]

2.6. Even the post incident conduct of an accused can be taken into account to determine as to whether the criminal act which had been committed was pursuant to a criminal conspiracy. In the instant case, there is categorical evidence with regard to the purchase of the Fortwin injections and Chloroform and merely because PW-BS and SK did not refer to the presence of S in the Alto car at the time of the actual kidnapping would not mean that she was not privy to the conspiracy. Moreover, the evidence also reveals that she was attempting to destroy the evidence relating to the kidnapping when she had been apprehended. Therefore, the second set of incriminating circumstances is the medical evidence and the conspiracy hatched between the three appellants including S leading to the kidnapping and murder. [Para 10] [47-E-H]

State of Himachal Pradesh vs. K.L.Pardhan & Ors. **1987 (2) SCC 17;** *Keshar Singh & Ors. vs. State (Delhi Administration)* **1988 (3) SCC 609, referred to.**

2.7. The appellants were under grave suspicion, suspected to be accused in a case of kidnapping and murder, and VS and JS had attempted to run away and S was in the process of destroying evidence, when they had been apprehended and put in police custody whereafter they had made their disclosure statements. [Para 11] [49-C-D]

2.8. A bare reading of s. 27 of the Evidence Act, 1872 would reveal that a 'person must be accused of any offence' and that he must be 'in the custody of a police officer' and it is not essential that such an accused must be under formal arrest. Section 46 Cr. P. C. deals with 'Arrest how made.' The word "arrest " used in s. 46 relates to a formal arrest whereas s. 27 of the Act talks about custody of a person accused of an offence. In the instant case, the appellants were undoubtedly put under formal arrest on 15.02.2005 whereas the recoveries had been made prior to that date but admittedly, also, they were in police custody and accused in an offence at the time of their apprehension on the 14.02.2005. Moreover in the light of the judgment in *Deoman Upadhyaya's* case and the observation that the words in s. 27 'accused of any offence' are descriptive of the person making the statement, the submission that this section would be operable only after formal arrest u/s. 46(1), cannot be accepted. [Paras 11 and 12] [49-F; 52-B-E]

State of Uttar Pradesh vs. Deoman Upadhyaya **AIR 1960 SC 1125, followed.**

Narayan Swami vs. Emperor **AIR 1939 PC 47, referred to.**

2.9. It is indeed true that most of the recoveries have been witnessed by PW-30 and JK-sub inspector and that PW-30 finally admitted that RV was his nephew and the deceased was his grandson. There is nothing unusual in PW 30's statement. It hardly needs emphasizing that independent witnesses are not forthcoming these days and the prosecution has per force to rely on witnesses who are relatives or associates of the complainant. This in a way also ensures that the witnesses would not leave out the true culprits. It is found from the statement of PW 30 that as a consequence of the disclosure statement

made by the three appellants, the Alto car had been recovered from PW-NK, the black Chevrolet car from the area of KT and on the search of the car, various other items such as the photographs and purse of the deceased, had been taken into possession under seizure Memo. It is also significant that on 16.02.2005 a silver ring belonging to the deceased had been recovered at the instance of VS and five empty ampules of Fortwin injections, a syringe, a plastic bag with hyperdemic needles and a roll of medical tape at the instance of JS from behind the kothi of DK and were taken to possession. [Para 15] [53-C-G]

2.10. It is also significant that JS also disclosed that he had kept concealed the dead body in the fields of village D and that it had been removed from DK's house in the Chevrolet car belonging to him and the three appellants further revealed that the dead body had been disposed of in the fields of village D and the dead body was recovered and taken into possession by Memo signed by PW-30 as also JK-Sub-Inspector. It cannot be said that the evidence of PW-30 and JK should not be believed as they were interested in the successful outcome of the prosecution, as no other material adverse circumstance has been brought to the notice. [Para 16] [53-G-H; 54-A-B]

2.11. RV had been called on the telephone repeatedly on his landline No. 226059 from Mobile No.98147 83418. Admittedly, the landline telephone is fixed in the shop of RV and it has come in evidence that the said card had been purchased on 14.02.2005 by appellant-JS. PW-14 stated that JS had come to him in hurry and demanded a connection which had been supplied to him after he had undertaken he would supply the identification papers later on. PW-15 also revealed that he had sold his post paid connection no. 98729-99441 and 98729-99442 on

14.08.2002 to VS and this fact was confirmed by PW-17, Executive, Human Resources, Bharti Cellular Ltd. [Para 17] [54-C-D; 54-E-F]

2.12. It was submitted that there was something amiss in the evidence of PW14 who deposed that the Mobile connection had been sold to JS on 14.02.2005, but it appeared from the call statement that the first, second and third calls from this Mobile had been made on 19.01.2005 and thereafter several calls had been made on 14.02.2005. Undoubtedly, there is some discrepancy in the records vis-à-vis the ocular statements but the fact remains that this mobile was being used by JS to call VS on his Mobile No.98729-99441 and that they had been talking to each other much before the present occurrence and that even on the day of crime, they had talked to each other at 7.30 on their Mobiles. Likewise, it has come on record that the several phone calls had been received by RV on the landline 226059 and were duly recorded by a tape recorder and the incoming number identified by an ID caller machine. It is significant that the conversations recorded on the tape recorder were compared by an expert with the sample voice of JS and they were found to match with each other. [Para 17] [55-A-D]

2.13. The prosecution has been able to show that the finger prints lifted by the police officers from the Alto and Chevrolet car belonged to VS and JS Singh respectively. It is significant that the Chloroform bottle recovered from DK's residence was also examined and the thumb impression of JS was detected thereon. [Para 18] [55-E-F]

2.14. Dr. DS, a very reputed Eye Surgeon, appeared as DW1. He deposed that S had been operated by him on 13.05.2002 and that she had come several times to his clinic for a re-check and that she had visited the hospital on the 11.02.2005 and had been attended by one JW.

When cross-examined, however, the Doctor admitted that though the OPD in the hospital was computerized there was no entry in the name of S as on 11.02.2005. Moreover, even assuming that S had indeed gone with her husband to Amritsar on the 11.02.2005, as claimed, it was possible for them to go there and return in time to purchase the Fortwin injections and the Chloroform etc. on 11.02.2005. DW-1's evidence, therefore, does not in any way prove the alibi of JS and S. [Para 19] [55-G-H; 56-A-B]

2.15. In a case of circumstantial evidence some uncertainty is bound to occur in the statements of the prosecution witnesses and that this flaw is occasioned by the fact that what they have witnessed is often an innocent transaction and it is only after the event that it transpires that what they had seen was a crime or a prelude to the commission of a crime. A witness, therefore, does not assimilate or imbibe the scene as carefully as he, would, say in a case where he was an eye witness to a murder. PW-BS saw nothing untoward in AV and his kidnappers moving together, and being unconcerned went off to Chintpurni whereas PW-SK who had seen the car being driven away at a fast speed and someone calling for help, on which he had immediately informed the police. While it is undoubtedly for the prosecution to prove its case beyond doubt but the standard to be applied for evaluating the evidence in a case of circumstantial evidence vis-à-vis an eye witness account would vary and a slightly different yardstick for assessment has to be applied. It is for this reason that courts have repeatedly emphasized that the chain of circumstances against an accused in a case of circumstantial evidence must be directed only towards his guilt and admit of no other hypothesis, whereas in the case of the evidence of an eye witness a chain of circumstances is not required and one good eye witness

is sufficient to record a conviction. [Para 20] [56-C-H]

3.1. There are the moralists who say that as God has given life, he alone has the right to take it away and this privilege cannot be usurped by any human being. There are others who believe that the death sentence cannot be taken as a retributive or deterrent factor as the statistics show that the possibility of a death sentence has never acted as a deterrent to serious crime. The theory which is widely accepted in India, however, is that as the death penalty is on the Statute Book it has to be awarded provided the circumstances justify it. The broad principle has been laid in *Bachan Singh's* case as the "rarest of the rare cases". In determining the culpability of an accused and the final decision as to the nature of sentence, a balance sheet of the aggravating and mitigating circumstances vis-à-vis the accused had to be drawn up and in doing so the mitigating circumstances had to be given full weight so that all factors were considered before the "option is exercised". The broad principle that emerges from all the judgments is that in evaluating the category of the rarest of the rare, the facts of that particular case must be given pre-dominant consideration. [Paras 24 and 25] [58-D-F; 60-G-H; 61-A-B]

3.2. Section 364-A had been introduced in the Penal Code by virtue of Amendment Act 42 of 1993. A plain reading of the Objects and Reasons which led to the amendment shows the concern of Parliament in dealing with kidnapping for ransom a crime which called for a deterrent punishment, even in a case where the kidnapping had not resulted in the death of the victim. The statistics further reveal that kidnapping for ransom has become a lucrative and thriving industry all over the country which must be dealt with, in the harshest possible manner and an obligation rests on Courts as

well. Courts to lend a helping hand in that direction. It is relevant that even before the aforesaid amendments, this Court in *Henry's* case observed that death sentence could be awarded even in a case of kidnapping and murder based on circumstantial evidence. [Para 26] [63-F-G; 64-B-D-E]

Bachan Singh vs. State of Punjab **(1980) 2 SCC 684;** *Machhi Singh & Ors. vs. State of Punjab* **(1983) 3 SCC 470;** *Henry Westmuller Roberts vs. State of Assam* **(1985) 3 SCC 291, relied on**

Dhondiba Gundu Pomaje & Ors. vs. The State of Maharashtra **1976 (1) SCC 162;** *Sushil Kumar vs. State of Punjab* **Criminal Appeal No.670 of 2009 decided by Supreme Court on September 1, 2009;** *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* **(2009) 6 SCC 498;** *Mohan & Ors. vs. State of T.N.* **(1998) 5 SCC 336, referred to.**

3.3. In this tragic scenario and in the drawing up of the balance sheet, the plight of the hapless victim, and the abject terror that he must have undergone while in the grip of his kidnappers, is often ignored. AV was only 16 years of age, and had been picked up by VS who was known to him but had soon realized the predicament that he faced and had shouted for help. His terror can further be visualized when he would have heard the threatening calls to his father and seen the preparations to do away with him, which included the taping of his mouth and the administration of an overdose of dangerous drugs. The horror, distress and the devastation felt in the family on the loss of an only son, can also be imagined. [Para 27] [65-F-H; 66-A-B]

Case Law Reference:

1983(3) SCC 327	**Referred to.**	**Para 7**

1987 (2) SCC 17	**Relied on.**	**Para 10**
1988 (3) SCC 609	**Relied on.**	**Para 10**
AIR 1960 SC 1125	**Followed**	**Para 11**
AIR 1939 PC 47	**Referred to**	**Para 11**
1976 (1) SCC 162	**Referred to**	**Para 22**
1980 (2) SCC 684	**Relied on.**	**Para 24**
2009 (6) SCC 498	**Referred to**	**Para 22**
1998 (5) SCC 336	**Referred to**	**Para 23**
1983 (3) SCC 470	**Relied on**	**Para 24**
1985 (3) SCC 291	**Relied on.**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1396-1397 of 2008.

From the Judgment & Order dated 30.5.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 105-DB/07and Murder Reference No. 01/07.

Amarendra Sharan, Jaspal Singh, Rishi Malhotra, Prem Malhotra, A.K. Singh, Amit Anand Tiwari, Sanchit Guru, Shubham Bhalla, Vipin Gogia, Jaspreet Gogia, Kuldip Singh for the appearing parties.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. These appeals arise out of the following facts:

1. On 14th February 2005 the deceased Abhi Verma @ Harry, a boy aged 16 years and a student of DAV School, Hoshiarpur, son of Goldsmith Ravi Verma (PW 27) was kidnapped at about 8.45 a.m. from outside the school. An anonymous call was received in Police Station City, Hoshiarpur

at 8.45 a.m. by Sub-Inspector Nirmal Singh (PW 39), the SHO, and on its basis an FIR was recorded under Section 364 of the IPC referring to the kidnapping of a child from a place near "Shimla Pahari". Sub-Inspector Jiwan Kumar (PW 43) of CIA Staff, Hoshiarpur also received information about the kidnapping on which the police machinery was further activated. A short while later, that is at about the noon time, Ravi Verma (PW) received a call on his landline telephone No.226059 installed in his shop telling him that his son had been kidnapped and in case he wanted him to return alive, he should pay a ransom of Rs.50 Lac and that he would be contacted later. Ravi Verma's request to the caller to permit him to speak with his son was denied. Ravi Verma, greatly alarmed, went post haste to the school and was told that his son had not come to class that day. This information confirmed his fear that his son had indeed been kidnapped for ransom. Sub-Inspector Jiwan Kumar (PW) in the meanwhile reached Shimla Pahari Chowk and met Ravi Verma at about 12.30 p.m. and recorded his statement (Ex.PWWW) and on its basis the offence under Section 364 IPC was converted into one under Section 364A of the IPC. The Sub-Inspector also directed Ravi Verma to arrange an ID caller with a tape recorder and to connect it with the telephone in his shop and to await another call from the kidnapper. These directions were carried out by Ravi Verma and the subsequent conversations were duly recorded. At about 4.00 p.m. Ravi Verma received a call on his Mobile No. 9814783418 and the kidnapper enquired as to whether arrangements for the payment of the ransom had been made. Ravi Verma told him that he was in the process of collecting the money on which the kidnapper once again threatened that in case the money was not paid, the boy would be killed. At 7.00 p.m. Ravi Verma received yet another call from the kidnapper on his landline number aforementioned, asking him to activate his Mobile but Ravi Verma told him that he was not carrying his Mobile at that moment. The kidnapper also told Ravi Verma that the police, including the SSP, Hoshiarpur had visited his house and that if this was repeated, the boy would be done to death. Ravi Verma,

however, told the kidnapper to reveal the place where the ransom could be delivered and was told that this information would be given later on phone. Ravi Verma again received a call on his landline from the kidnapper asking him to switch on his Mobile and on which the kidnapper called him on the Mobile and told him that there was great panic all over the town after the kidnapping and that this would have serious consequences on his son. Ravi Verma, however, assured the kidnapper that he had no concern with the activity and that he was only interested in securing his son. No call was thereafter received from the kidnapper. The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to S.I. Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the police. During the course of the investigation, it transpired that appellant Vikram Singh @ Vicky had visited Naresh Sharma (PW-3) who was the father of Mukul Sharma, at about 7 or 7.30 a.m. on the 14th February, 2005 and had requested for the loan of his car as he wanted to go to Jahankhelan. Naresh Sharma accordingly loaned his Alto Car PB-07-M-5023 to Vicky. Vicky parked his motorcycle inside Naresh Sharma's house and drove off in the car but returned it at about 10 or 10.15 a.m. the same day. Naresh Sharma's statement was recorded by the Magistrate under Section 164 of the Cr.P.C. on 21st February 2005 as his car was suspected to be used in the commission of an offence. The police also recorded the statement of Baljeet Kumar Saini (PW13) at about 11.15 p.m. on 14th February 2005 to the effect that an Alto car of grey colour had been parked at 8.30 a.m. in his locality while he was near the main gate of his house awaiting the arrival of a rickshaw to carry children to their school and that he had noticed that the appellant Vikram Singh was sitting on the driver's seat and that in the meantime Abhi Verma had arrived with the appellant Jasvir Singh and the two had got into the rear seat whereafter Vikram Singh had driven towards the DAV school. During the investigation, it further came to light that a few minutes later, that is at about 8.40 a.m., Satish Kumar (PW

19) who owned a shop called New Deluxe Bakers and Confectioners situated at Shimla Pahari Chowk had heard a cry of anguish (Bachao Bachao) while standing outside the shop and on looking that side had seen an Alto Car of silver grey colour without a number plate coming from the side of DAV school at a very high speed and a human foot protruding out of the car window. This information was immediately conveyed to the police on telephone. It further came out during the investigation that one Amit Chohan (PW24), a relative of the complainant Ravi Verma, while was on his way to Kartarpur heard the news on the TV about the kidnapping and decided to return home to Hoshiarpur via Kishangarh and Adampur and as he reached village Daulatpur he saw a Chevrolet Car of black colour and a motorcycle of silver colour parked on the road side and while driving by the car he heard a whispered conversation, and on the next day came to know that Abhi Verma had been murdered and the dead body had been found lying in the fields of village Daulatpur. It also transpired from the investigation that Vikram Singh on the motorcycle (Ex.P5) and Jasvir Singh and his wife Sonia appellant in the Chevrolet Car (Ex.P3) were seen driving on the Jalandhar road and they were duly identified by Amit Jain (PW18). The police also received secret information that the appellants were, at that moment, hiding in a house owned by one Darshan Kaur (father's sister of accused Jasvir Singh) a NRI, situated in Mohalla Milap Nagar, Hoshiarpur on which a police party headed by SI Jiwan Kumar accompanied by Manohar Lal (PW30) raided the house and on going inside the drawing room, found Vikram Singh and Jasvir Singh present there. Seeing the police, they attempted to run away but were over powered and arrested. The police also found Sonia in the backyard hurriedly pouring Alcohol on some clothes and attempting to set them on fire. She too was arrested and the clothes which had been partly burnt, were recovered. The police also found several half burnt articles including a school bag with books and on a search of the house a pair of black shoes, a belt, an iron karra, a sim card of Mobile No. 9814783418 and a bottle of chloroform with some material

which too were taken into possession. The police also secured the services of (PW25) a finger print expert, who lifted the finger prints from several items, which were sent to the forensic laboratory for comparison. The police also took into possession a Hero Honda (Karizma) motorcycle bearing a temporary No.PB-07 P 200 belonging to Vikram Singh. Jasvir Singh was interrogated and he disclosed that the dead body of Abhi Verma had been carried in his Chevrolet Optra Car B-08 (T)-AL-1718 to a field near village Daulatpur and that he could get the same recovered. Similar statements of Vikram Singh and Sonia were also recorded. The appellants then led the police to the specified place whereafter the naked dead body of Abhi Verma wrapped in a bed sheet, was recovered. The appellants also revealed the whereabouts of the Alto and Chevrolet Optra cars. The Alto car was recovered from the residence of Naresh Kumar Sharma (PW), its owner. The finger print experts PWs. Gurdip Singh and Kashmir Singh also lifted some finger prints from the car which too were sent to the forensic laboratory. The police party then proceeded to katcha tobba where the Chevrolet car was found parked in front of the residence of one Subhash Kapoor and this too was taken to possession and examined by the two finger print experts. The police also recovered a pass port size photograph of Abhi Verma and two applications for the grant of leave by Abhi Verma from the car and these were taken into possession. In addition the police found a black coloured pouch with the label of Capital Bank containing visiting cards of Jasvir Singh. All the articles aforesaid were duly sent to the forensic laboratory for examination. The post mortem on the dead body was carried out by Dr. Mrs. Gurinder Chawla alongwith a team of two Doctors at about 2.30 p.m. on 15th February 2005 but no conclusive report as to the cause of death was given but after the report (Ex.PZZ) of the Chemical Examiner was received, the Doctors opined that the cause of death was chloroform and pentazocine poisoning. The Doctors also explained that pentazocine was the chemical name for the drug sold under the

trade name 'Fortwin'. During the course of the investigation, the police also ascertained that the sim card bearing No. 9814783148 had been sold to appellant Jasvir Singh from a dealer M/s Telecom Bullowel owned by Jasvir Singh PW. The call print out of the aforesaid Mobile telephone was also obtained from the service provider, Airtel. On the completion of the investigation, a charge-sheet was filed against the three appellants and a charge was framed against them under Sections 302, 364A, 120B and 201 of the IPC and as they pleaded not guilty, they were brought to trial. In their statements under Section 313 of the Cr.P.C. the appellants pleaded false implication. Appellant Jasvir Singh and his wife Sonia also pleaded an alibi and claimed that they had been present at Amritsar in the clinic of Dr. Daljit Singh so that the latter could get treatment for her eye problem. They also produced, amongst others, Dr. Daljit Singh as a defence witness.

2. The Sessions Judge, Hoshiarpur on an analysis of the evidence, all circumstantial in nature, observed that the chain of circumstances was complete and that there was no room for doubt with regard to the guilt of the appellants. He also observed that as the present matter was a case of ransom and a young person had been done to death, the appellants deserved no mercy and accordingly identifying the case as being in the category of the "rarest of the rare", convicted them for offences punishable under sections 302, 364A, 201 and 120-B IPC and sentenced them to death. The proceedings were thereafter submitted to the Punjab and Haryana High Court for confirmation of the sentence, as provided under Section 366 of the Code of Criminal Procedure. The High Court by its judgment dated 30th May 2008 accepted Murder Reference No.1 of 2007 and confirmed the death sentence. Resultantly, Criminal Appeal No.105-DB/2007 filed by the appellants was dismissed. It is in this background that the matter is before us after the grant of special leave.

3. Mr. A.Sharan, the learned senior counsel for the

appellants has made his submissions under three broad heads; one, that the chain of circumstances and the links in the prosecution evidence were not complete, moreso, as all the witnesses were not only chance witnesses but also related to or associates of Ravi Verma, second that the recoveries made at the instance of the appellants under Section 27 of the Evidence Act could not be taken into evidence as it was the case of the prosecution itself that the appellants had been taken into custody at about 8 p.m. on 15th February 2005 whereas the recoveries had been made on 14th February 2005, and that in any case there was absolutely no evidence to suggest Sonia's involvement in the kidnapping or the murder and that her case would, at its worst, fall under Section 201 of the IPC as an attempt to destroy evidence, and finally the death sentence was not warranted as the case was based exclusively on circumstantial evidence and did not fall in the category of the rarest of the rare case.

4. These arguments have been stoutly controverted by Mr. Jaspal Singh, the learned senior counsel for the complainant and by Mr. Kuldip Singh the Counsel representing the State of Punjab. It has been submitted that the circumstances essential for conviction on the basis of circumstantial evidence were complete inasmuch that there was evidence to show that the deceased had been kidnapped for ransom from outside the school and while he was being whisked away, had been seen by several trustworthy witnesses, that the purchase of chloroform and fortwin injections had also been proved by independent evidence and the fact that the appellants had been seen near village Daulatpur, from where the dead body had been recovered at their instance, by at least two witnesses whose presence too had been proved beyond doubt and the fact that the motive was kidnapping for ransom as the impression was that the father of the deceased, being a goldsmith, was reputedly a rich man and therefore in a position to pay up to save his son. It has been submitted that the factum of the telephone calls made to the telephone of Ravi Verma by

Jasvir Singh which had been recorded on the instructions of the police or from his Mobile No. 9814783418 and that the voice had been matched with the voice sample taken from Jasvir Singh proved that it was the appellants and the appellants alone who were guilty of the ghastly crime. It has also been submitted by Mr. Jaspal Singh that Section 27 of the Evidence Act envisaged recovery from a person "accused of any offence, in the custody of a police officer" and as admittedly, the appellants had been taken to custody late on the evening of the 14th February 2005 but had been formally arrested the next day at 8 a.m., would have no adverse effect on the recoveries made earlier. Controverting Mr. Sharan's submission with regard to the sentence, it has been submitted that kidnapping for ransom and murder, individually envisaged a death sentence and taken cumulatively, the offences fell in the rarest of the rare cases category, as held by this Court in *Bachan Singh v. State of Punjab* and as such the death penalty was justified.

5. We now examine the evidence under the broad heads delineated by Mr. Sharan. It has been submitted that the chain of circumstances was not complete. It has first been submitted by Mr. Sharan that the statement of Naresh Kumar (PW) with regard to the borrowing of the Alto car by Vikram Singh @ Vicky on the morning of 14th February 2005 had not been proved on record and that it was doubtful as to whether this car had actually been used. It has been highlighted that there was no evidence to suggest that the car in question was indeed the one belonging to Naresh Kumar as the colour of the car owned by him was "Miami Gold" and the very description suggested that it was a shade of Gold and not Grey or Silver, as had been stated by PWs. Naresh Kumar, Baljeet Kumar Saini, Satish Kumar and Kulwant Kaur (PW1), the Clerk from the Office of the DTO, Hoshairpur. It is true that the colour of the Alto Car is said to be Miami Gold but it is significant that in the cross-examination of all the witnesses referred to above and in particular PW3, PW13 and PW19 who had deposed that the colour was silver grey not a single question had been put as to

the fact that the car was gold in colour and not grey. The only inference that can flow from this omission in the cross-examination is that "Miami Gold" was in fact a trade name and not an indication of the actual colour of the car. It is also significant that PW's Naresh Kumar, Baljeet Kumar Saini and Satish Kumar had absolutely no animosity against the appellants which could motivate them to give a false statement as to the colour of the vehicle. Naresh Kumar in fact deposed that the car had been taken by Vicky, his son's friend, at about 7.30 a.m. and had been returned at about 10.30 a.m. or so the same morning. This circumstance fits in with the prosecution story that Vikram Singh and Jasvir Singh had been seen by PW Baljeet Kumar Saini with Amit deceased and a short while later Satish Kumar PW had heard the noise of "bachao bachao" and on looking in that direction had seen a silver grey coloured car being driven away from the DAV School at a very high speed with one human foot protruding outside the car window. It is significant that this information had been conveyed on telephone to the police as well.

6. Mr. Sharan has also dubbed PW13 Baljeet Saini and PW19 Satish Kumar as chance witnesses whose statement could not be relied upon. He has seriously challenged the conduct of PW13 Baljeet Saini, statedly a friend of the complainant family for 25 years, and has pointed out that though he had seen the kidnapping at 8.30 a.m. on the morning of the 15th February 2005 yet, contrary to the behaviour of a close friend, he had gone on to a pilgrimage to Chintpurni and had returned late the same evening and though information about the kidnapping had been given to him, he had not got in touch with Ravi Verma that evening and had chosen to keep silent. We are unable to accept this submission. Baljeet Kumar has given a cogent explanation as to the circumstances under which he had seen Abhi Verma being kidnapped and taken away in the Alto Car. He deposed that he had come out of his house at about 8.30 a.m., which was admittedly on the way leading to the DAV School, to see off the children of a relative who had

to take a Rikshaw to school and it was at that crucial moment that he had seen Abhi Verma being innocently taken away by Vikram Singh and Jasvir Singh in the grey Alto Car Ex.P4 which was also identified by him. He also stated that on his return from Chintpurni he had tried to contact to Ravi Verma but his telephone remained continuously engaged. It is also extremely significant that this witness was in a position to recognize Vikram Singh as he (Vikram Singh) was running a computer centre where Saini was undergoing training. Likewise, he knew Jasvir Singh and Sonia from those days as they too would often visit Vikram Singh in the computer centre.

7. It is also relevant that when Baljeet Saini had seen the Alto Car driven being away, it appeared to be a normal transaction as the boy appeared to be going willingly with his kidnappers. It is, therefore, obvious that his suspicion about anything amiss could not have been raised at any stage prior to his return from Chintpurni. Criticism of PW Satish Kumar is equally misplaced. Admittedly, this witness was the owner of a bakery shop at Shimla Pahari and it was while he was outside the shop that he had heard the screams of "Bachao Bachao" and on looking in that direction had seen a car being driven away at a high speed and a human foot protruding out of the car window and on seeing this unusual activity the owner of Laxmi Steels, Satish Kumar's neighbour, had informed the Police on telephone. Further, Satish Kumar clarified that as he was running a bakery which attracted customers from 8.00 or 8.30 a.m. onwards and for that reason it was his practice to open his shop early. It is also significant that this witness was not in any way connected with Ravi Verma, the complainant, and that they were not even known to each other. Mr. Jaspal Singh has also cited *Rana Partap & Ors. vs. State of Haryana* 1983(3) SCC 327 as to the meaning of the expression "chance witness".

> "**3.** There were three eyewitnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned counsel described both the independent witnesses as "chance witnesses" implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed on a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence."

Applying the above broad principles to the facts of the present case, we find that the presence of PW Baljeet Saini and PW Satish Kumar was natural at the places they professed to be in and they cannot, therefore, be dubbed as chance witnesses.

8. There is yet another material circumstance with regard to the unfortunate incident. This is the medical evidence. As already indicated above, the dead body had been recovered on the morning of 15th February 2005 and had been subjected to a post-mortem by a Board of Doctors headed by PW-14 Dr. Gurinder Chawla at 2.30 the same afternoon. The Board was

called upon to examine the allegation that the deceased had died of a poisonous or intoxicating injection or of suffocation on account of a tape having been put over his mouth. As the post-mortem did not indicate any of these conditions, the viscera was taken from the body and sent to the chemical examiner. On the receipt of the chemical examiner's report Ex.PZZ, the Board opined that the cause of death was Chloroform and Pentazocine poisoning. Dr. Chawla further explained that Fortwin was the trade name for the chemical Pentazocine and that the maximum normal dose for Fortwin was 0.5 ml to 1 ml. and that anything in excess of 1ml. would be a fatal dose. She further clarified that Chloroform, which was an anesthetic, earlier used during surgery, was not being used any more because of its known toxicity. In cross-examination, however, the Doctor admitted that the quantitative analysis regarding the Chloroform and Pentazocine had not been made by the Chemical Examiner and she further revealed the existence of two pin-point brown coloured marks on the lateral side of the right buttock which was the usual side for the administration of an injection.

9. The evidence of the Medical Board has to be scrutinized in the light of the evidence pertaining to the purchase of the Fortwin injections and the Chloroform. The first witness in this connection is PW4 Anand Kumar the owner of a shop called Scientific Sales Corporation at Hoshiarpur. He deposed that he knew the appellants as they were all residing near his house. He further went on to say that on the 11th February 2005 he had been present in his shop at 4.00 p.m. when the appellants had come to him and told him that they wanted to purchase Chloroform for a student who had to undergo a practical examination in a Science subject. He further stated that he had sold a bottle of 500 ml Chloroform manufactured by Glaxo and also issued Bill No.347 dated 11th February 2005 Ex.P6 pertaining to the sale. This witness also produced the purchase bill Ex.P7 indicating that the Chloroform had earlier been purchased by him for sale in his shop and after a comparison

of the batch number on the bottle with the Bills Ex.P6 and P7, testified that it was the same bottle of Chloroform that had been sold to the appellants. We have gone through the cross-examination of this witness and see that some insignificant questions had been put to him and no material circumstance could be elicited by the defence. It is extremely relevant to notice that not a single question was put to him as to his connection, if any, with the complainant party. The evidence of Bhanu Aggarwal PW5, another shop keeper, is equally significant as the 5 Fortwin injections of 1 ml. each had been purchased by the appellants vide Bill No. 1951 dated 11th February 2005 Ex.P9 on the basis of a prescription from a veterinary Doctor that had been produced by them. PW5 also brought the original bill whereby he had purchased the injections from Sood Medical Traders vide Bill No. L-009075 dated 15th December 2004. The fact that the prescription for Fortwin injection had been produced on account of a prescription from a veterinary Doctor is fortified by the fact that on the Bill Ex.P9 the word "Dog" has been written. It is again of great consequence that not a single question was put to him as well as to his association with the complainant party. The factum of the over dose of Chloroform and pentazocine administered to the deceased is clear from the fact that the recoveries show that almost the entire bottle of Chloroform (500 ml.) and all five Fortwin injections i.e. 5 ml. had been used by the kidnappers and that this lethal combination of Chloroform and an over dose of pentazocine was the cause of death. The medical evidence, thus, is another link in the chain of circumstances.

10. We now take up the question of Sonia's culpability. The above evidence reveals that the conspiracy had been hatched by the three appellants and the first step towards the execution of the conspiracy was taken on the 11th February 2005 at 11.00 a.m. when the Fortwin injections were purchased from Bhanu Aggarwal PW5, the second step was the purchase of Chloroform at 4.00 p.m. the same afternoon from PW4 Anand Kumar and the third the borrowing of the Alto car from Naresh

Kumar on the morning of 12th February 2005. These three transactions are intimately connected with the kidnapping and subsequently the murder of Abhi Verma. In *State of Himachal Pradesh vs. K.L.Pardhan & Ors.* 1987 (2) SCC 17, this Court while examining the concept of criminal conspiracy has observed:

> "In the opinion of the Special Judge every one of the conspirators must have taken active part in the commission of each and every one of the conspiratorial acts and only then the offence of conspiracy will be made out. Such a view is clearly wrong. The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences."

It was observed in *Keshar Singh & Ors. vs. State (Delhi Administration)* 1988 (3) SCC 609 that even the post incident conduct of an accused can be taken into account to determine as to whether the criminal act which had been committed was pursuant to a criminal conspiracy. In the case in hand, we find categorical evidence with regard to the purchase of the Fortwin injections and Chloroform and merely because PW Baljeet Saini and Satish Kumar did not refer to the presence of Sonia in the Alto car at the time of the actual kidnapping would not mean that she was not privy to the conspiracy. Moreover, the evidence also reveals that she was attempting to destroy the evidence relating to the kidnapping when she had been apprehended. We are, therefore, of the opinion that the second set of incriminating circumstances is the medical evidence and the conspiracy hatched between the three appellants including Sonia leading to the kidnapping and murder.

11. Mr. Sharan, being alive to the fact that in a matter resting on circumstances, the evidence of recovery becomes extremely relevant, has dwelt on this aspect in extenso. He has first and foremost pointed out that the recoveries made on the disclosure statements of the appellants were not admissible under Section 27 of the Evidence Act as the appellants were not under arrest at that point of time. He has taken us to the evidence of Sub-Inspector Jeevan Kumar, who had led the police party which had raided the house of Darshan Kaur, on the evening of 14th February 2005, pursuant to secret information that Abhi Verma was being detained in that house and had deposed that as the raiding party entered the premises they had found Vikram Singh and Jasvir Singh in the drawing room, and on seeing the police they had tried to run away but had been apprehended. A further search of the house had been made and Sonia, who was in the rear court-yard, was caught while burning some clothes by pouring alcohol on them. The police party had, thereafter, conducted a minute search of the house and several items used in the commission of the crime i.e. a partly used bottle of Chloroform, nylon socks, partly burnt clothes, a school bag containing books, copies and answer sheets in the name of the deceased, were duly taken to the possession. The appellants had thereafter been interrogated and Jasvir Singh had revealed in his statement Ex.PFFF that he had carried the dead body in his Chevrolet Car No. PB-08(T) AL1718 and thrown it in the area of village Daulatpur. This statement was signed by Jasvir Singh and attested by Manohar Lal Verma PW-30, Kulwinder Singh and Shiv Raj Singh, ASI. Vikram Singh and Sonia appellants had made similar statements and they too were duly recorded. The appellants had thereafter disclosed that the Alto Car was parked in the house of Naresh Kumar PW in Bahadurpur Enclave and the police party had reached that place and taken it into possession as well and on a search thereof a black coloured purse Ex.P.34 containing a passport size photograph of the deceased Ex.P36 and two applications for grant of leave Ex.DD and DE were recovered therefrom. The appellants had thereafter led the

police party to Mohalla Katcha Tobba and the aforementioned Chevrolet Car had been taken into possession and on a search thereof (amongst other items) a pouch containing visiting cards of Jasvir Singh were recovered. The dicky of the car had also been vacuumed with the help of a vacuum cleaner and the rubble had been taken into possession. Both the cars were subjected to examination by finger print experts who lifted several finger prints which were duly dispatched to the laboratory. The question raised by Mr. A. Sharan as to whether the recoveries pursuant to the disclosure statements could be taken into consideration or not has to be decided on these facts. It bears repetition that the appellants were under grave suspicion, suspected to be accused in a case of kidnapping and murder, and Vicky and Jasvir Singh had attempted to run away and Sonia was in the process of destroying evidence, when they had been apprehended and put in police custody whereafter they had made their disclosure statements. Section 27 of the Evidence Act reads as under:

> *"27. How much of information received from accused may be proved* - Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

A bare reading of the provision would reveal that a "person must be accused of any offence" and that he must be "in the custody of a police officer" and it is not essential that such an accused must be under formal arrest. In *State of Uttar Pradesh vs. Deoman Upadhyaya* AIR 1960 SC 1125 this is what a Constitution Bench had to say while examining the scope and applicability of Section 27. The Bench relying on the observations made by the Privy Council in *Narayan Swami vs. Emperor* (AIR 1939 PC 47) observed as under:

> "Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions i.e. of statements made by a person stating or suggesting that he has committed a crime. By Section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By Section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under Section 24 and complete under Section 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in Section 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in Pakala Narayan Swami v. Emperor by the Judicial Committee of the Privy Council, "Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The adjectival clause "accused of any offence" "is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides. "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against a person accused

of any offence". By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas Section 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, Section 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in the form of a proviso states "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved". The expression, "accused of any offence" in Section 27, as in Section 25, is also descriptive of the person concerned i.e. against a person who is accused of an offence, Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable insofar as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by Section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly

relates to the fact discovered. By Section 26, a confession made in the presence of a Magistrate is made provable in its entirety."

12. Mr. Sharan has, however, referred us to Section 46(1) of the Code of Criminal Procedure to argue that till the appellants had been arrested in accordance with the aforesaid provision they could not be said to be in police custody. We see that Section 46 deals with 'Arrest how made'. We are of the opinion that word "arrest" used in Section 46 relates to a formal arrest whereas Section 27 of the Evidence Act talks about custody of a person accused of an offence. In the present case the appellants were undoubtedly put under formal arrest on the 15th February 2005 whereas the recoveries had been made prior to that date but admittedly, also, they were in police custody and accused in an offence at the time of their apprehension on the 14th February 2005. Moreover in the light of the judgment in the Constitution Bench and the observation that the words in Section 27 "accused of any offence" are descriptive of the person making the statement, the submission that this Section would be operable only after formal arrest under Section 46(1) of the Code, cannot be accepted. This argument does not merit any further discussion.

13. Some argument has been raised by Mr. Jaspal Singh as to whether (even assuming that Section 27 of the Evidence Act could not be applied to the facts of the present case) yet the conduct of the appellants when the raid had been carried out in the house of Darshan Kaur by Sub-Inspector Jeevan Kumar was such as would be a material circumstance in terms of Section 28 of the Evidence Act. We are of the opinion that in the light of the above findings, we are not called upon to examine this aspect of the matter.

14. The question that now falls for consideration is as to the credibility that can be attached to the recoveries that had been made. Mr. Sharan has been at pains to point out that the

recovery witnesses could not be believed as they were interested parties and it appeared that the recoveries had, in fact, been manipulated. He has referred primarily to the fact that Manohar Lal (PW30) who was a very close relative of Ravi Verma, had attempted to withhold this information whereas the other witness of the recoveries was Sub-Inspector Jeevan Kumar, the Investigating Officer himself.

15. It is indeed true that most of the recoveries have been witnessed by these two and that PW Manohar Lal did finally admit that Ravi Verma was his nephew and the deceased was his grandson. We find nothing unusual in Manohar Lal's statement. It hardly needs emphasizing that independent witnesses are not forthcoming these days and the prosecution has per force to rely on witnesses who are relatives or associates of the complainant. This in a way also ensures that the witnesses would not leave out the true culprits. We find from the statement of PW Manohar Lal that as a consequence of the disclosure statement made by the three appellants, the Alto car had been recovered from Naresh Kumar (PW), the black Chevrolet car from the area of Katchha Tobba vide Memo Exhibit-PJJJ and on the search of the car, various other items such as the photographs and purse of the deceased, had been taken into possession under seizure Memo Ex.PLL. It is also significant that on 16th February 2005 a silver ring belonging to the deceased had been recovered at the instance of Vikram Singh and five empty ampules of Fortwin injections, a syringe, a plastic bag with hyperdemic needles and a roll of medical tape at the instance of Jasvir Singh from behind the kothi of Darshan Kaur and were taken to possession vide Memo Ex.PMMM and PNNN respectively.

16. It is also significant that Jasvir Singh also disclosed that he had kept concealed the dead body in the fields of village Daulatpur and that it had been removed from Darshan Kaur's house in the Chevrolet car belonging to him and the three appellants had further revealed that the dead body had been

disposed of in the fields of village Daulatpur and the dead body was recovered and taken into possession by Memo Ex.PGGG signed by Manohar Lal as also Sub-Inspector Jeevan Kumar. We are unable to accept Mr. Sharan's bare submission that the evidence of Manohar Lal and Sub-Inspector Jeevan Kumar should not be believed as they were interested in the successful outcome of the prosecution, as no other material adverse circumstance has been brought to our notice.

17. The matter does not end here. As already indicated above, Ravi Verma had been called on the telephone repeatedly on his landline No.226059 from Mobile No.98147 83418. Admittedly, the landline telephone is fixed in the shop of Ravi Verma and it has come in evidence that the card aforesaid had been purchased on 14th February 2005 by Jasvir Singh appellant. PW14 stated that Jasvir Singh had come to him in hurry and demanded a connection which had been supplied to him after he had undertaken he would supply the identification papers later on. PW12 Jaswinder Singh who had a dealership for pre-paid Airtlel Sim cards deposed that a pre-paid connection No.98727-12583 had been sold to Iqbal Singh on 10th July 2004 and Iqbal Singh has come as PW16 and deposed that he had sold the aforesaid Airtel connection to Jasvir Singh appellant. PW15 Rohit Khullar also revealed that he had sold two post paid connections No.98729-99441 and 98729-99442 on 14th August 2002 to Vikram Singh and this fact was confirmed by PW17 Kamalpreet Singh, Executive, Human Resources (HR) Bharti Cellular Ltd., Mohali. Simarjeet Singh (PW 21) of the telephone department appeared and testified that on the directions of the SSP, Hoshiarpur several telephone numbers including 226059 had been kept under observation and the computer print out of the calls made to and from the said number had been supplied to the police. He further deposed that the record of incoming calls on telephone No.226059 running into five pages had been supplied to the police. PW40 Saurabdeep Singh, Executive Regulatory Affairs, Spice Communication Pvt. Ltd., Mohali also supplied the call

details of Mobile No.98147 83148. It is submitted by Mr. Sharan that there was something amiss in the evidence of PW14 Manjeet Singh who deposed that the Mobile connection had been sold to Jasvir Singh on 14th February 2005, but it appeared from the call statement Ex.PYYY that the first, second and third calls from this Mobile had been made on 19th January 2005 and thereafter several calls had been made on 14th February 2005. Undoubtedly, there is some discrepancy in the records vis-à-vis the ocular statements but the fact remains that this mobile was being used by Jasvir Singh to call Vikram Singh on his Mobile No.98729-99441 and that they had been talking to each other much before the present occurrence and that even on the day of crime, they had talked to each other at 7.30 on their Mobiles. Likewise, it has come on record that the several phone calls had been received by Ravi Verma on the landline 226059 and were duly recorded by a tape recorder and the incoming number identified by an ID caller machine. It is significant that the conversations recorded on the tape recorder were compared by an expert with the sample voice of Jasvir Singh and they were found to match with each other.

18. We also find that the prosecution has been able to show that the finger prints lifted by the police officers from the Alto and Chevrolet car belonged to Vikram Singh and Jasvir Singh respectively. It is significant that the Chloroform bottle recovered from Darshan Kaur's residence was also examined and the thumb impression of Jasvir Singh was detected thereon.

19. Mr. Sharan has referred us to the defence evidence in order to prove the alibi of Jasvir Singh and Sonia. Dr. Daljeet Singh, a very reputed Eye Surgeon of Amritsar, has appeared as DW1. He deposed that Sonia had been operated by him on 13th May 2002 and that she had come several times to his clinic for a re-check and that she had visited the hospital on the 11th February 2005 and had been attended by one Jaswinder Singh. When cross-examined, however, the Doctor admitted

that though the OPD in the hospital was computerized there was no entry in the name of Sonia as on 11th February 2005. Moreover, even assuming that Sonia had indeed gone with her husband to Amritsar on the 11th of February 2005, as claimed, it was possible for them to go there and return in time to purchase the Fortwin injections and the Chloroform etc. on 11th February 2005. Doctor Daljeet Singh's evidence, therefore, does not in any way prove the alibi of Jasvir Singh and Sonia.

20. We must also emphasize that in a case of circumstantial evidence some uncertainty is bound to occur in the statements of the prosecution witnesses and that this flaw is occasioned by the fact that what they have witnessed is often an innocent transaction and it is only after the event that it transpires that what had been was a crime or a prelude to the commission of a crime. A witness, therefore, does not assimilate or imbibe the scene as carefully as he, would, say in a case where he was an eye witness to a murder. Also consider the conduct of PW Baljeet Kumar who saw nothing untoward in Abhi Verma and his kidnappers moving together, and being unconcerned went off to Chintpurni. Contrast this with the reaction of PW Satish Kumar who had seen the car being driven away at a fast speed and someone calling for help, on which he had immediately informed the police. To our mind, while it is undoubtedly for the prosecution to prove its case beyond doubt but the standard to be applied for evaluating the evidence in a case of circumstantial evidence vis-à-vis an eye witness account would vary and a slightly different yardstick for assessment has to be applied. It is for this reason that courts have repeatedly emphasized that the chain of circumstances against an accused in a case of circumstantial evidence must be directed only towards his guilt and admit of no other hypothesis, whereas in the case of the evidence of an eye witness a chain of circumstances is not required and one good eye witness is sufficient to record a conviction. In the present case, however, there is the direct and eye witness evidence of PW Baljeet Saini who had seen Vikram and Jasvir (whom he

knew earlier) kidnapping Abhi Verma from outside the school.

21. Three death sentences have been awarded in this case to the appellants herein, Vikram Singh being about 26 years of age as on the date of incident, Jasvir Singh about 24 and his wife Sonia, slightly older, at 29 years.

22. Much argument and passion have been expended by the learned counsel as to the propriety of the death sentence in the facts of the case. Mr. Sharan has emphasized that as the prosecution story rested on circumstantial evidence, this fact by itself was a relevant consideration in awarding the lesser sentence. It has also been pleaded that the appellants were all young persons and the possibility that they could be reformed during their incarceration could not be ruled out and this too was a factor which had to be considered in awarding the sentence. He has also referred us to *Dhondiba Gundu Pomaje & Ors. vs. The State of Maharashtra* 1976 (1) SCC 162 that an accused of young age should not ordinarily be meted out a death sentence. Reference has also been made by Mr. Sharan to some observations in *Bachan Singh vs. State of Punjab* (1980) 2 SCC 684 that the mitigating circumstance in favour of an accused must also be factored in. It has also been pleaded that the additional circumstance in favour of Sonia was that she was not only young but she was also a lady and as it was possible that she had been influenced into the unpleasant situation by her husband, the death sentence should not be given to her in any case. Mr. Sharan has also placed reliance on two recent judgments of this Court in *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* (2009) 6 SCC 498 and an unreported judgment in *Sushil Kumar vs. State of Punjab* Criminal Appeal No.670 of 2009 decided on September 1, 2009 whereby it has been indicated that the latest trend in jurisprudence was that the death penalty should not be awarded except in the most extraordinary of cases and that the position and background of the appellant-accused was to be kept in mind in evaluating the circumstances for and

against the imposition of the death sentence.

23. These submissions have been strongly controverted by Mr. Jaspal Singh and Kuldeep Singh the learned counsel representing the complainant and the State of Punjab respectively. It has been emphasised that Section 364-A and 302 both provided for the imposition of a death sentence and as kidnapping for ransom was perhaps the most heinous of offences, no latitude should be shown to the appellants as they had poisoned a young boy to death for money. The learned counsel have also placed reliance on *Henry Westmuller Roberts vs. State of Assam* (1985) 3 SCC 291 and *Mohan & Ors. vs. State of T.N.* (1998) 5 SCC 336 where the kidnap victim was a young boy and had subsequently been done to death, the Court had awarded the death penalty.

24. Some of the judgments aforesaid refer to the ongoing debate as to the validity and propriety of the death sentence in a modern society. There are the moralists who say that as God has given life, he alone has the right to take it away and this privilege cannot be usurped by any human being. There are others who believe that the death sentence cannot be taken as a retributive or deterrent factor as the statistics show that the possibility of a death sentence has never acted as a deterrent to serious crime. The theory which is widely accepted in India, however, is that as the death penalty is on the Statute Book it has to be awarded provided the circumstances justify it. The broad principle has been laid in *Bachan Singh's* case (supra) as the "rarest of the rare cases". Bachan Singh case has been followed by a series of judgments of this Court delineating and setting out as to the kind of matters that would fall within this category. In *Machhi Singh & Ors. vs. State of Punjab* (1983) 3 SCC 470 this Court gave an indication as to what could constitute this category. It was observed as under:

> "32. The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first

place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of his doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law endorsed by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others it if suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

1. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

11. Motive for commission of murder

34.When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

25. It was further observed that in determining the culpability of an accused and the final decision as to the nature of sentence, a balance sheet of the aggravating and mitigating circumstances vis-à-vis the accused had to be drawn up and in doing so the mitigating circumstances had to be given full weight so that all factors were considered before the "option is exercised". In *Santosh Kumar's* case (supra) this Court

further expounded on the propriety and justification in awarding the death sentence. The broad principle that emerges from all the judgments is that in evaluating the category of the rarest of the rare, the facts of that particular case must be given pre-dominant consideration. As noted above, the High Court in the present matter while determining the various factors against the appellants has observed as under (verbatim reproduction) :

"In the instant case, from a careful reading of facts; minute analysis of evidence on records, and due consideration of rival submissions, we notice the following special reasons to hold that this case has acquired enormity (sic) of that kind which brings it in the rarest of rare category and for those reasons, we accept death reference and confirm death sentence:

(1) This is a case that involves kidnapping of a school going innocent boy for ransom and from discussion on motive, as above, it appears that the accused had raised a demand of Rs.50,00,000/- from father of the deceased boy who was an established jeweler of Hoshiarpur;

(2) This has come in evidence of father of the deceased, Ravi Verma (PW27), that accused Vikram Singh @ Vicky was known to his family and thus, under that acquaintance, accused Vikram Singh @ Vicky and Jasvir Singh committed kidnapping of the boy while betraying his trust in them;

(3) That all three accused-appellant committed offence of murder in a pre-planned manner by using scientific methods and injecting fatal dozes of chemicals in order to ensure that the offence was not detected and they were not fastened with criminal liability;

(4) Right from pre-planning through death till recovery of dead body of the deceased, all three accused-appellants remained closely associated;

(5) It appears that murder of the deceased was committed by administering chloroform and fortwin injections in heavy dozes after tying his both hands and legs and putting a tape on his mouth. Chloroform which was used to make the boy unconscious is now not given as anesthetic drug to any patient and fortwin is administered only in moderate dozes of 0.5 ml o 1 ml at a time after a gap of 8 hours. However, at the time of recovery of ampoules, each of 1 ml. quantity, all 5 ampoules were found to be empty. As such, the deceased was administered 5 ml. fortwin just within 24 hours apart from giving heavy dozes of chloroform. Thus, soon after kidnapping, the deceased was reduced to a corpus with the help of chemicals and he was done to death in inhuman, diabolical and dastardly manner;

(6) The deceased was the only son on his parents and incident of his kidnapping had sent a shock wave throughout the town of Hoshiarpur and in adjacent areas and further it also shocked the cumulative conscious of community causing hue and cry all over;

(7) This is not a case of murder simplicitor but the accused persons have also been held guilty under Section 364-A IPC which was brought in statute book in order to curb the menace of kidnapping for ransom and even independent of penal provisions of Section 302 IPC, this Section also prescribes the punishment of death sentence in fit cases; and

(8) This is not a case with even an iota of evidence to

show enmity between parties, therefore, this is a case of cold blooded murder committed only in order to extract a heavy ransom of Rs.50,00,000/- which is evident from evidence of Ravi Verma (PW27) father of the deceased that every time, while calling on phones, the kidnapper gave him threats that if he wanted his son to be alive, he should immediately arrange for ransom amount of Rs.50,00,000/-. It appears as the police became active, the accused could not extract the ransom and out of panics, poisoned the boy to death by administering heavy dozes of chloroform and fortwin. However, as accused Vikram Singh @ Vicky was known to the family and the body had seen them, in all probabilities, the accused would not have spared his life in order to destroy evidence even in case of having received the ransom amount. Thus, from very beginning, the accused had kidnapped the boy for his elimination finally in either case (whether ransom amount was paid or not).

On the other hand, Mr. Sharan has been at pains to point out that the appellants were young persons, and Sonia a lady as well, who could be rehabilitated and the pre-dominant trend being against the imposition of the death penalty as of today, and the evidence being circumstantial in nature, the death penalty should not be awarded.

26. The learned counsel for the Complainant and the State have, however, pointed out that Section 364-A had been introduced in the Penal Code by virtue of Amendment Act 42 of 1993 and the purpose for its introduction was given as under:

"Kidnappings by terrorists for ransom, for creating panic amongst the people and for securing release of arrested associates and cadres have assumed serious dimensions. The existing provisions of law have proved to

be inadequate as deterrence. The Law Commission in its 42nd Report has also recommended a specific provision to deal with this menace. It was necessary to amend the Indian Penal Code to provide for deterrent punishment to persons committing such acts and to make consequential amendments to the code of Criminal Procedure, 1973."

A plain reading of the Objects and Reasons which led to the amendment shows the concern of Parliament in dealing with kidnapping for ransom a crime which called for a deterrent punishment, even in a case where the kidnapping had not resulted in the death of the victim. The statistics further reveal that kidnapping for ransom has become a lucrative and thriving industry all over the country which must be dealt with, in the harshest possible manner and an obligation rests on Courts as well. Courts to lend a helping hand in that direction. In the case before us, we find that not only was Abhi Verma kidnapped for ransom which acts which would by itself attract the death penalty but he was murdered in the process. It is relevant that even before the aforesaid amendments, this Court in Henry's case (supra) observed that death sentence could be awarded even in a case of kidnapping and murder based on circumstantial evidence holding that:

"We are of the opinion that the offences committed by Henry, the originator of the idea of kidnapping children of rich people for extracting ransom, are very heinous and pre-planned. He had been attempting to extract money from the unfortunate boy's father, PW23 even after the boy had been murdered by making the father to believe that the boy was alive and would be returned to him if he paid the ransom. In our opinion, this is one of the rarest of rare cases in which the extreme penalty of death is called for the murder of the innocent young boy, Sanjay in cold blood after he had been kidnapped with promise to be given sweets. We, therefore, confirm the sentence of death and the other sentences awarded to Henry by the High Court

under Sections 302, 364, 201 and 387 IPC and dismiss Criminal Appeal No. 545 of 1982 filed by him."

Moreover, as already indicated, we have the eye witness statement of PW Baljeet Saini with regard to the kidnapping of Abhi Verma from outside the school.

27. Likewise in *Mohan's* case (supra) which again related to a kidnapping for ransom and murder under Sections 364-A and 302 of a young boy aged 10 years, while assessing the aggravating and mitigating circumstances, it was observed that the former far outweighed the others. It was held as under:

> "So far as the appellant Gopi is concerned, he not only did participate by pulling the rope around the neck of the boy, as already narrated, but went to his house and brought a coir rope. After removing the rope from the neck of the boy, he encircled the coir rope again around the boy's neck and the pulled the said rope for about ½ a minute and the boy stopped breathing. Thereafter he took out one Keltron TV box from underneath the cot and packed the boy in the box. These aggravating circumstances on the part of accused Mohan and Gopi clearly demonstrate their depraved state of mind and the brutality with which they took the life of a young boy. It further transpires that after killing the boy and disposing of the dead body of the boy, Mohan also did not lose his lust for money and got the ransom of Rs.5 lakhs.

We must also emphasize that in this tragic scenario and in the drawing up of the balance sheet, the plight of the hapless victim, and the abject terror that he must have undergone while in the grip of his kidnappers, is often ignored. Take this very case. Abhi Verma was only 16 years of age, and had been picked up by Vikram Singh who was known to him but had soon realized the predicament that he faced and had shouted for help. His terror can further be visualized when he would have heard the threatening calls to his father and seen the

preparations to do away with him, which included the taping of his mouth and the administration of an overdose of dangerous drugs. The horror, distress and the devastation felt in the family on the loss of an only son, can also be imagined.

28. Mr. Sharan has, however, placed reliance on some observations in *Santosh Kumar's* and *Sushil Kumar's* cases (supra), as already indicated above. These judgments have merely rested on the earlier position of law, and laid great emphasis on the drawing up of the balance sheet and have gone into the development of the jurisprudence and philosophy with regard to the imposition of the death penalty under Indian law. *Sushil Kumar's* case (supra), cited by Mr. Sharan sentence pertained to a death sentence awarded for the murder of a wife, a son aged 6 years and a daughter aged 4 years of the appellant. The judgment of the Sessions Judge was confirmed by the High Court in reference. The matter thereafter came to this Court by way of special leave. This Court after hearing the matter at length drew up the balance sheet envisaged in Bachan Singh's and *Machi Singh's* cases (supra) and held that the mitigating circumstances far outweighed the aggravating ones and these were delineated as under:

> "(i) appellant had been unemployed for last 7 to 8 months.
>
> (ii) he used to borrow money from others to meet his daily needs.
>
> (iii) he himself had consumed 'sulphas tablets' to commit the suicide even though not medically established.
>
> (iv) he therefore, was keen that his whole family should be finished and no one should be alive to suffer the pain and agony alone.
>
> (v) he was fed up with his life and was seen in a perplexed condition by PW-4.

(vi) in any case, he cannot be a threat to the society and there are fairly good chances of his reformation as he has learnt sufficient lesson from it.

Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members – his wife, minor son and daughter.

There is nothing on record to show that appellant is a habitual offender. He appears to be a peace loving, law abiding citizen but as he was poverty stricken, he thought in his wisdom to completely eliminate his family so that all problems would come to an end. Precisely, this appears to be the reason the offence of murder. No witness has complained about his bad or intolerable behaviour in the past. Many people had visited his house after the incident is indicative of the fact that he had cordial relations with all. He is now about 35 years of age and there appear to be fairly good chances of the appellant getting reformed and becoming a good citizen."

29. This judgment can by no stretch of imagination advance the case of appellants before us. The balance sheet has been drawn up by the High Court. We adopt the same.

30. We, however, do find some reason in favouring Sonia, the lady appellant, wife of Jasbir Singh. Keeping in view the overall picture and the fact that at the time when Abhi Verma had been kidnapped from outside the DAV School, Sonia had not been present and that she may have got embroiled in the conspiracy with her husband and Vikram Singh on account of having come under their pressure, some leniency must be shown to her. We are, therefore, of the opinion that insofar as Sonia is concerned, her death sentence ought to be converted into one of life. We order accordingly. The appeal of the other two appellants, however, is dismissed.

N.J. Appeals disposed of.

THE COMMISSIONER OF CENTRAL EXCISE, GOA & ANR

v.

M/S. FUNSKOOL (INDIA) LTD. & ANR.

IA Nos. 8-10 of 2009

IN

(Civil Appeal Nos. 3460-3462 of 2004)

JANUARY 25, 2010

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

Central Excise and tariff act, 1985:

First Schedule – Chapter 95 – Heading 95.04 – Items 'Snake and Ladder', 'Monopoly' and 'Scrabble/Upwards' – Classification of – Order of Supreme Court dated 12.11.2009 – Clarification of – The appeal filed by the Department dealt with 34 items (and not with 12 items as mentioned in the order dated 12.11.2009) – It is clarified that 3 out of 34 items dealt with 'Scrabble'/'Upward', 'Monopoly' and 'Snake and Ladder' – Applying the judgment in M/s Pleasantime Products, the said three items, namely, 'Snake and Ladder', 'Monopoly' and 'Scrabble/Upwards' stand classifiable under Ch. 95.04 – The matter is remitted to the Tribunal to examine as to whether each of the remaining 31 items would stand covered by CSH 9504.90 or by CSH 9503.00 – For that purpose Tribunal needs to apply the tests enunciated in the judgment in the case of M/s Pleasantime Products – Order – Clarification of – Central Excise Act, 1944 – s.11-A.*

M/s. Pleasantime Products & Anr. v. Commissioner of Central Excise, Mumbai-I* **[2009] 15 SCR 851 – relied on.

Central Excise Act, 1944:

ss. 11-A – Show cause notices – Limitation – HELD: On

the facts and in the circumstances of the case, in respect of show-cause notice dated 23.11.2001, claim of the Department has got to be confined to the period after October, 2000, and that too, if, at all, the decision on merits in the matter of classification goes against the assessee – As regards show-cause notice dated 1.5.2001, the said notice is within limitation and, therefore, the Department would be at liberty to proceed in accordance with law – Central Excise and Tariff Act, 1985.

Case Law Reference:

[2009] 15 SCR 851 relied on para 3

CIVIL APPELLATE JURISDICTION : IA Nos. 8-10 of 2009

IN

Civil Appeal Nos. 3460-3462 of 2004.

From the Judgment & Order dated 23.1.2004 of the Custom, Excise and Service Tax Appellate Tribunal South Zonal Bench at Chennai in Final Order Nos. 103 to 105 of 2004.

H.P. Raval, ASG, T.V. Ratnam, D. Mohta, B. Krishna Prasad for the Appellants.

M. Chandrasekharan, K.R. Nambiar for the Respondents.

The following Order of the Court was delivered

O R D E R

1. In view of factual errors committed through oversight in stating particulars of items in dispute (though there is no mistake in recording findings/ conclusion), we recall our order dated 12th November, 2009 in Civil Appeal Nos. 3460-3462 of 2004 in the case of Commissioner of Central Excise, Goa & Anr. v. M/s. Funskool (India) Ltd. & Anr. ("FIL" for short).

Accordingly, IA Nos. 8 – 10 of 2009 in Civil Appeal Nos.

3460-3462 of 2004 stand allowed.

2. By consent, Civil Appeal Nos. 3460-3462 of 2004 are taken up for hearing and disposed of.

3. By our judgment dated 12th November, 2009, in the case of M/s. Pleasantime Products and Anr. v. Commissioner of Central Excise, Mumbai – I [Civil Appeal Nos. 4309-4311 of 2008], this Court held that the product "Scrabble/ Upwords" is classifiable under CSH 9504.90 of the First Schedule to the Central Excise and Tariff Act, 1985. The said CSH 9504.90 comes under CH 95.04 which refers to "Articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment". In the afore-stated judgment, we have taken the view that the product "Scabble/ Upwords" falls under CH 95.04 and we have rejected the argument of the assessee that the said product fell under CSH 9503.00 which refers to the words "other toys; reduced-size models; puzzles of all kinds". The decision in the case of *M/s. Pleasantime Products* (supra) was given on 12th November, 2009. On that day, the connected matter was *M/s. FIL* (supra).

4.The appeal filed by the Department in the case of *M/s. FIL* (supra) dealt with 34 items (and not with 12 items as mentioned in our order dated 12th November, 2009, which is now recalled). We may state that three out of 34 items dealt with Scrabble/ Upwords, Monopoly, Snake and Ladder. Applying our judgment in the case of *M/s. Pleasantime Products* (supra), we hold that the said three items, namely, Snake and Ladder, Monopoly and Scrabble/ Upwords stand classifiable under CH 95.04 of Central Excise and Tariff Act, 1985.

5. Subject to the question of limitation, we have discussed hereinafter, we remit the case to the Tribunal with the request to examine as to whether each of the remaining 31 items would stand covered by CSH 9504.90 or by CSH 9503.00. For that

purpose, the Tribunal needs to apply the tests which we have enunciated in our judgment in the case of *M/s. Pleasantime Products* (supra).

6. Now, coming to the question of limitation, we are of the view that, on facts and circumstances of this case, in respect of first show-cause notice dated 23rd November, 2001, the claim of the Department has got to be confined to the period after October, 2000, and that too, if at all the decision on merits in the matter of classification goes against the assessee. As regards second show-cause notice dated 1st May, 2001, the said notice is within limitation and, therefore, the Department would be at liberty to proceed in accordance with law.

7. Before concluding, we may clarify that we have recalled our order dated 12th November, 2009 only to bring about clarity in our order. We could have corrected our order easily by incorporating the correct number of items. However, we thought it best to recall the order and to re-dictate the said order for the sake of clarity.

8. Accordingly, the Civil Appeals filed by the Department are allowed with no order as to costs.

R.P. Appeals allowed.

STATE OF TAMIL NADU & ANR.
v.
A. MANICKAM PILLAI
(Civil Appeal No. 4400 of 2007)

JANUARY 27, 2010

[HARJIT SINGH BEDI AND T.S. THAKUR, JJ.]

Freedom Fighters' Pension – Claim for – Application appended with certificate from co-pensioner – Claim rejected by State Government as the application was not appended with certificate from approved certifier – Writ petition appended with certificate from approved certifier – Single Judge as well as Division Bench of High Court granted the claim – On appeal, held: State Government was not correct in rejecting the claim as the same was recommended by two Collectors and District Level Screening Committee – Requirement of certificate from approved certifier was introduced to curb the difficulty faced by the claimants in getting certificate from co-prisoners Constitution of India—Art. 136.

Respondent's application for grant of freedom fighter's pension was rejected by State Government on the ground that the co-prisoner, whose certificate was appended to the application, was not an approved certifier.

The Respondent filed a writ petition, appending therewith another certificate issued by an approved certifier. A Single Judge of High Court allowed the writ petition. The judgment was affirmed by Division Bench of High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The certificate issued by the co-prisoner

had been rejected by the State Government on the plea that the co-prisoner was not an approved certifier, as required by the Government instructions dated 7th February 1996. The stand of the appellant-State based on the communication dated 7th February 1996 is misplaced. This communication refers to the difficulty being faced by applicants for a freedom fighters' pension in producing co-prisoner certificates from two of the persons mentioned in the Government Order of 16th November 1988. Realizing this difficulty, the State Government by its order dated 7th February 1996 issued a modified and simplified procedure for the grant of certificates with effect from that date. A perusal of this G.O. would reveal that freedom fighter certificates could now be issued by approved certifiers and these were held as sufficient evidence for the grant of a pension. The G.O. further set out the constitution of District Level Screening Committees to be nominated by the Government in consultation with the Collectors concerned and that these committees were required to personally examine the documents produced and decide as to the entitlement of the applicant to the grant of pension and refer the matter for the formal approval to the State Government. [Para 5] [76-A-H]

1.2. In the present case, there are two certificates on record. The matter had also been recommended by two Collectors and the District Level Screening Committee. This was sufficient compliance with the Government Order of 7th February 1996. The Court, is thus, disinclined to interfere in the matter, in exercise of jurisdiction under Article 136 of the Constitution of India. [Para 6] [77-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4400 of 2007.

From the Judgment & Order dated 26.6.2006 of the High Court of Judicature at Madras in Writ Appeal No. 745 of 2006.

T. Harish Kumar (NP) for the Appellants.

S. Ravi Shankar for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. This appeal is an example and a reflection of the way we treat our freedom fighters inasmuch that while we applaud their contributions to the fight for freedom, deny them a pension, which, even if granted, amounts to a pittance and while many who apply are under financial distress, all without exception, wear it as a badge of honour and as a certificate of recognition of their efforts in the struggle for independence.

2. The respondent, A. Manickam Pillai claiming to be a freedom fighter, applied for the grant of a freedom fighter's pension on 30th December 1996. This representation was rejected by the Collector on 21st August 1997. Undeterred, the respondent again filed an application on the 8th May 1998 and after a recommendation by two Collectors and the District Level Screening Committee, it was forwarded to the State Government. This was, however, rejected by the State Government on the ground that in the face of Government Order No.30 dated 7th February 1996 such an application had to be supported by a certificate of a co-prisoner who was a Government approved certifier and the certificate appended had been issued by one Mayandi Bharathi, who was not a Government approved certifier. The respondent thereupon filed a writ petition in the High Court, appending therewith another certificate issued by one Karuppan Chettiar certifying as accurate (on the basis of his personal knowledge) the contents of the certificate issued by Mayandi Bharathi. Before the Single Bench, the appellant-State took the stand that as per the Government instructions dated 7th February 1996, it was

mandatory for an applicant seeking a freedom fighter's pension to produce co-prisoner certificates from two of the persons mentioned in the Memorandum dated 16th November 1988 indicating specifically that the applicant as well as the certifiers had undergone imprisonment in the same jail and in the absence of such evidence, the applicant was not entitled to a pension. It was pointed out that neither Mayandi Bharathi nor Karuppan Chettiar satisfied this rigid test. The learned Single Judge, however, rejected this plea by observing that as the respondent's case for pension had been recommended by two Collectors and the District Level Screening Committee, the mere fact that a co-prisoner's certificate had not been appended would make no difference and having held as above, allowed the writ petition. This judgment was affirmed in appeal by the Division Bench by its judgment dated 26th June 2006 which has now been impugned before us.

3. It has been submitted by the learned counsel for the appellants that in the light of the fact that the respondent had not provided the documents/evidence that was envisaged in the order dated 7th February 1996, the mere fact that some certificates had been appended or a recommendation had been made by the Collectors or the District Level Screening Committee would not entitle the respondent to a pension. It has been submitted that the Government Order had to be read in toto and the right created in the respondent by the said order was circumscribed by the conditions laid down for its applicability.

4. The learned counsel for the respondent has, however, submitted that the Single Judge and the Division Bench of the High Court had clearly observed that the fact that the respondent was indeed a freedom fighter, had not been disputed by the appellant-State or its agents and even assuming that the Government Order dated 7th February 1996 was applicable, in the facts as given above, this Court should not interfere in the matter under Article 136 of the Constitution.

5. We have considered the arguments advanced by the learned counsel for the parties. It will be seen that the respondent, had, in the writ petition, appended two certificates, one given by Mayandi Bharathi, who was a co-prisoner with the respondent and was also recipient of a freedom fighter's pension sanctioned by the Government of Tamil Nadu and other benefits as well in accordance with that status, and this certificate gave full details with regard to the incarceration of the respondent and his contribution to the freedom movement. This certificate had earlier been rejected by the State Government on the plea that the Mayandi Bharathi was not an approved certifier, as required by the Government instructions dated 7th February 1996. The second certificate appended in the High Court by the respondent was the one issued by Karuppan Chettiar dated 30th December 1998 who was an approved certifier and who certified that he knew the respondent and further that the contents of the certificate issued by Mayandi Bharathi were correct, and he accordingly recommended the respondent's claim. We see that the stand of the appellant-State based on the communication dated 7th February 1996 is, in fact, misplaced. This communication refers to the difficulty being faced by applicants for freedom fighters' pension in producing co-prisoner certificates from two of the persons mentioned in the Government Order of 16th November 1988. Realizing this difficulty, the State Government by its order dated 7th February 1996 issued a modified and simplified procedure for the grant of certificates with effect from that date. A perusal of this G.O. would reveal that freedom fighter certificates could now be issued by approved certifiers and these were held as sufficient evidence for the grant of a pension. The G.O. further set out the constitution of District Level Screening Committees to be nominated by the Government in consultation with the Collectors concerned and that these committees were required to personally examine the documents produced and decide as to the entitlement of the applicant to the grant of pension and refer the matter for formal approval to the State Government.

6. We find two certificates on record – one of Mayandi Bharathi and the other of Karuppan Chettiar, an approved certifier. We also see that the matter had been recommended by two Collectors and the District Level Screening Committee. This was sufficient compliance with the Government Order of 7th February 1996. Significantly, the State Government has not disputed the respondent's claim on facts. We are, thus, disinclined to interfere in the matter under our jurisdiction under Article 136 of the Constitution. Dismissed. No costs.

K.K.T. Appeal dismissed.

P. VIJAYAN

v.

STATE OF KERALA & ANR.

(Criminal Appeal No. 192 of 2010)

JANUARY 27, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Code of Criminal Procedure, 1973 – s. 227 – Discharge – Retired IPS officer aged 85 years charge-sheeted u/s.302/34 IPC for killing a naxalite in a fake encounter, on basis of confession of a constable – Discharge petition u/s. 227 – Rejection of, by courts below – Held: s. 227 confers special power on the judge to discharge accused if upon consideration of records and documents 'there is no sufficient ground' for proceeding against accused – On facts, trial court after evaluating the materials produced by prosecution and after considering the probability of the case, dismissed the discharge petition and High Court upheld the same – Admissibility or acceptability of extra judicial confession made by constable before High Court in earlier proceedings is to be considered at the time of trial – Thus, orders of courts below does not call for interference – Penal Code, 1860 – s.302/34 – Evidence Act, 1872 – s. 30.

Appellant is a retired IPS official aged about 85 years. Appellant along with the other accused were charge-sheeted in year 2002 for offence punishable u/s. 302 read with s. 34 IPC for killing a Naxalite in year 1970, in a fake encounter. Appellant-A3 filed a petition for discharge u/s. 227 of the Code of Criminal Procedure, 1973. Trial court dismissed the same and ordered for framing of charges against the appellant. Single Judge of High Court dismissed the revision petition. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1 Section 227 of the Code of Criminal Procedure, 1973 confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused. His consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge u/s. 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time which did not disclose a *prima facie* case and to save the accused from avoidable harassment and expenditure. [Para 21] [93-E-H]

1.2. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of s. 227, the judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the

evidence recorded by the police or the documents produced before the Court which *ex facie* disclose that there are suspicious circumstances against the accused so as to frame a charge against him. [Para 10] [86-C-H]

1.3. If on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a *prima facie* finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge. [Para 14] [90-A-D]

State of Bihar vs. Ramesh Singh **(1977) 4 SCC 39;** *Union of India vs. Prafulla Kumar Samal* **(1979) 3 SCC 4;** *Niranjan Singh K.S. Punjabi vs. Jitendra Bhimraj Bijjaya* **(1990) 4 SCC 76;** *Soma Chakravarty vs. State through CBI* **(2007) 5 SCC 403, Relied on.**

2.1. From 1970 till 1998, there was no allegation that the encounter was a fake encounter. In the year 1998, reports appeared in various newspapers in Kerala that the killing of the Naxalite in the year 1970 was in a fake encounter and that senior police officers are involved in the said fake encounter. Pursuant to the said news

reports, several writ petitions were filed by various individuals and organizations before the High Court with a prayer that the investigation may be transferred to Central Bureau of Investigation. In the said writ petition, Constable-A1 filed a counter affidavit in which he made a confession that he had shot Naxalite on the instruction of the then Deputy Superintendent of Police-A2; and that the appellant was present when the incident occurred. Based on the assertion in the counter affidavit of the constable-A1, Single Judge of High Court passed an order entrusting an investigation to the CBI. CBI registered an FIR implicating the Constable, the DSP and the appellant as accused Nos. 1, 2 and 3 respectively for an offence u/s. 302/34 IPC. Constable-A1 is not alive and there is no question of joint trial by the prosecution against the other two accused along with A1. [Paras 16 and 18] [90-F-H; 91-A-C; 92-C]

2.2. Insofar as the admissibility or acceptability of the extra judicial confession in the form of counter affidavit made by the first accused before the High Court in the earlier proceedings are all matters to be considered at the time of trial. Their probative value, admissibility, reliability etc. are matters for evaluation after trial. The Additional Solicitor General rightly pointed out that apart from the confession, the statement of CW-6, CW-21, CW-31 and CW-32 are very well available and cannot be ignored lightly. All the above materials require sufficient scrutiny at the hands of the trial judge. [Para 20] [93-C-E]

Mohd. Khalid vs. State of West Bengal **(2002) 7 SCC 334;** *Hardeep Singh Sohal & Ors. vs. State of Punjab* **(2004) 11 SCC 612, referred to.**

2.3. In the instant case, though, the trial judge has not assigned detailed reasons for dismissing the discharge petition filed u/s. 227, it is clear from his order that after consideration of the relevant materials charge had been

framed for offence u/s. 302 read with s. 34 IPC and because of the same, he dismissed the discharge petition. After evaluating the materials produced by the prosecution and after considering the probability of the case, the judge being satisfied by the existence of sufficient grounds against the appellant and another accused framed a charge. Whether the materials at the hands of the prosecution are sufficient or not are matters for trial. At this stage, it cannot be claimed that there is no sufficient ground for proceeding against the appellant and discharge is the only remedy. Further, whether the trial will end in conviction or acquittal is also immaterial. All these relevant aspects have been carefully considered by the High Court and it rightly affirmed the order passed by the trial judge dismissing the discharge petition filed by the appellant-A3. The said conclusion are concurred with. [Para 22] [94-A-D]

2.4. Nothing is expressed on the merits of the claim made by both the parties and the conclusion of the High Court as well as this Court are confined only for disposal of the discharge petition filed by the appellant u/s. 227 of the Code. It is for the prosecution to establish its charge and the trial judge is at liberty to analyze and to arrive at an appropriate conclusion, one way or the other, in accordance with law. [Para 23] [94-E-F]

Case Law Reference:

(1977) 4 SCC 39	**Relied on.**	**Para 11**
(1979) 3 SCC 4	**Relied on.**	**Para 12**
(1990) 4 SCC 76	**Relied on.**	**Para 13**
(2007) 5 SCC 403	**Relied on.**	**Para 14**
(2002) 7 SCC 334	**Referred to.**	**Para 18**
(2004) 11 SCC 612	**Referred to.**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No 192 of 2010.

From the Judgment & Order dated 4.7.2007 of the High Court of Kerala at Ernakulam in Criminal Revision Petition No. 245 of 2007.

Raghenth Basant, Liz Mathew, Senthil Jagadeesan for the Appellant.

H.P. Raval, ASG, A. Mariarputham, P.K. Dey T. A. Khan Rajiv Nanda, Arvind Kr. Sharma, Dushyant Parashar, R. Sathish, P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order of the High Court of Kerala at Ernakulam dated 04.07.2007 passed in Criminal Revision Petition No. 2455 of 2007, in and by which, the learned single Judge, after finding no ground to interfere with the order passed by the Trial Judge dismissing discharge petition filed by the appellant herein, refused to interfere in his revision.

3. According to the appellant, he is a retired IPS officer aged about 85 years. He enjoyed a considerable reputation as an IPS officer and had retired as the Director General of Police, Kerala. In the course of his tenure as a senior police officer, he controlled the Naxalite militancy which was rampant in Kerala in the 1970s. In the 1970s, Naxalites under the banner of CPI(ML), a militant organization, had taken up the cause of the poor through armed appraisal and violence. The said organization committed various brutal murders and dacoities including attacking police stations and murdering innocent policemen. The State Government which was in power at the relevant time took serious note of the said atrocities committed

by the cadres of CPI (ML) and took a decision to put an end to the said atrocities.

4. It is his further case that Naxalite Varghese was a prominent leader of the CPI (ML) in Kerala during 1970s. He was an accused in cases relating to murder of landlords as well as attack on policemen. Since, he was wanted in many grave criminal offences, he was hiding. A special team consisting members of the Kerala Police as well as CRPF was formed to nab Naxalite Varghese. On 18.02.1970, the police received a tip off that he was present in the hut of one Shivaraman Nair and based on the said information, the special team rushed to the spot and broke open the door of the said hut and arrested Naxalite Varghese. However, while he was being taken to the Mananthavadi police station in a police jeep, he tried to escape and attacked the policemen resulting in clash between the police party and Naxalite Varghese. During the said clash, in order to prevent Naxalite Varghese from escaping, the police had to fire and in the shoot out he was killed. The capture of Naxalite Varghese was highlighted as one of the achievements of the Kerala Police at that time and the police personnel involved in the said operation were given out of turn promotions and increments in appreciation of being part of the team. The appellant had also received various medals while in service for his role in tackling the naxalite militancy in Kerala.

5. It was further pointed out that from 1970 till 1998, there was no allegation that the said encounter was a fake encounter. Only in the year 1998, reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers are involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organizations before the High Court of Kerala with a prayer that the investigation may be transferred to Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999

in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. He also stated that the appellant was present when the incident occurred. By order dated 27.01.1999, learned single Judge of the High Court of Kerala passed an order directing the CBI to register an FIR on the facts disclosed in the counter affidavit filed by Constable Ramachandran Nair. Accordingly, the CBI registered an FIR on 03.03.1999 in which Constable Ramachandran Nair was named as accused No. 1, Mr. Lakshmana was named as accused No. 2 and Mr. P. Vijayan, the appellant herein, was named as accused No. 3 for an offence under Section 302 IPC read with Section 34 IPC. After investigation, the CBI filed a charge-sheet before the Special Judge (CBI), Ernakulam on 11.12.2002 wherein all the above mentioned persons were named as A1 to A3 respectively for an offence under Sections 302 and 34 IPC.

6. By pointing out various reasons, his meritorious service and nothing whispered for a period of twenty years, the appellant filed a petition on 17.05.2007 under Section 227 of the Code of Criminal Procedure (in short "CrPC") for discharge. The learned Trial Judge by order dated 08.06.2007, dismissed the said petition and passed an order for framing charge for offence under Sections 302 and 34 IPC. Aggrieved by the aforesaid order, the appellant filed a Criminal Revision Petition No. 2455 of 2007 before the High Court of Kerala. By an impugned order dated 04.07.2007, learned single Judge of the High Court dismissed the said Criminal Revision Petition. Questioning the said order, the appellant filed the above appeal by way of Special Leave Petition.

7. We have heard Mr. Raghenth Basant, learned counsel for the appellant and Mr. H.P. Raval, learned Additional Solicitor General for CBI-second respondent herein.

8. The questions that arose for consideration in this appeal are (i) whether the appellant established sufficient ground for

discharge under Section 227 of the CrPC, and (ii) whether the Trial Judge as well as the High Court committed any error in rejecting the claim of the appellant.

9. Before considering the merits of the claim of both the parties, it is useful to refer Section 227 of the Code of Criminal Procedure, 1973, which reads as under:-

> *"227. Discharge.*—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

10. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the Trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

11. The scope of Section 227 of the Code was considered by this Court in the case of *State of Bihar vs. Ramesh Singh* (1977) 4 SCC 39, wherein this Court observed as follows:-

> "… … Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. …. "

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Trial Judge in order to frame a charge against the accused.

12. In a subsequent decision i.e. in *Union of India vs. Prafulla Kumar Samal,* (1979) 3 SCC 4, this Court after adverting to the conditions enumerated in Section 227 of the Code and other decisions of this Court, enunciated the following principles:-

> "(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has

> the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
>
> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
>
> (4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

13. The scope and ambit of Section 227 was again considered in *Niranjan Singh K.S. Punjabi vs. Jitendra Bhimraj Bijjaya,* (1990) 4 SCC 76, in para 6, this Court held that:

> "Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that

since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the *State of Bihar v. Ramesh Singh* this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In *Union of India v. Prafulla Kumar Sama*l this Court after considering the scope of Section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence."

14. In a recent decision, in the case of *Soma Chakravarty vs. State through CBI,* (2007) 5 SCC 403, this Court has held that the settled legal position is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a prima facie finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge.

15. We shall now apply the principles enunciated above to the present case in order to find out whether or not the Courts below were justified in dismissing the discharge petition filed under Section 227 of the Code.

16. In the earlier part of our judgment, we have adverted to the assertion of the appellant that from 1970 till 1998, there was no allegation that the encounter was a fake encounter. In the year 1998, reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers are involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organizations before the High Court of Kerala with a prayer that the investigation may be transferred to Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999

in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. In the same counter affidavit, he also stated that the appellant was present when the incident occurred. Based on the assertion in the counter affidavit of Ramachandran Nair dated 11.01.1999 by order dated 27.01.1999 learned single Judge of the High Court of Kerala passed an order entrusting an investigation to the CBI. As said earlier, accordingly, CBI registered an FIR on 03.03.1999 implicating Constable Ramachandran Nair, Lakshmana and the appellant-Vijayan as accused Nos. 1, 2 and 3 respectively for an offence under Section 302 read with Section 34 IPC.

17. The materials relied on by the CBI against the appellant are as follows:-

(a) Confessional note dictated by Constable Ramachandran Nair to Shri M.K. Jayadevan which was handed over to one Mr. Vasu.

(b) The 161 statement of CW 6, Mr. Vasu, an erstwhile Naxalite in which he stated that in the year 1977, Constable Ramachandran Nair confessed to him that he had shot dead Naxalite Varghese.

(c) The 161 statement of CW 21 Constable Mohd. Hanifa in which he has stated that he was present along with Constable Ramachandran Nair while he shot dead Naxalite Varghese.

(d) The 161 statement of CW 31, Mr. K. Velayudhan in which he stated that Constable Ramachandran Nair contacted him and stated that he had shot dead Naxalite Varghese.

(e) The 161 statement of CW 32, Mr. M.K. Jayadevan who stated that Constable Ramachandran Nair had dictated his confessional statement to him and he delivered the same to Mr. Vasu.

(f) The counter affidavit dated 11.01.1999 filed by Constable Ramachandran Nair before the High Court of Kerala in O.P. No. 21142/1998.

18. Learned counsel for the appellant at the foremost submitted that even if the alleged confession of Constable Ramachandran Nair is found to be correct, in view of the fact that the said Ramchandran Nair is no more and died long ago, in the light of Section 30 of the Indian Evidence Act, 1872 and in the absence of joint trial, the same cannot be used against the appellant. It is not in dispute that Constable Ramachandran Nair is not alive and there is no question of joint trial by the prosecution against the other two accused along with the said Ramchandran Nair. Section 30 of the Evidence Act, 1872 reads as:

> *"30. Consideration of proved confession affecting person making it and other jointly under trial for same offence.*— When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
>
> [Explanation.—"Offence", as used in this section, includes the abetment of, or attempt to commit the offence]"

It was pointed out that the confession of Constable Ramachandran Nair is inadmissible since this confession is made by an accused which cannot be used against a co-accused except for corroboration that too in a case where both accused are being tried jointly for the same offence. In the present case, the accused-Constable Ramachandran Nair is dead and, therefore, the trial against him has abated, hence there is no question of joint trial of Constable Ramachandran Nair and the appellant. He further pointed out that in view of the same the said extra judicial confession is inadmissible by virtue

of Section 30. He relied on a three-Judge Bench decision of this Court in *Mohd. Khalid vs. State of West Bengal,* (2002) 7 SCC 334.

19. In *Hardeep Singh Sohal & others vs. State of Punjab,* (2004) 11 SCC 612, this Court again held that confession cannot be admitted in evidence against the co-accused under Section 30 of the Indian Evidence Act, 1872, since, the accused who made the confession was not tried along with the other accused.

20. Insofar as the admissibility or acceptability of the extra judicial confession in the form of counter affidavit made by the first accused before the High Court in the earlier proceedings are all matters to be considered at the time of trial. Their probative value, admissibility, reliability etc are matters for evaluation after trial. As rightly pointed out by Mr. H.P. Raval, learned Additional Solicitor General, apart from the confession, the statement of Vasu-CW-6, Md. Hanifa-CW-21, Mr. K. Velayudhan-CW-31 and Mr. M.K. Jayadevan-CW-32 are very well available and cannot be ignored lightly. We are satisfied that all the above materials require sufficient scrutiny at the hands of the Trial Judge.

21. As discussed earlier, Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused. In other words, his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time was not disclosed a *prima facie* case when and to save the accused from avoidable harassment and expenditure.

22) In the case on hand, though, the learned Trial Judge has not assigned detailed reasons for dismissing the discharge petition filed under Section 227, it is clear from his order that after consideration of the relevant materials charge had been framed for offence under Section 302 read with Section 34 IPC and because of the same, he dismissed the discharge petition. After evaluating the materials produced by the prosecution and after considering the probability of the case, the Judge being satisfied by the existence of sufficient grounds against the appellant and another accused framed a charge. Whether the materials at the hands of the prosecution are sufficient or not are matters for trial. At this stage, it cannot be claimed that there is no sufficient ground for proceeding against the appellant and discharge is the only remedy. Further, whether the trial will end in conviction or acquittal is also immaterial. All these relevant aspects have been carefully considered by the High Court and it rightly affirmed the order passed by the Trial Judge dismissing the discharge petition filed by A3-appellant herein. We fully agree with the said conclusion.

23. It is made clear that we have not expressed anything on the merits of the claim made by both the parties and the conclusion of the High Court as well as this Court are confined only for disposal of the discharge petition filed by the appellant under Section 227 of the Code. It is for the prosecution to establish its charge and the Trial Judge is at liberty to analyze and to arrive at an appropriate conclusion, one way or the other, in accordance with law.

24. We direct the Trial Judge to dispose of the case of the CBI expeditiously, uninfluenced by any of the observations made above. Considering the age of the appellant, he is permitted to file appropriate petition for dispensing his personal appearance and it is for the Trial Court to pass an order taking into consideration of all relevant aspects. With the above direction, the criminal appeal is dismissed.

N.J. Appeal dismissed.

RAM SINGH @ CHHAJU
v.
STATE OF H.P.
(Criminal Appeal No. 1248 of 2008)

JANUARY 28, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Penal Code, 1860 – s. 376 – Allegation of commission of rape on victim by accused – Acquittal by trial court – Convicted u/s. 376 and sentenced to rigorous imprisonment for ten years by High Court – Sustainability of – Held: Sustainable – Conviction by High Court based on evidence on record – Testimony of victim corroborated by witnesses as also by medical evidence – At the site of incident, grass and plants found damaged and ruffled – Absence of injuries on the person of victim and her private parts not fatal to the prosecution case – Failure of investigating officer to send blood stained clothes of victim for investigation would not discredit the testimony of victim.

The question which arose for consideration in this appeal was whether the High Court was justified in convicting the appellant for the offence of rape punishable u/s. 376 IPC and sentencing him to rigorous imprisonment for ten years, by setting aside the order of acquittal by trial court.

Dismissing the appeal, the Court

HELD: 1. The accused committed forcible rape on the victim, as alleged by her, and his conviction by the High Court is quite justified being based on evidence on record. It is, therefore, confirmed. [Para 18] [108-C-D]

2.1. The submission that the findings and the

conclusion reached by the Sessions Court is one of the possible view in the facts and circumstances of the case and therefore, the High Court ought not to have taken a different view and passed an order of conviction against the appellant, has no merits. High Court on re-appreciation of evidence on record has differed with the findings of the Sessions Court on the innocence of the accused and has found him guilty of the charges leveled against him. The High Court after evaluating the manner in which the evidence and other materials on record has been appreciated as well as the conclusions arrived at by the Sessions Court, has come to the conclusion that the findings of the Sessions Court are perverse and has resulted in miscarriage of justice and has found that the appellant is guilty of the offence alleged. [Paras 16 and 17] [106-F-G; 107-G-H; 108-A-B]

Perla Somasekhara Reddy and Ors. vs. State of A.P. **(2009) 7 SCALE 115;** *Chandrappa and Ors. vs. State of Karnataka* **(2007) Crl.L.J. 2136 – held inapplicable.**

2.2. The High Court in its judgment stated that the trial court erred in appreciating the testimony of the witnesses to the extent the victim nowhere mentioned in her statement that the appellant (dead) had taken any particular name when he had requested her to accompany him to facilitate the delivery of his sister-in-law. High Court also observed that there is no contradiction in the testimony of victim and her son PW-7 as both of them testified that there was reluctance shown by victim to accompany the appellant at around 12.00 a.m. at night, to facilitate the delivery of his sister-in-law. High Court also observed that the trial judge was not justified in coming to the conclusion that PW-7 could not have heard the narration of the incident by the victim to her husband since he was sleeping in the court yard.

High Court also noticed that the observation of trial judge that the victim did not name the culprits while narrating the incident to PW-4 of the village contradicts the prosecution case, cannot be held to be correct as the husband of victim in her presence had already told that she was raped by the appellants. Therefore, it is not reasonable to expect from the victim who was under shock due to the incident, to narrate the same to PW-4 in presence of her husband and son. [Para 10] [103-E-H; 104-A-B]

2.3. High Court also found it difficult to accept the reasoning of the trial court about the fact that there were no injuries on the person of the victim belied her testimony that she was subjected to forcible sexual intercourse. High Court observed that the victim was suffering from toothache because of which she was unable to firmly resist, and further she could not raise alarm since her mouth had been gagged by the accused persons. The court also observed that though the blow with the fist was given on her mouth by the appellant, it may not have caused any serious injury. However, being an old lady of more than 40 years at the relevant time and the appellants being young men both around 20 years, the victim could not have put up a strong defence. High Court also pointed towards the finding that the spot where the victim was raped, shown in the spot inspection map and which was proved by the Investigation Officer PW-11 shows that at the site of incident, grass and plants of some crop were found damaged and ruffled. High Court is also not convinced with the trial court's observation that the victim at the late hours of the night should have been accompanied either by her husband or her son. High Court observed that there was nothing unusual about victim going alone with the appellants as it is normal practice to go with male members to facilitate the deliveries as the midwives are respected like mothers.

Therefore, there was no reason for herself or her husband and son to disbelieve the appellant and deny the request of appellant in that situation. The entire conspectus of the case was viewed by the High Court in vivid detail to come to the conclusion that the appellant was guilty of the crime. [Para 11] [104-C-H; 105-A-B]

2.4. The testimony of the victim inspires confidence. Her testimony is not only corroborated by other witnesses but also by the medical evidence. Even if the statement of PW-4 is not taken into consideration, the other corroborative evidence is sufficient to connect the accused with the crime. [Para 15] [106-D-E]

2.5. Regarding the submission that there was no injury on the person of the victim, and if there was sexual assault on the victim, she would have resisted the offender and in that process she would have received some injuries on other parts of the body, much importance cannot be given to the absence of defence injuries, because it is not inevitable rule that in the absence of defence injuries the prosecution must necessarily fail to establish its case. In the FIR and also in the evidence of PW-1, it has come on record that she could not cry out for help since her mouth was gagged by the accused. It has also come in the evidence that the victim was aged about 40 years and the accused persons were young and aged about 20 years, therefore, she was not in a position of equal strength so as to resist the appellants. Even in the absence of any injuries on the person of the victim, with the other evidence on record, the prosecution is able to establish that the offence was committed. [Para 12] [105-B-E]

2.6. It cannot be said that in the absence of any injury on the private parts of the victim, the High Court should have disbelieved the prosecution story. The

reason being the doctor who was examined as PW-2 found that the victim PW-1 was used to sexual intercourse and as such absence of injury on the private parts of the victim may not be very significant. PW-1 was also used to sexual intercourse. The evidence of the victim has been corroborated by the evidence of PWs. 2 and 3, the two post occurrence witnesses, as well as by the FIR which was lodged without any delay. Therefore, it is difficult to differ from the findings of the High Court. [Para 14] [106-B-C]

2.7. It was submitted that the blood stained clothes which were said to have been handed over to the Officer-in-Charge at the Police Station by the husband of the victim were not sent for chemical examination and, therefore, the corroboration with which such evidence could offer was absent. The failure of the investigating agency cannot be a ground to discredit the testimony of the victim. The victim had no control over the investigating agency and the negligence, if any, of the investigating officer could not affect the credibility of the statement of PW-1-the victim. Having regard to the facts and circumstances of this case, on the basis of the evidence on record, the conviction of the appellant can be sustained. [Para 13] [105-E-H; 106-A]

Case Law Reference:

(2009) 7 SCALE 115 Held inapplicable. Para 16

(2007) Crl.L.J. 2136 Held inapplicable. Para 16

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1248 of 2008.

From the Judgment & Order dated 20.3.2008 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 142 of 1994.

S.N. Bhardwaj, S. Ramamani for the Appellant.

Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal, by the accused, arises out of the judgment of High Court of Himachal Pradesh in Criminal Appeal No. 142 of 1994 dated 20.3.2008, whereby the appellant is convicted for the offence of rape punishable under Section 376 of Indian Penal Code by reversing the judgment of Additional Sessions Judge, Kangra Division in Sessions Case No. 9 of 1992 dated 2.8.1993. The High Court has come to the conclusion that the prosecution has brought home the charge under Section 376 of I.P.C. and has sentenced the appellant to suffer rigorous imprisonment for ten years and to pay a fine of Rs.5000/-, in default of payment of fine to undergo rigorous imprisonment for a further period of one year. The accused feeling aggrieved sought special leave to appeal, on the same being granted, this appeal is before us.

2. Co-accused Naresh Singh alias Titta died during the pendency of appeal before the High Court.

3. We shall state the facts of the case as put forth by the prosecution:- Smt. Chanchala Devi, hereinafter referred to as the "victim", is the resident of village Dhabian and, was midwife by profession. Shri Chattar Singh is the husband of Smt. Chanchala Devi. Shri Ashok Kumar (PW-7) is her son. The accused are the residents of village Guriyal, which is situated at a distance of about 2 Kms from village Dhabian. Smt. Chanchala Devi – Victim was present in her house on August 13, 1989. She had gone to bed along with her husband after taking her meal on that day. Her son Ashok Kumar (PW-7) aged about 24 years was present in the house and was sleeping in the courtyard of the house. That night i.e. on the night of 12/13th August, 1989, PW-7 Ashok Kumar woke up his mother Chanchala Devi and told her that Naresh Singh alias Titta

(dead) has come to call her as his Bhabi, who was not named by him, has been having labour pains in village Guriyal. The victim went out of the room and saw Naresh Singh alias Titta sitting on the cot of her son in the verandah of the house. The case of the prosecution is that, though the victim refused to the request made by Naresh Singh alias Titta stating that it was not convenient for her as she was having tooth ache, however, after being persuaded by Naresh Singh alias Titta and also by her son PW-7 Ashok Kumar, the victim agreed to accompany Naresh Singh alias Titta to his house situated at village Guriyal. When they had covered a distance of about 30 yards from the house of victim, the appellant Ram Singh alias Chhaju also met them. They all continued walking towards the house of Naresh Singh alias Titta. When they had reached a place known as Tapukar, Naresh Singh alias Titta caught hold of the victim and the appellant Ram Singh alias Chhaju laid her on the ground and opened her trousers. The victim tried to raise alarm, but the Naresh Singh alias Titta dealt a fist blow on her mouth and then gagged it. Both the accused performed sexual intercourse forcibly with the victim and thereafter sneaked away from the place. After returning home, victim had narrated the whole incident to her husband and son. The son of the victim PW-7 Ashok Kumar brought PW-4 Niaz Deen, the Pradhan of the Panchayat on the same night. He was apprised of the incident by the husband of the victim. On his advice, on the following day i.e. on 14.8.1989, the victim being accompanied by her husband reported the matter at police station Nurpur, where her statement was recorded on the basis of which the first information report was registered on 14.8.1989. She was got medically examined at about 12.15 P.M. on the same day. The doctors had opined that victim had been subjected to sexual intercourse 12 to 14 hours prior to her medical examination. The accused were also got medically examined by Dr. Anil Mahajan (PW-3), who had opined that there was nothing suggesting that the accused were incapable of performing sexual intercourse. On completion of the investigation, the final report was filed in the court of Sub-Divisional Magistrate,

Nurpur. The case was committed by the learned Magistrate to the Additional Sessions Court, Kangra Division at Dharmashala (Himachal Pradesh) on 6.5.1992, and the same was numbered as Sessions Case No. 9 of 1992. Charges were framed under Section 376 read with Section 34 of Indian Penal Code and put up for trial before the Additional Sessions Judge, Nurpur.

4. The accused persons pleaded not guilty to the charge. Their defence was that they have been falsely implicated by the victim on account of animosity.

5. In support of its case, the prosecution examined the victim Smt. Chanchala Devi (PW1) who has supported the prosecution version in all its material particulars. Niaz Deen (PW-4) was also examined as a witness of fact, but he was declared hostile and cross examined by State counsel. Dr. S. Mahajan, (PW-2) was examined to prove the medical examination report of the victim. Dr. Anil Mahajan (PW-3) was examined to prove the medical examination report of the accused. Sardar Balwant Singh, (PW-5) was examined to prove the statement of the accused made before the Station House Officer, but, he was declared hostile and cross examined by the State counsel. Ashok Kumar, (PW-7), son of the victim was examined to corroborate the statement of the victim.

6. The trial court has found that the prosecution has not been able to prove that the accused persons had sexual intercourse with the victim. Accordingly, has acquitted the appellant herein of the crime.

7. The State of Himachal Pradesh had carried the matter by filing Criminal Appeal No. 142 of 1994 under Section 378 of the Code of Criminal Procedure before the High Court of Himachal Pradesh against the decision of the trial court. The High Court has allowed the appeal vide its judgment dated 20.3.2008, by setting aside the judgment and order of the trial court and after hearing the accused while deciding on the quantum of sentence, has convicted the accused under Section

376 of the I.P.C. and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 5,000/-, in default of payment of fine to undergo rigorous imprisonment for a period of one year which has given rise to this appeal.

8. While assailing the judgment of the High Court, the learned counsel for the appellant has contended that the finding of conviction of the High Court is unreasonable and not justified on the material on record. It is not proved by reliable and independent evidence that the incident alleged had taken place. It is also not proved from the medical evidence that rape had been committed by the appellant and the co-accused and there is no corroboration of the evidence of the victim by any independent evidence and the testimony of the victim is not reliable and trustworthy and the conviction on the sole testimony of the victim is not justified.

9. Learned counsel for the appellant has laid great stress on the proposition that the testimony of the victim required corroboration and as no independent corroboration was available, the trial court rightly had passed an order of acquittal which should not have been upset by the High Court in an appeal filed by the State.

10. The High Court in its judgment has stated that the trial court has erred in appreciating the testimony of the witnesses to the extent the victim has nowhere mentioned in her statement that the appellant Naresh Singh alias Titta (dead) had taken any particular name when he had requested her to accompany him to facilitate the delivery of his Bhabhi. The High Court has also observed that there is no contradiction in the testimony of victim and her son PW-7 Ashok Kumar as both have testified that there was reluctance shown by victim to accompany the appellant Naresh Singh alias Titta (dead) at around 12.00 a.m. at night, to facilitate the delivery of his Bhabhi. The High Court has also observed that the Trial Judge was not justified in coming to the conclusion that Ashok Kumar (PW-7) could not have heard the narration of the incident by the victim to her

husband since he was sleeping in the court yard. The High Court has also noticed that the observation of Additional Sessions Judge that the victim did not name the culprits while narrating the incident to PW-4 Niaz Deen Pradhan of village Dhabian contradicts the prosecution case, cannot be held to be correct as the husband of victim in her presence had already told that she was raped by the appellants. Therefore, it is not reasonable to expect from the victim who was under shock due to the incident, to narrate the same to PW-4 Niaz Deen Pradhan in presence of her husband and son.

11. The High Court has also found it difficult to accept the reasoning of the Trial Court about the fact that there were no injuries on the person of the victim belied her testimony that she was subjected to forcible sexual intercourse. The High Court has observed that the victim was suffering from toothache because of which she was unable to firmly resist, and further she could not raise alarm since her mouth had been gagged by the accused persons. The Court has also observed that though the blow with the fist was given on her mouth by the appellant, it may not have caused any serious injury. However, being an old lady of more than 40 years at the relevant time and the appellants being young men both around 20 years, the victim could not have put up a strong defence. The High Court has also pointed towards the finding that the spot where the victim was raped, shown in the spot inspection map Ext.PK and which has been proved by the Investigation Officer PW-11 Govardhan Dass, shows that at the site of incident, grass and plants of some crop were found damaged and ruffled. The High Court is also not convinced with the trial court's observation that the victim at the late hours of the night should have been accompanied either by her husband or her son. The High Court observes that there was nothing unusual about victim going alone with the appellants as it is normal practice to go with male members to facilitate the deliveries as the midwives are respected like mothers. Therefore, there was no reason for herself or her husband and son to disbelieve the appellant and

deny the request of appellant in that situation. The entire conspectus of the case was viewed by the High Court in vivid detail to come to the conclusion that the appellant was guilty of the crime.

12. It was submitted before us by the learned counsel for the appellant that there was no injury on the person of the victim. According to him, if there was sexual assault on the victim, she would have resisted the offender and in that process she would have received some injuries on other parts of the body. Much importance cannot be given to the absence of defence injuries, because it is not inevitable rule that in the absence of defence injuries the prosecution must necessarily fail to establish its case. In the first information report and also in the evidence of PW-1, it has come on record that she could not cry out for help since her mouth was gagged by the accused. It has also come in the evidence that the victim was aged about 40 years and the accused persons were young and aged about 20 years and, therefore, she was not in a position of equal strength so as to resist the appellants. Even in the absence of any injuries on the person of the victim, in our view, with the other evidence on record, the prosecution is able to establish that the offence was committed.

13. It was contended by the learned counsel for the appellant that the blood stained clothes which were said to have been handed over to the Officer-in-Charge at the Police Station by the husband of the victim were not sent for chemical examination and, therefore, the corroboration with which such evidence could offer was absent. In our view, the failure of the investigating agency cannot be a ground to discredit the testimony of the victim. The victim had no control over the investigating agency and the negligence, if any, of the investigating officer could not affect the credibility of the statement of PW-1 – the victim. Having regard to the facts and circumstances of this case, we are satisfied that on the basis of the evidence on record, the conviction of the appellant can

be sustained.

14. It is also submitted that in the absence of any injury on the private parts of the victim, the High Court should have disbelieved the prosecution story. In our view, it is difficult to accept the submission of the learned counsel. The reason being the doctor who has been examined as PW-2 has found that the victim PW-1 was used to sexual intercourse and as such absence of injury on the private parts of the victim may not be very significant. PW-1 was also used to sexual intercourse. The evidence of the victim has been corroborated by the evidence of PWs.2 and 3, the two post occurrence witnesses, as well as by the FIR which was lodged without any delay. Therefore, it is difficult to differ from the findings of the High Court.

15. In the present case, the testimony of the victim inspires confidence. Her testimony is not only corroborated by other witnesses but also by the medical evidence. Even if the statement of Niaz Deen, PW-4 is not taken into consideration, the other corroborative evidence in the case is sufficient to connect the accused with the crime.

16. Before we conclude, out of sheer deference to learned counsel for the appellant, we intend to notice the feeble submission made by the learned counsel for the appellant. It is contended by the learned counsel that the findings and the conclusion reached by the Sessions Court is one of the possible view in the facts and circumstances of the case and therefore, the High Court ought not to have taken a different view and passed an order of conviction against the appellant. In aid of this submission, the learned counsel has invited our attention to the observations made by this Court in the case of *Perla Somasekhara Reddy and Ors. vs. State of A.P.* (2009) 7 SCALE 115. In our considered view, the submission of the learned counsel has no merit. This Court in the aforesaid case by way of universal application has not stated, that, whenever there is a judgment and order of acquittal by the Sessions

Court, the High Court under no circumstances would interfere with the said order even when it comes to the conclusion that the findings and conclusion reached by the trial court is based on mere conjecture and hypothesis and not on the legal evidence. In fact, in the aforesaid decision this Court has taken note of what has been stated by this Court in the case of *Chandrappa and Ors. vs. State of Karnataka* (2007) Crl.L.J. 2136, wherein apart from others, it is stated, that the appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded; the Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law; various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion; an appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court; and if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

17. In the present case, the High Court on re-appreciation of evidence on record has differed with the findings of the Sessions Court on the innocence of the accused and has found

him guilty of the charges leveled against him. The High Court after evaluating the manner in which the evidence and other materials on record has been appreciated as well as the conclusions arrived at by the Sessions Court, has come to the conclusion that the findings of the Sessions Court are perverse and has resulted in miscarriage of justice has re-appreciated the evidence and materials on record and has found that the appellant is guilty of the offence alleged. Therefore, in our view, the decision on which reliance has been placed by learned counsel for the appellant would not assist him in any manner whatsoever.

18. The result of the aforesaid discussion leads to only one conclusion that the accused committed forcible rape on the victim on the intervening night of 12/13th August, 1989, as alleged by her, and his conviction by the High Court is quite justified being based on evidence on record. It is, therefore, confirmed.

19. We, therefore, find no merit in this appeal and the appeal is, accordingly, dismissed.

N.J. Appeal dismissed.

POONAM CHAND JAIN AND ANR.

v.

FAZRU

(Criminal Appeal No. 203 of 2010)

JANUARY 28, 2010

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

Code of Criminal Procedure, 1973: s.203 – First complaint dismissed on merits – Second complaint filed on same facts without disclosing fact of dismissal of first complaint – Maintainability of – Held: An order of dismissal under s.203 is no bar for entertaining a second complaint on the same facts but only in exceptional circumstances – On facts, core of both complaints was same – Second complaint not covered within exceptional circumstances – In that view of the matter, the second complaint was not maintainable.

The question which arose for consideration in the present appeal is whether after an order of dismissal of complaint has attained finality, the complainant can file another complaint on almost identical facts without disclosing in the second complaint the fact of either filing of the first complaint or its dismissal.

Allowing the appeal, the Court

HELD: An order of dismissal under Section 203 Cr.P.C. is no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. The exceptional circumstances may be (a) where the previous order was passed on incomplete record (b) or on a misunderstanding of the nature of the complaint (c) or the order which was passed was manifestly absurd, unjust or foolish or (d) where new facts which could not, with

reasonable diligence, have been brought on the record in the previous proceedings. In the instant case, the second complaint was on almost identical facts which were raised in the first complaint and which was dismissed on merits. The core of both the complaints was same. Nothing was disclosed in the second complaint which was substantially new and not disclosed in first complaint. No case was made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the knowledge of the first complaint. In fact such a case could not be made out since the facts in both the complaints were almost identical. Therefore, the second complaint is not covered within exceptional circumstances. In that view of the matter the second complaint in the facts of this case, cannot be entertained. Unfortunately, the High Court fell into an error in not appreciating the legal position in its correct perspective while allowing the revision petition of the respondent. The order passed by the High Court in revision jurisdiction cannot be sustained and is quashed. [Paras 23, 27 and 28] [116-A-C; 118-C-G]

Pramatha Nath Talukdar and another v. Saroj Ranjan Sarkar **AIR 1962 SC 876;** *Jatinder Singh and others v. Ranjit Kaur* **AIR 2001 SC 784;** *Mahesh Chand v. B. Janardhan Reddy and another* **(2003) 1 SCC 734;** *Hiralal and others v. State of U.P. & others* **AIR 2009 SC 2380, relied on.**

Case Law Reference:

AIR 1962 SC 876	**relied on**	**Para 23**
AIR 2001 SC 784	**relied on**	**Para 24**
(2003) 1 SCC 734	**relied on**	**Para 25**
AIR 2009 SC 2380	**relied on**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 203 of 2010.

From the Judgment & Order 5.2.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Revision No. 552 of 2000.

A.M. Singhvi, U.U. Lalit, Jayant Mohan, Rahul Pratap (for "Coac") for the Appellants.

Khurshid Ahmed, Mehtab Ahmed, Aftab Ali Khan for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. Assailing the judgment of High Court dated 05.02.2009 rendered in Criminal revision No. 552/2000 this appeal was filed.

3. The main contention of the appellants before this Court is that without any colour of right the respondent herein repeatedly filed complaints on same facts and the High Court without proper appreciation of the facts and the legal position allowed the revision petition of the respondent and caused a grave failure of justice.

4. The material facts are that a complaint was filed by the respondent in the court of judicial Magistrate 1st Class, Nuh on or about 10.06.1992 alleging therein that the appellants who own and possess his own house at Faridabad came into contact with the respondent and ultimately won the confidence of the respondent. In the complaint it was alleged that the respondent is an illiterate, innocent person with a poor village background and he was induced to purchase some land at village Mohammedpur for and on behalf of the appellants. Thus the respondent entered into an agreement to sell different plots of land of about 60 acres at Mohammedpur village.

5. The said complaint further alleges that various sale deeds were executed and registered and respondent was given

the impression that those deeds were registered in the names of appellants and the respondent jointly.

6. It is further alleged that the respondent was asked to put his thumb impression on the sale deeds and he was further assured that the land situated in village Mohammedpur, Nuh will be transferred in their joint names of appellants and the respondent.

7. According to the complaint, fraud was thus played on the respondent by the appellants and when the respondent realized the same he allegedly filed a complaint in Chhitranjan Park police Station on 28.06.1991 but that police station failed to take any action inter alia on the ground that the entire thing took place beyond their territorial jurisdiction.

8. The further case in the complaint is that the respondent wanted to file complaint before local police station but as the police failed to take any step, the complaint was filed before the Magistrate complaining of offences under Sections 420/120B/426 IPC.

9. On such complaint the matter was taken up by the Judicial Magistrate Ist Class, Nuh and ultimately after a detailed analysis of factual and legal position, the Judicial Magistrate Ist Class came to a conclusion on 13.01.1994 to the following effect:

> "Thus the whole story of the complainant is bundle of falsehood and is liable to be discarded forthwith without going further in the investigation of the allegations. Hence the complaint is dismissed u/s 420 IPC also qua accused no. 1. Record be consigned."

10. Challenging the order of the Magistrate, a revision petition was filed in the High Court of Punjab and Haryana by the respondent. The said revision petition was also dismissed by order dated 12.02.1996 and while dismissing the petition

the High Court recorded the following finding:

> "Having gone through the judgment of the trial court and hearing counsel for the parties, I am of the view that the case is not for interference. Dismissed."

11. High Court's finding was not challenged and attained finality. It may be noted that respondent also filed a civil suit on inter alia the same allegations. The said Civil Suit was numbered as 599/92 and was dismissed for default by the learned Civil Judge, Junior Division, Nuh.

12. The said order of dismissal of the suit became final since no attempt was made to challenge the same.

13. In the meantime, the appellants filed several suits some of which were filed by several companies against the respondent for permanent injunction and other relief. These suits were numbered as follows:

> "(i) Suit No. 241/89 filed by M/s. SPML India Ltd. along with *Suman Malik, w/o Balkishan/Usman Absul Rahim & Hanif v. Fazru s/o Bher Khan and Rahim Bux s/o Shri Kaho Khan*
>
> (ii) Suit No.242/89 dated 28.11.1989 title *M/s. SPML India Limited and others vs. Fazru and others.*
>
> (iii) Suit No.243/89 dated 21.11.1989 title *Poonam Chand Sethi and other vs. Fazru and others.*
>
> (iv) Suit No.244/89 title *M/s. SPML India Limited vs. Fazru and others."*

14. All the suits which were filed against respondent were clubbed as common questions were involved and there was an analogous hearing.

15. All the four suits succeeded with costs and defendants including the respondents were prevented from the

dispossessing the plaintiff over the suit land except in the process established by law. Before passing the final decree the Civil Court came to the following finding:

> "23. From the oral as well as documentary evidence led by the plaintiffs, it is proved that the plaintiffs have purchased the suit land from its original owners and Usman, Hanif and Abdul Rahim are in cultivating possession of the suit land as a lessee. The defendant no.1 has himself admitted that he is not in possession of the suit land. The defendant no.2 has already admitted the claim of the plaintiffs. Therefore, it is concluded that the plaintiffs are entitled to the decree of permanent injunction as prayed for. Hence, this issue is decided in favour of the plaintiffs and against the defendants."

16. The aforesaid decree passed on 27.10.1997 was not challenged by the respondent and therefore become final.

17. After the civil suits were decreed on 24.10.97, just a month thereafter on 25.11.97 another complaint was filed by the respondent in the Court of Judicial Magistrate on virtually the same facts. In fact, paragraphs 4, 6, 7 and 9 of the subsequent complaint has a striking similarity with the previous one. It may be mentioned that in the second complaint the fact of filing of the first complaint and its dismissal was totally suppressed.

18. On such complaint the Magistrate passed an order summoning the appellants 1 and 2. Challenging the said order of summoning the appellants, the appellants moved a criminal revision before the Court of Additional Sessions Judge, Gurgaon and the Additional Sessions Judge, Gurgaon allowed the revision and the summoning order was set aside by an order dated 9.7.99. Against that order the respondent moved a criminal revision being Criminal Revision No.552 of 2000 before the High Court and the Hon'ble High Court reversed the order passed by the Additional Sessions Judge and directed

the appellants to appear before the trial Court where appellants were given liberty to raise all the points and seek reconsideration of the order in accordance with Section 245 of Criminal Procedure Code.

19. Against that order the appellants filed a special leave petition before this Court wherein leave was granted and it was numbered as Criminal Appeal No.371/04.

20. In the said criminal appeal this Court remanded the matter to the High Court for recording positive finding on relevant issues. This Court while remanding the matter was of the opinion that High Court has not considered the legality of the order directing issuance of summon keeping in view the law laid down by this Court. The exact directions given by this Court in its concluding portion vide order dated 15.10.04 in the aforesaid criminal appeal is as follows:

> "As the High Court has not considered the legality of the order directing issuance of process keeping in view the law laid down by this Court, we feel it would be proper to remit the matter to the High Court to record positive findings on the relevant issues".

21. After the matter was remanded to the High Court, the High Court passed the impugned judgment holding therein that the Magistrate's order dated 9.1.99 whereby the appellants have been summoned is restored and the appellants were asked to face trial.

22. In the background of these facts, the question which crops-up for determination by this Court is whether after an order of dismissal of complaint attains finality, the complainant can file another complaint on almost identical facts without disclosing in the second complaint the fact of either filing of the first complaint or its dismissal.

23. Almost similar questions came up for consideration before this Court in the case of *Pramatha Nath Talukdar and*

another vs. Saroj Ranjan Sarkar – (AIR 1962 SC 876). The majority judgment in *Pramatha Nath* (supra) was delivered by Justice Kapur. His Lordship held that an order of dismissal under Section 203 of the Criminal Procedure Code (for short 'the Code') is, however, no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. This Court explained the exceptional circumstances as (a) where the previous order was passed on incomplete record (b) or on a misunderstanding of the nature of the complaint (c) or the order which was passed was manifestly absurd, unjust or foolish or (d) where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings. This Court made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In paragraph 50 of the judgment the majority judgment of this Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. This Court very clearly held that it cannot be settled law which permits the complainant to place some evidence before the Magistrate which are in his possession and then if the complaint is dismissed adduce some more evidence. According to this Court such a course is not permitted on a correct view of the law. (para 50, page 899)

24. This question again came up for consideration before this Court in *Jatinder Singh and others vs. Ranjit Kaur* – (AIR 2001 SC 784). There also this Court by relying on the principle in *Pramatha Nath* (supra) held that there is no provision in the Code or in any other statute which debars complainant from filing a second complaint on the same allegation as in the first complaint. But this Court added when a Magistrate conducts an enquiry under Section 202 of the Code and dismisses a complaint on merits a second complaint on the same facts could not be made unless there are 'exceptional

circumstances'. This Court held in para 12 if the dismissal of the first complaint is not on merit but the dismissal is for the default of the complainant then there is no bar in filing a second complaint on the same facts. However if the dismissal of the complaint under Section 203 of the Code was on merit the position will be different. Saying so, the learned Judges held that the controversy has been settled by this Court in *Pramatha Nath* (supra) and quoted the observation of Justice Kapur in paragraph 48 of *Pramatha Nath* (supra):-

> "……An order of dismissal under S. 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into……"

25. Again in *Mahesh Chand vs. B. Janardhan Reddy and another* – (2003) 1 SCC 734, a three Judge Bench of this Court considered this question in paragraph 19 at page 740 of the report. The learned Judges of this court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous complaint was dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In *Mahesh Chand* (supra) this Court relied on the ratio in *Pramatha Nath* (supra) and held if the first complaint had been dismissed the second

complaint can be entertained only in exceptional circumstances and thereafter the exceptional circumstances pointed out in *Pramatha Nath* (supra) were reiterated.

26. Therefore, this Court holds that the ratio in *Pramatha Nath* (supra) is still holding the field. The same principle has been reiterated once again by this Court in *Hiralal and others vs. State of U.P. & others* – AIR 2009 SC 2380. In paragraph 14 of the judgment this Court expressly quoted the ratio in *Mahesh Chand* (supra) discussed hereabove.

27. Following the aforesaid principles which are more or less settled and are holding the field since 1962 and have been repeatedly followed by this Court, we are of the view that the second complaint in this case was on almost identical facts which was raised in the first complaint and which was dismissed on merits. So the second complaint is not maintainable. This Court finds that the core of both the complaints is the same. Nothing has been disclosed in the second complaint which is substantially new and not disclosed in first complaint. No case is made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the Knowledge of the first complain. In fact such a case could not be made out since the facts in both the complaints are almost identical. Therefore, the second complaint is not covered within exceptional circumstances explained in *Pramatha Nath* (supra). In that view of the matter the second complaint in the facts of this case, cannot be entertained.

28. Unfortunately, the High Court fell into an error in not appreciating the legal position in its correct perspective while allowing the revision petition of the respondent. The order passed by the High Court in revision jurisdiction cannot be sustained and is quashed. This appeal succeeds.

29. There shall be no order as to costs.

D.G. Appeal allowed.

MUSHEER KHAN @ BADSHAH KHAN & ANR.
v.
STATE OF M.P.
(Criminal Appeal No. 1180 of 2005)

JANUARY 28, 2010

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

Penal Code, 1860 – s. 302/120B – Arms Act, 1959 – ss. 25(1)(b)(a) and 27 – Murder of deceased by fire shots – A-4 and A-5 engaged on payment by A-1, A-2, A-3 and A-6 for killing deceased – Conviction of A-4 and A-5 u/s. 302/120B and ss. 25(1)(b)(a) and 27 and sentenced to death – Conviction of A-1, A-2, A-6 u/s. 302/120B and sentenced to life imprisonment – High Court upheld death sentence against A-4 and A-5 but acquitted A-1, A-2 and A-6 – On appeal held: Circumstantial evidence against A-4 and A-5 did not constitute a complete chain which is consistent with their guilt – Identification by PW 4 in T.I. parade cannot be relied upon as his presence at the place of occurrence doubtful – Discrepancy between the versions of witnesses identifying and persons conducting T.I. Parade – Delay in holding T.I. Parade of A-5 – PW 3 having a little chance of seeing A-4 and A-5 – No relevancy of evidence of finger print expert on the car – Also discovery of weapon not relevant – Thus, order of High Court as regard A-4 and A-5 set aside and that of A-1, A-2 and A-6 upheld – Evidence.

According to the prosecution case, A-1, A2, A3 and A-6 engaged A-4 and A-5 on payment, for killing the deceased MB. A-4 and A-5 shot the deceased from a close range. Before the incident A-4 and A-5 were seen in the company of A-1, A-2, A-3, A-6 and A-7. Thereafter, the PWs.3 and 4 saw the accused going away from the scene of occurrence on a scooter along with A-7 who is absconding. Trial court convicted A-4 and A-5 u/s. 302/

120B IPC read with ss. 25(1)(b)(a) and 27 of the Arms Act and awarded death penalty. A-1, A-2 and A-6 were convicted u/s. 302/120B and sentenced to life imprisonment. A-3 was acquitted and A-7 being an absconder, trial against him did not commence. High Court upheld the death sentence against A-4 and A-5 but set aside the conviction of the A-1, A-2 and A-6. Hence the present appeals.

Allowing the appeals by A-4 and A-5 and dismissing the appeals by the State, the Court

HELD: 1. The so called circumstantial evidence against A-4 and A-5 does not constitute a complete chain which is consistent with the guilt of A-4 and A-5 and incompatible with their innocence. Considering the facts of the case and also going by the test of appreciation of circumstantial evidence, the benefit of doubt is to be extended to A-4 and A-5 and the judgment and order of conviction of A-4 and A-5 u/ss. 302/120-B I.P.C read with ss. 25(1)(a)(b) and 27 of the Arms Act cannot be sustained and consequently the death sentence awarded to them by the High Court is set aside. [Paras 58 and 71] [143-B-D; 146-B]

2.1. On an analysis of the evidence of PW-3 and PW-4, the presence of PW-4 in the place of occurrence is very doubtful. PW-4's evidence is that he was coming to meet the deceased. They were known to each other for the last 20 years and PW-4 had very good friendly relations with the deceased. PW-3 is a close relation of the deceased and lives in the same apartment where the deceased stayed. PW-4 also admitted that he knows PW-3. From the evidence of PW-3 and PW-4, it is clear that they were present at the place of occurrence at the same time. [Paras 14 and 15] [132-B-D]

2.2. On reading the evidence of PW-3 and PW-4 it

would appear that one is totally insulated from the other as if they are strangers and reside in different islands. This is totally improbable. In the appreciation of evidence neither the High Court nor the trial court considered this glaring improbability in the prosecution case. Taking into account the factual background, it is very doubtful whether PW-4 was at all present at the place of occurrence having regard to the evidence of PW-3. Regarding assessment of the evidence of identification of the accused persons by PW-3 and PW-4, the identification by PW-4 cannot be relied upon at all. [Paras 19, 20 and 21] [133-D-H]

2.3. It is the prosecution case that A-4 and A-5 are hired criminals and are not persons of the locality. The prosecution has also not claimed that A-4 and A-5 were known to PW-3 from before. From the evidence of PW-3 it is clear that PW-3 only had a fleeting chance of seeing A-4, A-5 and A-7 when they were obviously in a hurry to board the scooter and escape from the scene. Assuming that there was street light, as is the claim of the prosecution, it is obvious the accused persons were fleeing from the place of occurrence on the scooter. Therefore, excepting a fleeting glance PW-3 had very little chance of seeing A-4, A-5 and A-7. [Para 23] [134-B-D]

2.4. The evidence of PW-3 that A-4, who was driving the scooter, was repeatedly looking back is highly improbable. PW-3 is a highly interested witness, being a very close relative of the deceased. That by itself, is not a ground to discard his evidence. But it is a golden rule that in such a situation, the evidence of PW-3 has to be weighed very carefully and cautiously before accepting the same. [Paras 24, 25 and 26] [134-D; 135-A-B]

3.1. Identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their

progress with the investigation into the offence is proceeding on right lines. It can only be used in corroboration of the statements in Court. [Paras 27 and 28] [135-C-D]

Matru Alias Girish Chandra vs. The State of Uttar Pradesh **1971(2) SCC 75;** *Santokh Singh vs. Izhar Hussain and Anr.* **(1973) 2 SCC 406;** *Amitsingh Bhikam Singh Thakur vs. State of Maharashtra* **(2007) 2 SCC 310, relied on.**

3.2. In the instant case, A-4 was apprehended on 05.12.2000 and was arrested on 06.12.2000 and the identification parade was held on 10.12.2000. It is admitted that A-4 was kept in open police custody for all these days, prior to his identification. About the identification by him PW-3 deposed that he recognized all the three persons in Court even though the fact remains that out of the three accused persons A-7 absconded and never faced trial. This is a clear discrepancy in the evidence of PW-3 about identification. It is an admitted position that A-4 is bald but in his evidence PW-3 admitted that during investigation the heads of none of the persons were covered. Though in his evidence PW-3 has said that the persons were covered with a blanket upto the neck but PW-12, who held the identification parade, in his cross examination admitted that there is no reference of blanket in the reports of T.I. parade of A-4 and A-5 respectively. This is a vital contradiction between the versions of witnesses identifying and the person conducting the T.I. Parade. [Para 31] [136-A-E]

4. Delay in holding the T.I. parade by itself throws a doubt on the genuineness of such identification and it is difficult to remember the facial expression of the accused persons after such a long gap in the facts of the instant case. Therefore, the alleged identification of A-5 after a gap of two months throws a doubt on the genuineness

of such identification especially when PW-3 had very little chance to see either A-4 or A-5. No reliance ought to have been placed by the courts below or High Court on such delayed T.I. parade for which there is no explanation by the prosecution. [Paras 32 and 37] [136-F-G; 138-A-B]

Soni vs. State of Uttar Pradesh **(1982) 3 SCC 368, relied on.**

Pramod Mandal vs. State of Bihar **(2004) 13 SCC 150, distinguished.**

5.1. The evidence of finger print expert falls under the category of expert evidence u/s. 45 of the Evidence Act, 1872. Under the Act, the word 'admissibility' has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Act. But one thing is clear that evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record. [Paras 38 and 39] [138-C-E]

5.2. It is nowhere alleged by the prosecution that there was any altercation between the deceased and the accused persons at the scene of occurrence. There is no whisper of any evidence that accused persons had any physical contact with the deceased or chased the deceased or dragged the deceased out of the car. The evidence is only of hearing shots of fire arm and that the deceased was fired from a point blank range and he immediately fell down and in such a way as his body was half inside the car and half outside the same. Therefore, there is no prosecution evidence to the effect that A-4 and A-5 had any occasion to touch the car and that too with the ring finger. It is obvious that the accused, being hired criminals, according to the prosecution, must be busy in escaping from the scene of occurrence after the

deceased had been shot from the point blank range and immediately the deceased fell down. There is no evidence of the deceased running away from his assailants or offering any resistance. Having regard to this state of evidence, the evidence of finger print on the car ceases to have any relevance. [Paras 43 and 44] [139-A-E]

5.3. PW-23-finger print expert, did not give any evidence of finger print on the alleged weapon of offence which was discovered pursuant to the statement of accused persons u/s. 27 of the Act. Therefore, in the facts of the case and in view of the prosecution evidence, the evidence of finger print expert does help the prosecution. Even if the evidence of finger print expert on the scooter is accepted, that by itself does not prove anything. If certain persons are riding on the scooter, it may have the finger prints of the person who is riding the scooter. That by itself does not connect the persons with the crime. [Para 45] [139-E-G]

6.1. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence. The instant case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is 'inferential evidence' and proof in such a case is derivable by inference from circumstances. [Paras 46 and 47] [139-G-H; 140-A-B]

6.2. Certain rules have been judicially evolved for appreciation of circumstantial evidence. The first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts

evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused. When in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail. The next principle is that, in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt. [Paras 48, 49, 50, 51 and 52] [140-D-G; 141-A-B]

Raghav Prapanna Tripathi and others vs. State of U.P. **AIR 1963 SC 74;** *State of UP vs. Ravindra Prakash Mittal* **1992 Crl.L.J 3693(SC);** *Govinda Reddy vs. State of Mysore* **AIR 1960 SC 29;** *Hanumant Govind Nargundkar and anr. vs. State of Madhya Pradesh* **AIR 1952 SC 343;** *Mohan Lal Pangasa vs. State of U.P.* **AIR 1974 SC 1144, relied on.**

Ashraf Ali vs. Emperor **43 Indian Cases 241;** *Nibaran Chandra Roy vs. King Emperor* **11 CWN 1085, referred to.**

6.3. A3 was acquitted by the trial court and also by the High Court. The State appeal against the same has already been dismissed by this Court. The State also filed an appeal against the order of acquittal by the High Court in respect of A1, A2 and A6. While acquitting A1, A2, and A6, the High Court has taken a plausible view. This Court in exercise of its jurisdiction under Article 136 is not inclined to take a different view. [Para 56] [142-C-E]

State of Haryana vs. Krishan **(2008) 15 SCC 208;** *State of Andhra Pradesh vs. S. Swarnalatha and others* **(2009) 8 SCC 383 – relied on.**

6.4. As a result of acquittal of A-1, A-2, A-3 and A-6, the conspiracy theory of the prosecution in this case fails. A substantial part of the prosecution case has not been accepted on valid grounds either by the High Court or by this Court. Thus, a very vital part of the prosecution case is finally knocked off. As the prosecution fails to prove its case of conspiracy, the motive angle behind the alleged crime committed by A-4 and A-5 disappears. The prosecution case is that A-4 and A-5 are hired criminals and were engaged on payment by A-1, A-2, A-3 and A-6 for killing the deceased. The acquittal of A-1, A-2, A-3 and A-6 which is upheld, casts a serious doubt on the entire prosecution and its case against A-4 and A-5 suffers a serious set back. [Para 57] [142-G-H; 143-A-B]

7.1. Reliability of the materials discovered pursuant to the facts deposed by the accused in police custody depends on the facts of each case. If the discovery is otherwise reliable, its evidentiary value is not diluted just by reason of non-compliance with the provision of s. 100(4) or s. 100(5) of Cr.P.C. The reason is that s. 100 falls under Chapter VII of the Code which deals with processes initiated to compel the production of things on a search. Therefore, the entire gamut of proceedings under Chapter VII of the Code is based on compulsion whereas the very basis of facts deposed by an accused in custody is voluntary and pursuant thereto discovery takes place. Thus, they operate in totally different situations. Therefore, the safeguards in search proceedings based on compulsion cannot be read into discovery on the basis of facts voluntarily deposed. [Paras 65 and 66] [144-F-H; 145-A-B]

State, Govt. of NCT of Delhi vs. Sunil and another **(2001) 1 SCC 652;** *The Transport Commissioner, A.P., Hyderabad and another vs. S. Sardar Ali, Bus Owner, Hyderabad and 41 others* **(1983) 4 SCC 245, relied on.**

7.2. Section 27 starts with the word 'provided'. Therefore, it is a proviso by way of an exception to ss. 25 and 26 of the Evidence Act. If the facts deposed u/s. 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [Para 67] [145-C-D]

State of Bombay vs. Kathi Kalu Oghad **AIR 1961 SC 1808, relied on.**

Pulukori Kottaya vs. King Emperor **(1947) PC 67, referred to.**

7.3. The objection that in the matter of discovery of the weapon pursuant to the facts deposed by A-4 and A-5, the prosecution has not followed the safeguards which are statutorily engrafted in connection with a search u/s. 100(4) and s. 100(5) Cr.P.C. and that the discovery pursuant to facts deposed u/s. 27 of the Act can only become relevant if it is made following the safeguards u/s. 100(4) and s. 100(5), cannot be sustained. But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court. [Paras 59, 60 and 70] [143-E-F; 146-A]

Case Law Reference:

1971(2) SCC 75	**Relied on.**	**Para 27**
(1973) 2 SCC 406	**Relied on.**	**Para 28**
(2007) 2 SCC 310	**Relied on.**	**Para 29**
(2004) 13 SCC 150	**Distinguished.**	**Para 36**
(1982) 3 SCC 368	**Relied on.**	**Para 37**
AIR 1963 SC 74	**Relied on.**	**Para 49**
1992 Crl.L.J 3693(SC)	**Relied on.**	**Para 50**
43 Indian Cases 241	**Referred to.**	**Para 51**
11 CWN 1085	**Referred to.**	**Para 53**
AIR 1960 SC 29	**Relied on.**	**Para 54**
AIR 1952 SC 343	**Relied on.**	**Para 54**
AIR 1974 SC 1144	**Relied on.**	**Para 55**
(2008) 15 SCC 208	**Relied on.**	**Para 56**
(2009) 8 SCC 383	**Relied on.**	**Para 56**
(2001) 1 SCC 652	**Relied on.**	**Para 61**
(1983) 4 SCC 245	**Relied on.**	**Para 62**
AIR 1961 SC 1808	**Relied on.**	**Para 67**
(1947) PC 67	**Referred to.**	**Para 68**

CRIMINAL APPELLATE JURISDICTION : Criminal No. 1180 of 2005.

From the Judgment & Order dated 6/8.11.2004 of the High Court of Madhya Pradesh at Jabalpur in CRL A. No. 1761 of 2003.

WITH

Crl. A. Nos. 1181, 1204 & 1205 of 2005.

Amrender Sharan, U.U. Lalit, Kunwar C M Khan, Irshad Ahmad, Imran K. Burney, Vikas Singh, Ramesh Kr. Kol, Vibha Datta Makhija, Siddhesh Katwal, Philemon Nongbei, Nitin Sangra for the Appellants.

S.K. Dubey, Yogesh Tiwari, Shiv Sagar Tiwari, C.D. Singh, Venkateswara Rao Anumolu for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Several appeals were heard together as they arose out of similar incidents and some common questions are also involved.

2. The prosecution version as unfolded in the case is that on 29.11.2000 around 7:10 P.M. one Pappu @ Prakash Tripathi (PW-3) was in his apartment. Then on hearing the firing of three shots, he came out of his apartment and saw a light blue coloured scooter, which was parked in front of the apartment, was being started by a man and after him two other persons also boarded that scooter. PW-3 also saw a Matiz car which was parked by the side of the road and he saw the body of Mallu Bhaiya, the deceased, half inside the car and the other half was lying outside the same. PW-3 further saw that after starting the scooter, those persons drove it towards the road and took a turn to the right and drove towards the side of Dainik Bhaskar Press. PW-3 further deposed that at the time those persons left in the scooter they were "turning their heads back". Then PW-3 came outside his apartment and started shouting.

3. The further evidence of PW-3 is that he immediately ran towards the deceased and found there was no movement in the body. On hearing the shots and the shouts of PW-3, the nearby cable operator Brajendra Keshwani (PW-17), Umesh Singh (PW-2) and one Gopal Jain (not examined by the prosecution) came to the place of incident. Then PW-3 with the help of those persons put the deceased on the back seat of that Matiz car. PW-3 drove that car with PW-2 in the front seat to Marble Hospital and PW-3 got the report written in the hospital which is marked Exhibit P-11.

4. PW-3 is virtually the star witness of the prosecution.

5. Prosecution also relied on the evidence of Shishir Tiwari (PW-4) who was also on a scooter and was going to the house of the deceased to meet him. As he reached near the Bungalow of Major General in front of Park Apartment, he also claimed to have heard three shots. Then he stopped his scooter and

saw another scooter at a distance of 60-70 feet and that scooter "was started and three persons boarded it" and "that scooter took a turn to reach the road and drove past me." According to him that scooter was driven 2-3 feet away from him towards Bhashkar Press side. He claimed to have seen those persons who were on that scooter.

6. PW-4 claimed to have seen PW-3 with the help of PW-2, PW-17 and Gopal Jain lifting the deceased in the Matiz car and driving it away with Umesh Singh (PW-2). He saw three ladies standing near the spot and on being asked by him the wife of the deceased, Jareena Chowrariya (PW-10), who was in tears, told PW-4 that the assailants had murdered the deceased. PW-4 then on his scooter went to the Marble Hospital.

7. About the presence of PW-4 at the place of occurrence, this Court has some serious doubts which shall be discussed later.

8. This is admittedly a case based on circumstantial evidence and the evidence of PW-3 and PW-4 form the main plank on which rests the prosecution case of circumstantial evidence.

9. In this case charge sheet was filed against seven persons, namely, A-1 Shambhu, A-2 Sapna @ Shhjahan, wife of Sambhu, A-3 Govinda @ Gudda, A-4 Musheer Khan @ Badshah Khan, A-5 Basant Shiva Bhai Jadav, A-6 Sattanarayan @ Sattu Sen, A-7 Mehffooz @ Chotey, remained an absconder and never faced trial. A-7 is the brother of A-2.

10. As per the prosecution, A-1, A2, A3 & A-6 had paid money to A-4 and A-5 for killing the deceased and pursuant thereto A-4 and A-5 had shot the deceased from a close range. A-4 & A-5 were arrested by the Jabalpur police at Ahmedabad. According to the prosecution A-4 & A-5 were seen before the occurrence in the company of A-1, A-2, A-3, A-6 & A-7 and after

the occurrence, they were seen by other witnesses, namely, PWs.3 & 4 as going away from the scene of occurrence on a light blue coloured scooter along with the absconding accused Mehfooz (A-7). According to prosecution A-4 and A-5 were identified by witnesses in the T.I. Parade, their finger prints were found on the car and on the recovered scooter. They had suffered a disclosure statement and which had resulted in discovery of the weapon of assault and the Ballistic Expert had given the report, according to which it was proved that weapon of assault recovered from the Appellants had been used by the deceased.

11. In this case the Trial Court in its judgment dated 13.10.2003 acquitted A-3 and convicted A-4 and A-5 under Sections 302/120B of the Indian Penal Code read with Sections 25(1)(b)(a) and 27 of the Arms Act and they were awarded death penalty. A-7 being an absconder, trial against him did not commence. The Trial Court convicted A-1, A-2 & A-6 under Sections 302/120B and gave them life sentence.

12. The High Court in its judgment dated 8.11.2004 partly confirmed the judgment of the Trial Court in confirming the death sentence against A-4 & A-5, but reversed the conviction of the other three accused, i.e. Shambhu (A-1), Sapna (A-2) and Sattanarain @ Sattu Sen (A-6) and the charge of conspiracy failed and they were acquitted.

13. Aggrieved by the conviction and death sentence imposed by the Hon'ble High Court, Musheer (A-4) and Basant (A-5), filed two special leave petitions being Crl.A. Nos.1180 & 1181/2005 before this Court. The State Government also filed special leave petitions against the judgment of the Hon'ble High Court acquitting Gobind (A-3), being Crl. Appeal No. 1206/ 2005, as well as Shambhu (A-1), Sapna (A-2) and Satyanarain @ Sattu Sen (A-6) being Crl. Appeal No. 1204/2005. The State Government also filed an appeal against the dismissal of petition for enhancement of sentence of these accused being Crl. Appeal No. 1205/2005. The brother of the deceased had

also filed a special leave petition along with an application seeking permission for filing the same being Crl. Appeal No. 4081/2005. That was dismissed by this Court by an order dated 18.04.2005 in view of the appeals having been filed by the State Government.

14. On an analysis of the evidence of PW-3 and PW-4 the presence of PW-4 in the place of occurrence is very doubtful. PW-4's evidence is that he was coming to meet the deceased Asim Chansoriaji. They were known to each other for the last 20 years and PW-4 had a very good friendly relations with the deceased. PW-3 is a close relation of the deceased and lives in the same apartment where the deceased stayed. PW-4 also admitted that he knows PW-3.

15. From the evidence of PW-3 and PW-4, it is clear that they were present at the place of occurrence at the same time.

16. PW-3 saw the accused persons from a distance of "20 steps" while PW-4 saw the accused persons from a distance "60-70" feet. The accused persons were allegedly identified by PWs 3 and 4. However in his evidence PW-3 never stated that he saw PW-4 in the place of occurrence. PW-3 also stated that after coming to the place of occurrence he was shouting that the deceased had been shot at. Hearing his shouts "at first cable operator Kesharwani came out there at the incident site. After him Umesh, who lives in my apartment came out. After Umesh then came Gappu of Jain family, who also reside in our same apartment and then came out my wife and after her when we were lifting Mallu Bhaiya to put him in the car then his wife Zarina also arrived there".

17. In view of the evidence discussed above it is absolutely natural for PW-4 to immediately talk with PW-3 to find out about the incident. But there is no evidence of that. PW-3 never whispered anything about the presence of PW-4 at the place of occurrence. On the other hand, evidence of PW-3 is that he with the help of PW-2, PW-17 and Gopal Jain (not examined)

put the body of the deceased, half of which was hanging outside the Matiz Car, in the back of that car and some of those persons sat in the car and PW-3 drove the car to the hospital.

18. PW-4, an athlete, and in his Tracksuit was obviously having a sound physique. It is wholly improbable that PW-4, who was known to PW-3 and was at the place of occurrence and saw PW-3 shouting for help for putting the body of the deceased in the car will not come forward to help PW-3 especially when he was very friendly with the deceased, having a long standing relationship of 20 years. This is very very un-natural. It also very un-natural for PW-4 to remain at the place of occurrence as a passive spectator and watch the incident of PW-3 taking the deceased in that Matiz car to the hospital with help of others who had come to the place of occurrence much after he was there. Evidence of PW-4 is that after PW-3 left for the hospital he talked with the ladies who came to the place of occurrence after the incident and thereafter went to the hospital. In the hospital also PW-4 did not talk with PW-3.

19. If one reads the evidence of PW-3 and PW-4 it would appear that one is totally insulated from the other as if they are strangers and reside in different islands. This is totally improbable. Unfortunately in the appreciation of evidence neither the High Court nor the trial Court has considered this glaring improbability in the prosecution case.

20. Taking into account the aforesaid factual background it is very doubtful whether PW-4 was at all present at the place of occurrence having regard to the evidence of PW-3. Therefore, identification by PW-4 of the scooter and the accused A-4 and A-5 in the T.I Parade becomes doubtful and no reliance can be placed on that.

21. Coming to the question of assessing the evidence of identification of the accused persons by PW-3 and PW-4, this Court is of the opinion that identification by PW-4 cannot be relied upon at all inasmuch as this Court has grave doubts about

the presence of PW-4 at the place of occurrence.

22. So far as identification by PW-3 is concerned, the Court must take into consideration the extremely limited opportunities which PW-3 had of seeing the accused persons.

23. It is the prosecution case that A-4 and A-5 are hired criminals and are not persons of the locality. Prosecution has not also claimed that A-4 and A-5 were known to PW-3 from before. From the evidence of PW-3 it is clear that PW-3 only had a fleeting chance of seeing A-4, A-5 and A-7 when they were obviously in a hurry to board the scooter and escape from the scene. Assuming that there was street light, as is the claim of the prosecution, it is obvious the accused persons were fleeing from the place of occurrence on the scooter. Therefore, excepting a fleeting glance PW-3 had very little chance of seeing A-4, A-5 and A-7.

24. The evidence of PW-3, that A-4, who was driving the scooter, was repeatedly looking back is highly improbable for the following reasons:

(i) A-4, being a hired man, was new to the place. Obviously he was not acquainted with the topography of the area. Therefore, he would be very busy in finding his way out of the place of occurrence and would concentrate on that;

(ii) A-4 was driving the scooter, it is difficult for the driver of the scooter in a new area to repeatedly look back. Being hired criminals, as is the prosecution case the accused persons will not do anything to facilitate their investigation;

(iii) It is not the prosecution case that the accused persons were given a chase and therefore there was no reason for them to look back. The only evidence of PW-3 is that he was shouting that Mallu Bhaiya had been killed by the assailants. A-4 was mere a spectator, assuming but not accepting that A-4 was present at the place of occurrence.

25. The Court must remember that PW-3 is a highly interested witness, being a very close relative of the deceased. That by itself, of course, is not a ground to discard his evidence. But it is a golden rule that in such a situation, the evidence of PW-3 has to be weighed very carefully and cautiously before accepting the same.

26. Applying these principles, in the facts of the case, the evidence of PW-3 that while driving the scooter A-4 was repeatedly looking back becomes highly doubtful.

27. It may be pointed out that identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. (See *Matru Alias Girish Chandra vs. The State of Uttar Pradesh* - 1971(2) SCC 75 at para 17)

28. It is also held by this Court that identification test parade is not substantive evidence but it can only be used in corroboration of the statements in Court. (See *Santokh Singh vs. Izhar Hussain and Anr.* – (1973) 2 SCC 406 at para 11)

29. Recently in the case of *Amitsingh Bhikam Singh Thakur vs. State of Maharashtra* - (2007) 2 SCC 310 this court held on a consideration of various cases on the subject that the identification proceedings are in the nature of tests and there is no procedure either in Cr. P.C., 1973 or in the Indian Evidence Act for holding such tests. The main object of holding such tests during investigation is to check the memory of witnesses based upon first impression and to enable the prosecution to decide whether these witnesses could be cited as eye witnesses of the crime.

30. It has also been held that the evidence of the identification of accused for the first time is inherently weak in character and the court has held that the evidence in test identification parade does not constitute substantive evidence

and these parades are governed by Section 162 of Code of Criminal Procedure and the weight to be attached to such identification is a matter for the courts.

31. In the instant case A-4 was apprehended on 05.12.2000 and was arrested on 06.12.2000 and the identification parade was held on 10.12.2000. It is admitted that A-4 was kept in open police custody for all these days from 6th December to 10th December, 2000 prior to his identification. About the identification by him PW-3 deposed that he recognized all the three persons in Court even though the fact remains that out of the three accused persons A-7 absconded and never faced trial. This is a clear discrepancy in the evidence of PW-3 about identification. It is an admitted position that A-4 is bald but in his evidence PW-3 admitted that during investigation the heads of none of the persons were covered. Though in his evidence PW-3 has said that the persons were covered with a blanket upto the neck but PW-12, who held the identification parade, in his cross examination admitted that there is no reference of blanket in Ext. P-14 and Ext. P-16 which are the reports of T.I. parade of A-4 and A-5 respectively. This is a vital contradiction between the versions of witnesses identifying and the person conducting the T.I. Parade.

32. In so far as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24.01.2001 and the incident is of 29.11.2000, even though A-5 was arrested on 22.12.2000. There is no explanation why his identification parade was held on 24.01.2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or High Court on such delayed T.I. parade for which there is no explanation by the prosecution.

33. At the Bar some decisions were cited about how the Court should consider the evidence in the test identification parade.

34. Mr. Lalit, learned senior counsel for the State relied on the decision in *Pramod Mandal vs. State of Bihar* – (2004) 13 SCC 150 in order to contend that mere delay in holding the test identification parade will not prevent the Court from accepting the evidence when defence failed to impute any motive to the prosecution by way of cross examination for delay in holding the T.I. parade. In *Pramod Mandal* (supra) it was held that delay of one month in holding the T.I. parade was not fatal.

35. The aforesaid decision of this Court has to be appreciated in the factual context of that case. From the facts in *Pramod Mandal* (supra) it appears that dacoity had taken place in the house for about 25 minutes in which PW-4 sustained several injuries from the accused in trying to resist the dacoity. Therefore, PW-4 had sufficient opportunity to notice the appearance and physical features of the accused and there was sufficient light. The Court found that the traumatic experience of PW-4 for a considerable period must have left the faces of the assailants firmly imprinted in his memory which could not be erased within a period of only 30 days. Under those circumstances, this Court held that the evidence in T.I. parade cannot be doubted.

36. But in the instant case the facts are totally different. Here PW-3 had nothing more than a fleeting chance of seeing A-4, A-5 and who hurriedly boarded the scooter while escaping from the place of occurrence. There is no evidence that PW-3 had any physical contact or confrontation with A-4 and A-5. Therefore, the ratio in *Pramod Mandal* (supra) cannot apply here.

37. However, the decision of this Court in *Soni vs. State of Uttar Pradesh* – (1982) 3 SCC 368(1) is more relevant to the facts of the case in hand. In *Soni* (supra), the facts have not been discussed in the judgment which was rather brief but one thing is made clear that T.I. Parade was held after a lapse of 42 days from the date of the arrest of the appellant. This

Court held that such delay in holding the T.I. parade by itself throws a doubt on the genuineness of such identification and we respectfully agree with the view that it is difficult to remember the facial expression of the accused persons after such a long gap in the facts of this case. Therefore, the alleged identification of A-5 after a gap of two months throws a doubt on the genuineness of such identification especially when PW-3 had very little chance to see either A-4 or A-5.

38. Learned counsel for the State relied very much on the evidence of finger print expert (PW-23). It is well known that the evidence of finger print expert falls under the category of expert evidence under Section 45 of the Indian Evidence Act, 1872.

39. It will be noticed that under the Indian Evidence Act, the word 'admissibility' has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Indian Evidence Act. But one thing is clear that evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record.

40. In the instant case, PW-23 (finger print expert) claimed to have matched the transparent marked 'C' with finger print marked 'ka'. This according to him is the index finger of right hand of A-4 (Musheer alias Badshah). PW-23 when compared the transparent 'F' with finger print marked 'kha' it was found identical with the finger print mark of A-5's right hand ring finger.

41. According to PW-23, he lifted these finger prints while going to the police station on 1.12.2000 from the Bajaj Super Scooter which was associated with the case and also from the Matiz Car both of which were parked in the police station.

42. According to the finger print expert (PW-23) 'C' was found on the right side of the rear mudguard of the scooter and 'F' was found on the side glass of the Matiz car.

43. Before this Court can appreciate the relevance of those prints, the Court has to look to the substantive evidence on record. It is nowhere alleged by the prosecution that there was any altercation between the deceased and the accused persons at the scene of occurrence. There is no whisper of any evidence that accused persons had any physical contact with the deceased or chased the deceased or dragged the deceased out of the car.

44. The evidence is only of hearing shots of fire arm and the further evidence is that the deceased was fired from a point blank range and he immediately fell down and in such a way as his body was half inside the car and half outside the same. Therefore, there is no prosecution evidence to the effect that A-4 and A-5 had any occasion to touch the car and that too with the ring finger. It is obvious that the accused, being hired criminals, according to the prosecution, must be busy in escaping from the scene of occurrence after the deceased had been shot from the point blank range and immediately the deceased fell down. There is no evidence of the deceased running away from his assailants or offering any resistance. Having regard to this state of evidence the evidence of finger print on the car ceases to have any relevance.

45. PW-23 (Finger print expert) has not given any evidence of finger print on the alleged weapon of offence which was discovered pursuant to the statement of accused persons under Section 27 of the Evidence Act. Therefore, in the facts of this case and in view of the prosecution evidence the evidence of finger print expert does help the prosecution. Even if we accept the evidence of finger print expert on the scooter that by itself does not prove anything. If certain persons are riding on the scooter, it may have the finger prints of the person who is riding the scooter. That by itself does not connect the persons with the crime.

46. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and

scattered links which do not make a complete sequence.

47. This Court finds that this case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.

48. Chief Justice Fletcher Moulton once observed that "proof does not mean rigid mathematical" formula since "that is impossible". However, proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Circumstantial evidence, on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape. Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence.

49. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. {See *Raghav Prapanna Tripathi and others vs. State of U.P.* - AIR 1963 SC 74}.

50. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused.

{See: *State of UP vs. Ravindra Prakash Mittal,* 1992 Crl.L.J 3693(SC) – (Para 20)}

51. While appreciating circumstantial evidence, we must remember the principle laid down in *Ashraf Ali vs. Emperor* – (43 Indian Cases 241 at para 14) that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.

52. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt.

53. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In *Nibaran Chandra Roy vs. King Emperor* – (11 CWN 1085) it was held the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

54. Same principles have been followed by the Constitution Bench of this Court in *Govinda Reddy vs. State of Mysore* – (AIR 1960 SC 29) where the learned Judges quoted the principles laid down in *Hanumant Govind Nargundkar and anr. vs. State of Madhya Pradesh* – (AIR 1952 SC 343). The ratio in *Govind* (supra) quoted in paragraph 5, page 30 of the reports in *Govinda Reddy* (supra) are:

> "in cases where the evidence of a circumstantial nature, the circumstances which lead to the conclusion of guilt should be in the first instance fully established, and all the facts so established should be consistent only with the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused and it must be shown that within all human probability the act must have been committed by the accused."

55. The same principle has also been followed by this Court in *Mohan Lal Pangasa vs. State of U.P.* – AIR 1974 SC 1144.

56. As noted above, along with the appeal of A4 and A5 against their judgment and order of conviction, in this case, several State appeals have been filed. A3-Govinda was acquitted by the trial court and also by the High Court. The State appeal against the same has already been dismissed by this court by an order dated 24.11.06. The State also filed an appeal against the order of acquittal by the High Court in respect of A1, A2 and A6. This Court finds that in acquitting A1, A2, and A6, the High Court has taken a plausible view. This Court in exercise of its jurisdiction under Article 136 is not inclined to take a different view.

[See *State of Haryana vs. Krishan* reported in (2008) 15 SCC 208, paras 10 and 11, pages 211-212 of the report and *State of Andhra Pradesh vs. S. Swarnalatha and others,* reported in (2009) 8 SCC 383, paras 25 and 26, pages 388-389 of the report.]

57. As a result of acquittal of A-1, A-2, A-3 and A-6, the conspiracy theory of the prosecution in this case fails. A substantial part of the prosecution case has not been accepted on valid grounds either by the High Court or by this Court. Thus, a very vital part of the prosecution case is finally knocked off. As the prosecution fails to prove its case of conspiracy, the

motive angle behind the alleged crime committed by A-4 and A-5 disappears. The prosecution case is that A-4 and A-5 are hired criminals and were engaged on payment by A-1, A-2, A-3 and A-6 for killing the deceased. The acquittal of A-1, A-2, A-3 and A-6 which is upheld by this Court casts a serious doubt on the entire prosecution and its case against A-4 and A-5 suffers a serious set back.

58. Considering the aforesaid facts and also going by the test of appreciation of circumstantial evidence as discussed above, this Court has to extend the benefit of doubt to A-4 and A-5 and cannot sustain the judgment and order of conviction of A-4 and A-5 under Sections 302/120-B of I.P.C read with Sections 25(1)(a)(b) and Section 27 of the Arms Act and consequently the death sentence awarded to them by the High Court is set aside. This Court is of the view that the so called circumstantial evidence against A-4 and A-5 does not constitute a complete chain which is consistent with the guilt of A-4 and A-5 and incompatible with their innocence.

59. Before parting, it may be noticed that in this case, it has been argued by the learned defence Counsel that in the matter of discovery of the weapon pursuant to the facts deposed by A-4 and A-5, the prosecution has not followed the safeguards which are statutorily engrafted in connection with a search under Section 100(4) and Section 100(5) of the Code of Criminal Procedure.

60. The learned Counsel argued that discovery pursuant to facts deposed under Section 27 of the Evidence Act can only become relevant if it is made following the safeguards under Section 100(4) and section 100(5) of the Code.

61. In *State, Govt. of NCT of Delhi vs. Sunil and another,* [(2001) 1 SCC 652], almost a similar contention has been negatived by this Court in Para 19 of the report. The learned judges held:

> "..recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code."

62. In doing so, the learned judges relied on a decision of this Court in *The Transport Commissioner, A.P., Hyderabad and another vs. S. Sardar Ali, Bus Owner, Hyderabad and 41 others* - [1983 4 SCC 245]. It may be true that the decision in *Sardar Ali* was rendered in the context of Motor Vehicles Act, but the propositions in Para 20, at page 662 of the report are, if I may say so, based on sound logic.

63. In Para 20, page 662 of the report it was held when discovery is made pursuant to any facts deposed by the accused, the discovery memo prepared by the investigating officer is necessarily attested by independent witnesses. But if in a given case, no witness is present or nobody agrees to attest the memo, it is difficult to lay down as a proposition that the discovery must be treated tainted or that the discovery evidence is unreliable. In such a situation, the Court has to consider the report of the investigating officer who made discovery on its own merits.

64. In para 21, this Court further elaborated this principle by saying when a police officer gives evidence in Court about discovery made by him on the strength of facts deposed by accused it is for the Court to believe the version, if it is otherwise shown to be reliable and it is for the accused to cross examine the investigating officer or rely on other materials to show that evidence of police officer is unreliable or unsafe.

65. Therefore, reliability of the materials discovered pursuant to the facts deposed by the accused in police custody depends on the facts of each case. If the discovery is otherwise reliable, its evidentiary value is not diluted just by reason of non-compliance with the provision of Section 100(4) or Section 100(5) of the Code.

66. The reason is that Section 100 falls under Chapter VII of the Code which deals with processes initiated to compel the production of things on a search. Therefore the entire gamut of proceedings under Chapter VII of the Code is based on compulsion whereas the very basis of facts deposed by an accused in custody is voluntary and pursuant thereto discovery takes place. Thus, they operate in totally different situations. Therefore, the safeguards in search proceedings based on compulsion cannot be read into discovery on the basis of facts voluntarily deposed.

67. Section 27 starts with the word 'provided'. Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed under Section 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [See *State of Bombay vs. Kathi Kalu Oghad,* [AIR 1961 SC 1808].

68. The Privy Counsel in *Pulukori Kottaya vs. King Emperor,* [1947 PC 67] held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposed by accused depends only to the nature of the facts discovered to which the information precisely relates.

69. The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 can be illustrated by the following example: Suppose a person accused of murder deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused.

70. So the objection of the defence counsel to the discovery made by the prosecution in this case cannot be

sustained. But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court.

71. For the reasons discussed above, the Appeal filed by A-4 Musheer Khan @ Badshah Khan and A-5 Basant Shiva Bhai Jadav are allowed. The judgment and order of conviction of the High Court dated 8.11.2004 passed in the Criminal Appeal No. 1761 of 2003 against them under Sections 302/120-B of I.P.C and under Sections 25(1)(a)(b) and Section 27 of the Arms Act is set aside. They are set at liberty forthwith, if not required to be detained in any other case.

72. All the appeals filed by the State of Madhya Pradesh are dismissed.

N.J. Appeals disposed of.

M/S. GODREJ SARA LEE LIMITED
v.
RECKITT BENCKISER AUSTRALIA PTY. LTD. AND ANR.
(Civil Appeal Nos. 996-997 of 2010)

JANUARY 29, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Design Act, 2000; s.19 – Jurisdiction– Cancellation of registered design by Controller, Kolkata – Appeals filed before Delhi High Court – Maintainability of – Held: Cause of action for the suit arose in Kolkata by virtue of order passed by Controller, appeal thereagainst would be maintainable before Calcutta High Court under s.19 of 2000 Act and not before Delhi High Court under s.51A of 1911 Act – Design Act, 1911 – s.51A – Cause of action.

The question which arose for consideration in these appeals was whether Delhi High Court had jurisdiction to entertain the appeals filed against the order passed by Controller of Patents and Designs, Kolkata cancelling the registered designs belonging to the appellant.

Allowing the appeals, the Court

HELD: 1. Section 51A(1)(a) of the Designs Act, 1911 provides that at any time after registration of the design, an application for cancellation of the registration could be made to the High Court on the grounds indicated therein. Section 51A(1)(b) makes an exception and provides that within one year from the date of registration of the design, an application could be made for cancellation of the registration to the Controller on the grounds specified in sub-clauses (i) and (ii) of Clause (a). Section 51A(2) provides that an appeal from the order of the Controller would lie to the High Court. In contrast to

the provisions of Section 51A(1)(a) of the 1911 Act, Section 19(1) of the Designs Act, 2000, which also deals with cancellation of registration, provides for a petition for cancellation of registration of a design to be filed before the Controller and not to the High Court. A comparison of the two provisions of two enactments shows that under the 2000 Act, the intention of the Legislature was that an application for cancellation of a design would lie to the Controller exclusively without the High Court having a parallel jurisdiction to entertain such matters. It is also very clear that all the appeals from any order of the Controller under Section 19 of the 2000 Act shall lie to the High Court. The basic difference, therefore, is that while under Section 19 of the 2000 Act, an application for cancellation would have to be made to the Controller of Designs, under Section 51A of the 1911 Act an application could be preferred either to the High Court or within one year from the date of registration to the Controller on the grounds specified under sub-clauses (i) and (ii) of Clause (a) of Section 51A(1). Under the 2000 Act, the High Court would be entitled to assume jurisdiction only at the appellate stage, whereas under Section 51A of the 1911 Act the High Court could itself directly cancel the registration. [Paras 19 and 21] [157-G-H; 158-A-G-H; 159-A-E]

Girdharilal Gupta v. M/s. K. Gian Chand Jain & Co. **(1978) 14 D.L.T. 132 – held inapplicable.**

M/s. Scooters India Ltd. v. M/s. Jaya Hind Industries Ltd. & Anr. **AIR 1988 Delhi 82;** *Ambika Industries v. Commissioner of Central Excise* **(2007) 6 SCC 769;** *Canon Steels (P) Ltd. v. Commissioner of Customs* **(2007) 14 SCC 464;** *M/s Metro Plastic Industries (Regd.) v. M/s Galaxy Footwear, New Delhi* **AIR 2000 Delhi 117;** *Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages (P) Ltd.* **(1994) 1 SCC 34, referred to.**

1.2. In the instant case, the doctrine of cause of action, as understood under Section 20 C.P.C., has been imported on the basis of the provisions of Section 51A of the Designs Act, 1911, whereas the case of the appellant would fall under Section 19 of the Designs Act, 2000, where the High Court functions as the Appellate forum. The cause of action for the instant proceedings is most certainly the cancellation of the registered design of the appellant which happened in the State of West Bengal which gave the Calcutta High Court the jurisdiction to deal with the matter. The Delhi High Court erred in holding that the cause of action had arisen within its local jurisdiction, whereas the jurisdiction of the High Court was on account of the cancellation of registration of the design and not on account of the impact thereof in any particular State. [Para 22] [160-A-D]

1.3. Apart from the fact that the parties to the suit were in Kolkata, it is clear that the cause of action for the suit arose in Kolkata by virtue of the order passed by the Controller in relation to the appellant's design. The Delhi High Court had erred in making a comparison between the provisions of Section 51A of the 1911 Act and Section 19(2) of the 2000 Act, which operate on different planes. Calcutta High Court has jurisdiction to entertain the appeal under Section 19 of the 2000 Act. The proceedings before the Delhi High Court are, therefore, quashed. The Appellant is granted leave to move the Calcutta High Court against the order of cancellation of its design on the grounds taken in these Appeals, as well as such other grounds as may be relevant for the purpose of deciding the question of cancellation of the Appellant's design by the Controller of Designs, Kolkata, within 30 days from date. [Paras 23, 25] [160-E-G; 161-B-D]

Case Law Reference:

(1978) 14 D.L.T. 132	**held inapplicable**	**Paras 5,6,12,21,22,23**
AIR 1988 Delhi 82	**referred to**	**Para 7**
(2007) 6 SCC 769	**referred to**	**Para 8**
(2007) 14 SCC 464	**referred to**	**Para 9**
AIR 2000 Delhi 117	**referred to**	**Para 13**
(1994) 1 SCC 34	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 996-997 of 2010.

From the Judgment & Order dated 12.5.2008 of the High Court Delhi in F.A.O. Nos. 131 and 132 of 2008.

Dushyant A. Dave, Rajiv Tyagi and Chanchal Biswas for the Appellant.

Chander Lall, Navin Chawla, Kirpa Pandit and Sharath Sampath for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. Two First Appeals were filed in the Delhi High Court, being FAO No.131 and 132 of 2008, against two orders, both dated 28th March, 2008, passed by the Controller of Patents and Designs, Kolkata, under Section 19(1) of the Designs Act, 2000, cancelling two registered designs for "Insecticide Coil" in Class 12 belonging to the Respondent No.1 herein. The question for determination before the High Court in the two appeals was whether the Delhi High Court had jurisdiction to entertain the same against the order passed by the Controller of Patents and Designs, Kolkata. Inasmuch as, in the said two

appeals, it was held by the Delhi High Court that it had jurisdiction to entertain the appeals, these two appeals have been preferred by M/s. Godrej Sara Lee Ltd. against the said decision.

3. On 27th January, 2005, the Respondent No.1 herein, M/s. Reckitt Benckiser Australia Pty. Ltd., filed a suit, being C.S.(O.S.)No.121 of 2005, against the appellant, in the Delhi High Court alleging infringement of its Registered Designs bearing Nos.184136 and 184137. The said suit is yet to be decided. On 4th February, 2005, the appellant herein filed his written statement in the suit, inter alia, contending that the aforesaid Designs of the Respondent No.1 were liable to be cancelled under Section 22(3) of the Designs Act, 2000, on the ground that registration of the same had been obtained by concealment of facts and infringement of the Designs Registration Nos. 197811 and 197426, before the Controller of Designs at Kolkata. Similarly, the appellant herein also filed a Designs Cancellation Petition for cancellation of the Registered Design Nos.184135, 184136 and 184137 standing in the name of the Respondent No.1 on the same ground as alleged by the respondent in its petition for cancellation of the appellant's Designs. After certain interlocutory proceedings relating to the prayer made for transfer of the cancellation proceedings from the Controller of Designs to the Delhi High Court, the Controller of Designs heard the parties on 5th March, 2008 and reserved his order. Meanwhile, the respondents filed FAO (OS) No.101/08 against the orders dated 13.2.2008 and 5.3.2008 passed by the Controller of Designs, Kolkata and the same was converted into a Petition under Article 227 of the Constitution. Initially the learned Single Judge was doubtful about the maintainability of the appeals. Thereafter, on 28th March, 2008, by three separate orders the Controller of Designs, Kolkata, cancelled the Registered Design Nos.184135, 184136 and 184137 belonging to Respondent No.1. As indicated hereinabove, three First Appeals were preferred before the Delhi High Court, where a question arose

with regard to the High Court's jurisdiction to entertain the appeals and by the orders impugned in these appeals the Delhi High Court held that the appeals were maintainable and it had jurisdiction to entertain the same.

4. Appearing in support of the appeals, Mr. Dushyant Dave, learned Senior Advocate, questioned the decision of the Delhi High Court based on the interpretation of Section 19(2) read with Section 2(e) of the Designs Act, 2000. He submitted that the expression "High Court" as used in Section 19(2) and Section 2(e), would have to be read in relation to the cause of action and not otherwise. In the instant case, since the cause of action for the appeal has arisen on account of the cancellation of Designs by the Controller of Designs at Kolkata, it is only the Calcutta High Court, which would have jurisdiction to entertain the appeals under Section 19. Any other interpretation would be contrary to the principles relating to the filing of suits where the cause of action arises as contemplated under Section 20 of the Code of Civil Procedure.

5. Mr. Dave urged that the High Court appears to have gone wrong in making a comparison between the provisions relating to cancellation of designs under Section 51A of the Designs Act, 1911 and Section 19 of the Designs Act, 2000. Mr. Dave urged that while Section 51A of the 1911 Act allowed a person to move for cancellation directly before the High Court in its original jurisdiction, under Section 19 of the 2000 Act an application for cancellation could only be made to the Controller of Designs, Kolkata. Mr. Dave urged that the conclusions arrived at by the High Court on an analysis of the two provisions were erroneous as was the reliance placed by the High Court on the decision in the case of *Girdharilal Gupta vs. M/s. K. Gian Chand Jain & Co.* [(1978) 14 D.L.T. 132].

6. Mr. Dave submitted that the decision in the said case was clearly distinguishable on facts, as also the finding that the cancellation of a design under Section 51A of the 1911 Act

could be filed either in the High Court having jurisdiction over the place at which the design is registered or in the High Court, the local jurisdiction of which has a nexus with the subject matter of the cause of action of the application. Mr. Dave urged that in the said case, the High Court made it clear that an application for cancellation cannot be made in any High Court merely because the applicant chose to do so. In fact, the applicant would have to establish the jurisdiction of the High Court to which the application is made by establishing a live link between the territory in which the cause of action and the subject matter of the application. Mr. Dave submitted that the sum total of the decision in *Girdharilal Gupta's* case is that in the normal course both the Calcutta High Court and the High Court within whose territorial jurisdiction the cause of action arises, would have jurisdiction to entertain an appeal under Section 19 of the Designs Act, 2000, but in some cases such jurisdiction would also extend to any other High Court within the local limits of which a part of the cause of action and/or subject matter of the application may arise or be situate. Mr. Dave urged that the latter part of the findings was not in consonance with Section 19(2) of the 2000 Act.

7. Mr. Dave submitted that a different view had been expressed by a learned Single Judge of the Delhi High Court in *M/s. Scooters India Ltd. vs. M/s. Jaya Hind Industries Ltd. & Anr.* [AIR 1988 Delhi 82], wherein it was held that rejection of an application for grant of patent under the provisions of the Patents Act, 1970, and the Patents Rules, 1972, by the Deputy Controller of Patents and Designs, Bombay, gave rise to a cause of action whereby appeal against such order of refusal could be filed only in the Bombay High Court and not in any other High Court.

8. Reference was then made by Mr. Dave to the decision of this Court in *Ambika Industries vs. Commissioner of Central Excise* [(2007) 6 SCC 769], wherein the question as to which High Court would have the jurisdiction to entertain an

appeal from an order of the Appellate Tribunal exercising jurisdiction over several States, was in question and this Court held that it had to be determined on the basis of the statutory provisions and nothing else such as dominus litus or the situs of the Appellate Tribunal or the cause of action. Accordingly, where the first forum was located in the State other than the State where the Appellate Tribunal was located, the appropriate High Court to entertain the appeal was the High Court situated in the former State and not the High Court situated in the latter State.

9. Mr. Dave also referred to the decision of this Court in *Canon Steels (P) Ltd. vs. Commissioner of Customs* [(2007) 14 SCC 464] where the original order had been passed under the Customs Act at Mumbai whereas the appellate order was passed by the Customs Excise and Service Tax Appellate Tribunal (CESTAT) at Delhi. Appeal under Section 130 of the Customs Act, 1962, filed in the High Court at Delhi was withdrawn with liberty to file the appeal in the appropriate place. An appeal was subsequently filed in the Punjab and Haryana High Court at Chandigarh on the ground that a part of the cause of action had arisen at Chandigarh. The Punjab and Haryana High Court, however, held that it had no jurisdiction to entertain the appeal. Affirming the said view, this Court held that since neither the original nor the appellate orders were passed within the territorial jurisdiction of the Punjab and Haryana High Court, it was the Delhi High Court which had jurisdiction to entertain the appeal.

10. Mr. Dave submitted that similarly since the order impugned in the appeal had been passed in Kolkata, it was the Calcutta High Court and not the Delhi High Court which had jurisdiction to entertain the statutory appeal under Section 19 of the Designs Act, 2000.

11. Several other decisions were also cited by Mr. Dave on similar lines which need not detain us at present.

12. Mr. Dave submitted that the Delhi High Court was apparently persuaded to make a comparison between the provisions of Section 51A of the Designs Act, 1911 and Section 19(2) of the Designs Act, 2000, which led to erroneous reliance being placed on the decision of the Delhi High Court in *Girdharilal Gupta's* case (supra) the facts whereof were completely different and distinguishable from the facts of this case. Mr. Dave submitted that having regard to the above, the impugned judgment of the High Court was liable to be set aside.

13. Mr. Chander Lall, learned advocate, appearing for the Respondent No.1, referred to Sections 19 and 22(2) (b) read with Section 22(3) of the Designs Act, 2000, and contended that the said provisions contemplated cancellation of a Design by the Controller of Designs, and punishment for piracy of a Design in any suit in any Court not below that of a District Judge. Mr. Lall submitted that when such a suit was pending before the High Court and a defence as provided for under Section 19 of the Act was taken, the matter had to be decided by the High Court and the Controller ought not to be left to decide the said issue, as an appeal from the Controller's order would also lie to the High Court under Section 19 which could result in conflict of decisions. In this regard reference was made to the Full Bench decision of the Delhi High Court in *M/s Metro Plastic Industries (Regd.) vs. M/s Galaxy Footwear, New Delhi* (AIR 2000 Delhi 117), in which the question for decision was whether an injunction could be granted in favour of a registered owner of a design when an application under Section 51-A of the Designs Act, 1911, was pending. After examining the provisions of Section 51 A, the Full Bench on a reference to Sections 53 and 54 relating to piracy of registered designs and the incorporation of the provisions of the Patents Act, 1970, into the Designs Act, held that the powers conferred under Section 53 were not absolute and did not contemplate an absolute right in the owner to prevent all other persons from infringing that design under all circumstances. It was held further that Section

53 creates a right in a registered owner and in the absence of an application for cancellation such a right can be enforced and no defence can be taken based on a ground of cancellation. But once an application for cancellation is filed, the Court trying a suit under Section 53 would not be entitled to ignore the same.

14. Mr. Lall then submitted that there were innumerable instances of appeals having to be filed at the place where the cause of action had arisen or the effect thereof was felt. By way of example, Mr. Lall submitted that appeals against orders passed by the Company Law Board would lie only before the Delhi High Court. The decision in *Stridewell Leathers (P) Ltd. vs. Bhankerpur Simbhaoli Beverages (P) Ltd.* [(1994) 1 SCC 34] was also referred to in this regard.

15. Mr. Lall submitted that full disclosures had not been made regarding the pendency of the suit filed by the respondent, which is still pending decision, wherein the appellant had filed a counter affidavit and a defence had been taken against cancellation. Mr. Lall submitted that for the reasons aforesaid and also in view of the fact that under the Designs Act, 2000, only the Controller of Designs had the jurisdiction to cancel a design, no interference was called for with the order of the Delhi High Court ruling on its jurisdiction to entertain the Appeals under Section 19 of the 2000 Act.

16. Countering the submissions made by Mr. Lall with regard to the jurisdiction of the Delhi High Court, Mr. Dave concluded on the note that after the enactment of the Design Act, 2000, it is only the Controller of Designs before whom an application can be made under Section 19 for cancellation of a Design in contrast to the provisions of Section 51 A of the 1911 Act under which even the High Court could cancel the registration of a Design. Mr. Dave urged that in view of the amendments in Section 51-A of the 1911 Act the question of jurisdiction of the Delhi High Court to entertain the appeals has become relevant.

17. The answer to the question thrown up in these appeals involves the interpretation of the expression "High Court" used in Sections 19(2) and 22(4) of the 2000 Act and in Section 51A of 1911 Act.

18. Section 51A of the 1911 Act which deals with "Cancellation of Registration", provides as follows:

> *"51A. Cancellation of registration.* (1) Any person interested may present a petition for the cancellation of the registration of a design-
>
> (a) at any time after the registration of the design, to the High Court on any of the following grounds, namely:-
>
> (i) that the design has been previously registered in India; or
>
> (ii) that it has been published in India prior to the date of registration ; or
>
> (iii) that the design is not a new or original design ; or
>
> (b) within one year from the date of the registration, to the Controller on either of the grounds specified in sub-clauses (i) and (ii) of clause (a).
>
> (2) An appeal shall lie from any order of the Controller under this section to the High Court, and the Controller may at any time refer any such petition to the High Court, and the High Court shall decide any petition so referred."

19. Section 51A(1)(a) very clearly provides that at any time after registration of the design, an application for cancellation of the registration could be made to the High Court on the grounds indicated therein. Section 51A(1)(b) makes an exception and provides that within one year from the date of

registration of the design, an application could be made for cancellation of the registration to the Controller on the grounds specified in Sub-clauses (i) and (ii) of Clause (a). Section 51A(2) provides that an appeal from the order of the Controller would lie to the High Court.

20. Section 19 of the 2000 Act, on the other hand, provides as follows :

> *"19. Cancellation of registration.*-(1) Any person interested may present a petition for the cancellation of the registration of a design at any time after the registration of the design, to the Controller on any of the following grounds, namely:-
>
> (a) that the design has been previously registered in India; or
>
> (b) that it has been published in India or in any other country prior to the date of registration; or
>
> (c) that the design is not a new or original design; or
>
> (d) that the design is not registrable under this Act; or
>
> (e) that it is not a design as defined under clause (d) of section 2.
>
> (2) An appeal shall lie from any order of the Controller under this section to the High Court, and the Controller may at any time refer any such petition to the High Court, and the High Court shall decide any petition so referred."

21. In contrast to the provisions of Section 51A(1)(a) of the 1911 Act, Section 19(1) of the 2000 Act, which also deals with cancellation of registration, provides for a petition for cancellation of registration of a design to be filed before the

Controller and not to the High Court. On a comparison of the two provisions of the two enactments, it will be obvious that under the 2000 Act the intention of the Legislature was that an application for cancellation of a design would lie to the Controller exclusively without the High Court having a parallel jurisdiction to entertain such matters. It is also very clear that all the appeals from any order of the Controller under Section 19 of the 2000 Act shall lie to the High Court. The basic difference, therefore, as was pointed out to the High Court and noticed by it, is that while under Section 19 of the 2000 Act an application for cancellation would have to be made to the Controller of Designs, under Section 51A of the 1911 Act an application could be preferred either to the High Court or within one year from the date of registration to the Controller on the grounds specified under Sub-clauses (i) and (ii) of Clause (a) of Section 51A(1). Under Section 19 of the 2000 Act the power of cancellation of the registration lies wholly with the Controller. On the other hand, an application for cancellation of a design could be made directly to the High Court under Section 51A of the 1911 Act. Under the 2000 Act, the High Court would be entitled to assume jurisdiction only at the appellate stage, whereas under Section 51A of the 1911 Act the High Court could itself directly cancel the registration. Whereas in *Girdharilal Gupta's* case (supra), the question of jurisdiction of the High Court was in relation to an application made to the High Court directly, in the instant case, we are concerned with an order of the Controller against which an appeal is required to be filed before the High Court. While in *Girdharilal Gupta's* case the Court was considering the expression "High Court" in the context of a fall-out in respect of the ground of registration and the cause of action arising on account of such fall-out, in the present case, there is no question of any consequential impact since the application for cancellation of registration was on the basis of fake documents created in order to perpetrate a fraud.

22. The reliance placed by the High Court on the judgment in *Girdharilal Gupta's* case (supra) appears to be misplaced,

inasmuch as, while under the 1911 Act the High Court acts as an Original forum, under the 2000 Act the High Court acts as an Appellate forum, which are two separate jurisdictions operating in two different fields. In the instant case, the doctrine of cause of action, as understood under Section 20 C.P.C., has been imported on the basis of the provisions of Section 51A of the Designs Act, 1911, whereas the case of the appellant would fall under Section 19 of the Designs Act, 2000, where the High Court functions as the Appellate forum. The cause of action for the instant proceedings is most certainly the cancellation of the registered design of the appellant which happened in the State of West Bengal which gave the Calcutta High Court the jurisdiction to deal with the matter. The Delhi High Court, in our view, erred in holding that the cause of action had arisen within its local jurisdiction, whereas the jurisdiction of the High Court was on account of the cancellation of registration of the design and not on account of the impact thereof in any particular State. This is what distinguishes the decision in *Girdharilal Gupta's* case from the facts of this case.

23. Apart from the fact that the parties to the suit were in Kolkata, it is clear that the cause of action for the suit arose in Kolkata by virtue of the order passed by the Controller in relation to the appellant's design. As the facts indicate, the cause of action for the suit arose in Kolkata, which, in any event, had jurisdiction to entertain the suit. Having erroneously applied the decision in *Girdharilal Gupta's* case (supra) to the facts of the case, the High Court was led into error in holding that the consequence of the cancellation gave jurisdiction to the Delhi High Court to entertain the suit, without considering in its proper perspective the provisions of Section 51A of the 1911 Act in contrast to the provisions of Section 19 of the 2000 Act.

24. The various decisions cited by Mr. Dave to support his submissions that the question as to which High Court would have jurisdiction to entertain an appeal under Section 19, had to be determined on the basis of the statutory provisions and

not on the basis of dominus litus or the situs of the Appellate Tribunal or the cause of action. We are inclined to accept Mr. Dave's submission that the Delhi High Court had erred in making a comparison between the provisions of Section 51A of the 1911 Act and Section 19(2) of the 2000 Act, which operate on different planes.

25. Having regard to the above, we are of the view that the impugned order of the Delhi High Court cannot be sustained and we, accordingly, set aside the same and hold that in the instant case it is the Calcutta High Court which will have jurisdiction to entertain the appeal under Section 19 of the 2000 Act. The proceedings before the Delhi High Court are, therefore, quashed. The Appellant is granted leave to move the Calcutta High Court against the order of cancellation of its design on the grounds taken in these Appeals, as well as such other grounds as may be relevant for the purpose of deciding the question of cancellation of the Appellant's design by the Controller of Designs, Kolkata, within 30 days from date. If the appeals are filed within the said period, the delay in taking such proceedings shall be condoned.

26. The appeals are, accordingly, allowed, but there will be no order as to costs.

D.G. Appeals allowed.

ALLAHABAD BANK & ANR.

v.

ALL INDIA ALLAHABAD BANK RETIRED EMPS. ASSN.

(Civil Appeal No. 1478 of 2004 etc.)

DECEMBER 15, 2009 & JANUARY 29, 2010*

[B. SUDERSHAN REDDY AND R.M. LODHA, JJ.]

Payment of Gratuity Act, 1972 – ss. 4, 4(5), 5 and 14 – Denial of gratuity – To the employees opting for pension in lieu of gratuity – Employer-Bank placing reliance on Awards and Bipartite Settlements – Held: Gratuity being a statutory right cannot be taken away except in accordance with provisions of the Act – Pension and gratuity are separate retiral benefits – Provisions of the Act prevail over other enactments, or instruments or contract so far as gratuity is concerned – Notwithstanding the Awards and Settlements, employees were entitled to gratuity – No exemption was granted to the employer-Bank from operation of the provisions of the Act – Waiver to the claim of gratuity on the part of employees also not established – The Controlling Authority neither had jurisdiction to decide nor was correct in deciding the question as regards comparative benefits between the pension scheme and the gratuity under the Act – Jurisdiction to decide such question is conferred on appropriate Government – An employee-establishment cannot decide this question for itself – For protection u/s. 4(5), the comparison is between gratuity under the Award/ Settlement/contract and the gratuity under the Act – Comparison cannot be between the pension scheme and gratuity under the Act – Service Law – Pension and Gratuity – Distinction between.

Interpretation of Statute – Remedial / welfare / labour

*Ed: The Judgment dated 15.12.2009 is modified/clarified by order dated 29.1.2010.

statutes – Interpretation of – Held: Such statutes should receive liberal construction having due regard to the directive principles of the State Policy, so as to secure the relief contemplated by the statute – Constitution of India, 1950 – Directive Principles.

The questions for consideration before this court were whether the retired employees of the appellant-Bank were entitled to payment of gratuity under the provisions of Payment of Gratuity Act, 1972, having opted for pensionary benefits in lieu of gratuity; and whether the Controlling Authority had jurisdiction to decide or rightly decided the question that the pension scheme offered by the Bank was more beneficial than the benefit of gratuity under Payment of Gratuity Act.

Dismissing the appeal preferred by the Bank and allowing the Writ Petitions preferred by the employees' Association, the Court

HELD: 1.1. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation etc. being a statutory right cannot be taken away except in accordance with the provisions of Payment of Gratuity Act, 1972, whereunder an exemption from such payment may be granted only by the appropriate Government under Section 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under the Act. [Para 14] [174-G-H; 175-A-B]

1.2. Pensionary benefits or the retirement benefits as the case may be whether governed by a Scheme or Rules may be a package consisting of payment of pension as well as gratuity. Pensionary benefits may include

payment of pension as well as gratuity. One does not exclude the other. Only in cases where the gratuity component in such pension schemes is in better terms in comparison to that of what an employee may get under the Payment of Gratuity Act, the Government may grant an exemption and relieve the employer from the statutory obligation of payment of gratuity. Pension and gratuity are separate retiral benefits and right to gratuity is a statutory right. [Paras 16 and 17] [175-D-H]

1.3. It is not correct to say that under pension and/or gratuity, in terms of Shastry/Desai Awards and/or Bipartite Settlement on one hand and the gratuity payable under the Act on the other, pensionary benefit was better in terms and more favourable than the benefits conferred under the Act. It is for the appropriate Government to form the requisite opinion that the employees were in receipt of gratuity or pensionary benefits which were more favourable than the benefits conferred under the Act and therefore, the establishment must be exempted from the operation of the provisions of the Act. The appellant-Bank having failed to obtain exemption from the operation of the provisions of the Act cannot be permitted to raise this plea. [Para 18] [178-F-H; 179-A-B]

1.4. No establishment can decide for itself that employees in such establishments were in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. Sub-section (5) of Section 4 protects the rights of an employee to receive better terms of gratuity from its employer under any Award or agreement or contract as the case may be. Admittedly the Scheme under which the employees of the Bank received the pension was in lieu of gratuity. There is no question of comparing the said Scheme and arrive at any conclusion that what they have received was much better in terms than the benefits conferred under

the Act. Reliance upon sub-section (5) of Section 4 is therefore unsustainable. [Para 18] [179-A-C]

1.5. The appellant being an establishment is under the statutory obligation to pay gratuity as provided for under Section 4 of the Act which is required to be read along with Section 14 of the Act which says that the provisions of the Act shall have effect notwithstanding anything inconsistent therein contained in any enactment or in any instrument or contract having effect by virtue of any enactment other than this Act. The provisions of the Act prevail over all other enactment or instrument or contract so far as the payment of gratuity is concerned. The right to receive gratuity under the provisions of the Act cannot be defeated by any instrument or contract. [Para 21] [180-G-H; 181-A-B]

1.6. Notwithstanding the Desai and Shastry Awards and the subsequent settlements, the members of the employees association are entitled to avail the benefit conferred upon them for payment of gratuity under the provisions of the Act. The employees cannot be deprived of their valuable statutory right conferred upon them to receive payment of gratuity. [Para 22] [181-C-D]

1.7. There is no material placed before the Court that the employees while opting for the pension scheme at the time of their superannuation/retirement either expressly or impliedly waived their statutory right to claim payment of gratuity under the provisions of the Act. [Para 23] [181-E-F]

Som Prakash Rekhi vs. Union of India **(1981) 1 SCC 449;** *Sudhir Chandra Sarkar vs. Tata Iron and Steel Co. Ltd.* **(1984) 3 SCC 369;** *Union of India vs. All India Services Pensioners' Association and Anr.* **(1988) 2 SCC 580;** *Hindustan Lever and Anr. vs. State of Maharashtra and Anr.* **(2004) 9 SCC 438;** *Purshottam H. Judye vs. V.B. Poddar*

(1966) 2 SCR 353, relied on.

DTC Retired Employees' Association and Ors. vs Delhi Transport Corporation and Ors. **(2001) 6 SCC 61;** *Beed District Central Coop. Bank Ltd. vs. State of Maharashtra and Ors.* **(2006) 8 SCC 514;** *Municipal Corporation Delhi vs. Dharam Prakash Sharma and Ors.* **(1998) 7 SCC 221;** *Workman of Metro Theatre, Bombay vs. Metro theatre Ltd. Bombay* **(1981) 3 SCC 596;** *Bank of India and Ors. vs. P.O. Swarnakar and Ors.* **(2003) 2 SCC 721 – distinguished.**

2. Remedial statutes, in contra distinction to penal statutes, are known as welfare, beneficient or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. Labour and welfare legislation have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Payment of Gratuity Act is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country. [Para 11] [173-E-G]

3.1. The Act, nowhere confers any jurisdiction upon the Controlling Authority to deal with any issue under sub-section (5) of Section 4 as to whether the terms of gratuity payable under any Award or agreement or contract is more beneficial to employees than the one provided for payment of gratuity under the Act. This Court's order could not have conferred any such jurisdiction upon the Controlling Authority to decide any matter under sub-section (5) of Section 4, since the Parliament in its wisdom had chosen to confer such jurisdiction only upon the appropriate Government and that too for the purposes of considering to grant exemption from the operation of the provisions of the Act. [Para 27] [183-G-H; 184-A]

3.2. Even on merits, the conclusions drawn by the Controlling Authority that the Pension Scheme (old) offered by the Bank is more beneficial since the amount of money, the pensioners got under the Pension Scheme is more than the amount that could have been received in the form of gratuity under the provisions of the Act, is unsustainable. The Controlling Authority failed to appreciate that sub-section (5) of Section 4 of the Act, protects the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer than the benefits conferred under the Act. The comparison, if any, could be only between the terms of gratuity under any award or agreement or contract and payment of gratuity payable to an employee under Section 4 of the Act. There can be no comparison between a Pension Scheme which does not provide for payment of any gratuity and right of an employee to receive payment of gratuity under the provisions of the Act. Viewed from any angle the order of the Controlling Authority is unsustainable. [Para 27] [184-B-E]

4. It is applicable to all the members of the Petitioner's Association/Pensioners in the respondent-Bank govened by the Pension Rgulations (old) 1890 of the Bank as well as those pensioners who retired during the period 1.1.1986 to 31.10.1993. However, it is clarified that such of those officers of the Bank working prior to 1.7.1979 and have retired after coming into force of the said Act on 31st October, 1993, shall alone be entitled for the benefits. [Para 28 (as modified/clarified by order dated 29.1.2010)] [185-C-D]

Case Law Reference:

(1981) 1 SCC 449	**Relied on.**	**Para 12**
(1984) 3 SCC 369	**Relied on.**	**Para 13**

(1988) 2 SCC 580	**Relied on.**	**Para 15**
(2001) 6 SCC 61	**Distinguished.**	**Para 17**
(2006) 8 SCC 514	**Distinguished.**	**Para 18**
(1998) 7 SCC 221	**Distinguished.**	**Para 19**
(1981) 3 SCC 596	**Distinguished.**	**Para 20**
(2003) 2 SCC 721	**Distinguished.**	**Para 21**
(2004) 9 SCC 438	**Relied on.**	**Para 22**
(1966) 2 SCR 353	**Relied on.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1478 of 2004.

From the Judgment & Order dated 13.11.2003 of the High Court of Allahabad, Lucknow Bench in Civil Misc. Writ Petition No. 1002 of 1989.

WITH

W.P. (C) Nos. 150 & 237 of 2007.

P.P. Rao, Jitendra Sharma, Dhruv Mehta, Yashraj Singh Deora, Tanushree Mukherjee, Rama Arora, Sr. Manager (Law) (for K.L. Mehta & Co.), Shail Kumar Dwivedi, Vandana Mishra, Ashutosh Kr. Sharma, Manoj Kr. Dwivedi, B.K. Pal, P.N. Jha, D.S. Mahra for the appearing parties.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. All India Allahabad Bank Retired Employees Association (for short 'Association') filed a writ petition invoking the original jurisdiction of the Allahabad High Court under Article 226 of the Constitution of India with a prayer to issue a writ of mandamus directing the appellant bank herein to pay gratuity to the members of its Association under the Payment of Gratuity Act, 1972 (for short 'the said Act'). The

High Court on due consideration of the matter declared that the retired employees of the appellant bank were entitled to the benefit of gratuity under the said Act and accordingly directed the payment of gratuity within the time specified in the judgment. The said judgment of the Allahabad High Court is impugned in this appeal.

2. A short question that arises for our consideration in this appeal is as to whether the retired employees of appellant bank are entitled to payment of gratuity under the provisions of the said Act?

3. The retired employees of the appellant bank having formed an association which includes officers and subordinate staff sent a legal notice to the appellant bank on 27.11.1988 requiring it to release the amount of gratuity to its members in accordance with the provisions of the said Act. The case set up by the Association was that its members were being illegally deprived of their statutory right to receive gratuity under the provisions of the Act on the pretext that they had opted for pensionary benefits in lieu of gratuity. It appears that on behalf of the Association applications were sent to the competent authority in the prescribed proforma for payment of gratuity in response to which the appellant bank made its stand explicitly clear that it was not possible to make payment of gratuity in addition to pension. Since the whole cause of action is based on the response of the appellant bank dated 10.01.1989, it would be appropriate to notice the same in its entirety.

"Ref. No. Admn./5/0280

Date: January 10,1989

The General Secretary
All India Allahabad Bank Retired
Employees Association,
Central Office, Ram Bhawan,
C-1254B, Sector-A,

Mahanagar, Lucknow.

Dear Sir,

Payment of Gratuity

This has reference to your letter Bank/14/8 dated 14.11.1988 and enclosures.

In this connection, we have to advise that Allahabad Bank has accepted contributory Provident Fund Scheme, which is not available to Government employees. Besides this, the Bank has a Pension Scheme in which an employee/officer may exercise option letter for Pension or Gratuity; but the dual benefits are not available under the scheme Since the respective pensioners have exercised their option voluntarily for availing of pension in lieu of Gratuity on their retirement from the bank's service, they are not eligible for gratuity at all. They are receiving pension since their retirement and as such we are not in a position to accede to your request for payment of gratuity in addition to pension to the persons named in your letter under reference.

Yours faithfully,
Sd/-
(R.K. Nath)
Chief Manager (P.A.)"

4. The Association thereafter filed a writ petition asserting its right that its members were entitled to receive gratuity in accordance with the provisions of the Act. The contention was that the consent or option given by the members of the Association opting for pension scheme would not deprive them of their statutory right to receive gratuity under the provisions of the Act. The appellant bank resisted the writ petition filed by the Association mainly relying upon the Awards known as Shastry Award and Deasai Award and subsequent settlements under which employees were entitled either to the benefit of

pension or benefit of gratuity at one's own option but not both. The Bank took a specific stand that the members of the Association had voluntarily opted for pension scheme, as a result thereof, they were not entitled to receive gratuity as well since they have already exercised their option claiming benefit of pension. The submission was that at the time of their retirement all the employees were paid contributory provident fund and pension in terms of option exercised by them, under the relevant Pension Scheme of the bank and therefore, they were not entitled to payment of any gratuity. The bank further asserted that the employees opted for the pensionary benefits which, admittedly, are better in terms as found by various Awards that pensionary scheme was really more advantageous to the employees than that of the gratuity.

5. We may at this stage notice that appellant bank did not succeed in its attempt to get the bank exempted from the operations of provisions of the Act.

6. Before adverting to the question as to whether the retired employees of the bank are entitled to payment of any gratuity, it may be just and necessary to notice the objects and reasons and the scheme of the Act. It was realised that there was no Central Act to regulate the payment of gratuity to industrial workers, except the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. The Government of Kerala enacted legislation for payment of gratuity to workers employed in factories, plantations, shops and establishments. The West Bengal enacted an Ordinance on 3.6.1971 prescribing a similar scheme of gratuity. Gratuity was also being paid by some employers to their workers under Awards and agreements. Since the enactment of the Kerala and the West Bengal Acts, some other State Governments have also voiced their intention of enacting similar measures in their respective States. It is under those circumstances the Union Government realised that it has become necessary, to have a Central law on the subject so as to ensure a uniform

pattern of payment of gratuity to the employees through out the country. The Act was intended to avoid different treatment to the employees of establishments having branches in more than one State. The proposal for Central legislation on gratuity was discussed in various Labour Ministers' Conference, where Central legislation on payment of gratuity was felt a necessity.

7. Section 4 (1) of the Act provides:

"(1) Gratuity *shall* be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,—

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:"

8. The expression "employee" is defined in Section 2 (e) of the Act as any person (other than apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied…… . There is no dispute before us that the appellant bank is an establishment and an employer within the meaning of the provisions of the Act. Section 5 confers power upon the appropriate Government to exempt any establishment, factory, mine, oilfield, plantation etc. from the operation of the provisions of the Act, if, in its opinion, the employees in such establishment, factory etc. are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. The power to exempt conferred upon the appropriate Government is not an unconditional power. The appropriate Government is required to hear all the persons concerned who are likely to be affected by the decision to be taken and the exemption itself

is subject to the conditions mentioned in the provisions of the Act namely that employee or class of employees in the opinion of the government are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act.

9. A plain reading of the provisions referred to herein above makes it abundantly clear that there is no escape from payment of gratuity under the provisions of the Act unless the establishment is granted exemption from the operation of the provisions of the Act by the appropriate Government.

10. Notwithstanding the subsequent improvements and embellishments the stand taken by the bank was and is before us that the members of the Association had accepted the Contributory Provident Fund Scheme and they opted for pension in lieu of gratuity which was being paid and therefore are not entitled to payment of gratuity under the provisions of the Act.

11. We shall proceed to examine the point urged by the learned counsel for the appellant. Remedial statutes, in contra distinction to penal statutes, are known as welfare, beneficient or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislations have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country.

12. Krishna Iyer, J in *Som Prakash Rekhi vs. Union of India*[1] stated the principle in his inimitable style that benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the

beneficial object should be preferred. It has been further observed: "We live in a welfare State, in a "socialist" republic, under a Constitution with profound concern for the weaker classes including workers (Part IV). *Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfilment of the Directive Principles.* The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set-off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be deprivatory. It is precisely to guard against such mischief that the non obstante and overriding provisions are engrafted on these statutes."

13. Interpreting the provisions of the said Act this Court in *Sudhir Chandra Sarkar vs. Tata Iron and Steel Co. Ltd.*[2] observed that pension and gratuity coupled with contributory provident fund are well recognised retiral benefits governed by various statutes. These statutes are legislative responses to the developing notions of the fair and humane conditions of work, being the promise of Part IV of the Constitution. It was observed: "the fundamental principle underlying gratuity is that it is a retirement benefit for long service as a provision for old age. Demands of social security and social justice made it necessary to provide for payment of gratuity. On the enactment of Payment of Gratuity Act, 1972 a statutory liability was cast on the employer to pay gratuity."

14. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation etc. being a statutory right cannot be taken away except in

accordance with the provisions of the Act whereunder an exemption from such payment may be granted only by the appropriate Government under Section 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under the Act.

15. In *Union of India Vs All India Services Pensioners' Association And Another,*[3] this Court explained that there is always a distinction between the pension payable on retirement and the gratuity payable on retirement. "While pension is payable periodically as long as the pensioner is alive, gratuity is ordinarily paid only once on retirement." No decision of this Court which has taken a view contrary to the decisions referred to herein above has been brought to our notice.

16. In our considered opinion pensionary benefits or the retirement benefits as the case may be whether governed by a Scheme or Rules may be a package consisting of payment of pension and as well as gratuity. Pensionary benefits may include payment of pension as well as gratuity. One does not exclude the other. Only in cases where the gratuity component in such pension schemes is in better terms in comparison to that of what an employee may get under the Payment of Gratuity Act the government may grant an exemption and relieve the employer from the statutory obligation of payment of gratuity.

17. In the result, we find merit in the submissions made by the learned senior counsel, Shri P.P. Rao appearing for the Association that pension and gratuity are separate retiral benefits and right to gratuity is a statutory right. However, Shri Dhruv Mehta, learned counsel for the bank placed strong reliance on the decision rendered by this Court in *DTC Retired Employees' Association & Ors. Vs Delhi Transport Corporation & Ors.,*[4] in support of his contention that the employees of the bank are not entitled to the twin benefits of

payment of pension and as well as gratuity. In that case, Delhi Transport Corporation introduced the Pension Scheme for the first time on 27.11.1992, for its retired employees, as per which all employees of DTC retiring on or after 3.8.1981, were to be covered for the purpose of pensionary benefits. The existing employees at the relevant time and those who retired on or after 3.8.1981, were required to exercise their option for the Pension Scheme. The retired employees opting for the pension scheme were required to refund the employer's share of provident fund received by them with interest thereon. Those employees, who joined the service on 27.11.1992, and thereafter, had no option but to be compulsorily covered under the Pension Scheme. This Court found that the employees therein received gratuity at the time of their exit from the service and subsequently opted for pension which had never been a part of their service conditions. It is under those circumstances, this Court took the view that it was a condition precedent that in order to get the benefit of the Pension Scheme, they were required to refund the gratuity received by them at the time of retirement. It was clear that at the time of receipt of gratuity they were not entitled to get pension. The employees have opted for payment of pension only after the introduction of the Scheme for the first time. *DTC* (supra), in our considered opinion, is not an authority for the proposition that an employee who receives the pension is not entitled to the payment of any gratuity. This decision is of no assistance to the appellant.

18. Learned counsel for the appellant has strenuously contended that under the Old Pension Scheme of the Bank, only two terminal benefits namely, Contributory Provident Fund and either gratuity or pension were required to be paid to the employees of the bank and not both. The bank in view of the Awards, circulars and statutory regulations is not under any legal obligation to pay gratuity as a third retiral benefit. The submission was that ever since the Payment of Gratuity Act came into force in 1972, no employee was paid both pension and gratuity till 1995, when the Pension Regulations came into

force. It is the case of the bank that the optional scheme of pension prevalent at the relevant time was a better mode of payment and therefore was a better form of retiral benefit within the meaning of Section 4 (5) of the Act. In this regard, he relied on the decision of this Court in *Beed District Central Coop. Bank Ltd. vs. State of Maharashtra & Ors.*[5] In that case a policy decision was taken by the bank to extend the benefit of better rate of gratuity to a large number of its employees and a scheme was accordingly formulated to the effect that such of those employees who were on its roll on and from 1.12.1975, the rate of gratuity was to be calculated on one month's salary for every completed year of service with ceiling limit of 20 months salary. It was operative from 1975 to 19.7.1996. The employees of the bank accepted the scheme and availed the benefit thereof. Thereafter the scheme was amended providing for payment of gratuity at the rate of 26 days' salary for every completed year of service with a ceiling limit of Rs. 1.7 lakhs which was operative from May, 1994 to September, 1997. Yet again, a scheme was floated raising the ceiling limit of Rs. 1.7 lakhs to Rs. 2.50 lakhs. The employees retired during the currency of the scheme formulated by the bank were offered gratuity in terms whereof the ceiling limit was fixed at Rs. 1.7 lakhs and Rs. 2.50 lakhs between the period 20.7.1996 and 30.11.1999 and the period 1.12.1999 to 17.1.2005, respectively and the amount of gratuity so offered to them in terms of the scheme was accepted. However, they raised a claim that they were entitled to the benefit of both the schemes as also the ceiling limit fixed under the Amendment Act, 1998, raising the ceiling limit to Rs. 3.50 lakhs. On the facts, this Court framed a question for its consideration as to whether keeping in view the provisions contained in sub-section (5) of Section 4 of 1972 Act, the employees although would be entitled to the benefit of ceiling limit of Rs. 3.5 lakhs, the rate of gratuity should be calculated at the rate of 26 days' instead and in place of 15 days' salary for every completed year of service in terms of the 1972 Act. We fail to appreciate as to how the said judgment is of any relevance to resolve the question that arises for our

consideration in the present case. It is not the case of the bank that at the time of superannuation of the employees there was a scheme for payment of gratuity under which the employees were entitled to payment of gratuity and the said scheme in comparison to that of the provisions of the Act was more beneficial to the workmen. On the other hand, the scheme that was prevalent at the relevant time in clear and categorical terms provided that "the gratuity will not be payable in case where a pension is granted by the Bank. But if a pensioned officer should die before receiving any pension payments an aggregate sum at least equal to the gratuity which he would otherwise have received then the Bank will pay the difference between such aggregate sum and gratuity to the officer's widow; if any, otherwise to his legal representative." Be it noted that in the counter affidavit filed in the High Court the Bank placed reliance on Shastry and Desai Awards which have taken the view that Allahabad Bank which had pension scheme of its own was more advantageous than the provisions of the gratuity to its employees. It is asserted that under the said Awards and the subsequent settlements an employee entitled to receive either the benefit of pension or gratuity at his own option but not both. The contention was that such of those Employees who had voluntarily opted for pension scheme were not entitled to receive the gratuity as well. The respective comparative figures under pension and/or gratuity, in terms of Shastry/Desai Awards and/or Bipartite Settlement on one hand and the gratuity payable under the Act on the other were made available for the perusal of the Court to buttress the Bank's submission that what has been paid to the employees was better in terms and more favourable than the benefits conferred under the Act. The submission is totally devoid of any merit for more than one reason namely, that it is for the appropriate Government to form the requisite opinion that the employees were in receipt of gratuity or pensionary benefits which were more favourable than the benefits conferred under the Act and therefore, the establishment must be exempted from the operation of the

provisions of the Act. The Bank having failed to obtain exemption from the operation of the provisions of the Act cannot be permitted to raise this plea. No establishment can decide for itself that employees in such establishments were in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. Sub-section (5) of Section 4 protects the rights of an employee to receive better terms of gratuity from its employer under any Award or agreement or contract as the case may be. Admittedly the Scheme under which the employees of the Bank received the pension was in lieu of gratuity. There is no question of comparing the said Scheme and arrive at any conclusion that what they have received was much better in terms than the benefits conferred under the Act. Reliance upon sub-section (5) of Section 4 is therefore unsustainable.

19. This Court in *Municipal Corporation Delhi vs. Dharam Prakash Sharma & Ors.,*[6] observed: "the mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. *In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot*

claim gratuity available under the Pension Rules" (emphasis supplied).

In the present case it is not the case of the Bank that its employees had claimed and received gratuity under the pension scheme.

20. The decision in the case of *Workman of Metro Theatre, Bombay vs. Metro theatre Ltd., Bombay*[7] in which this Court took the view that on true construction the expression 'Award' occurring in sub-section (5) of Section 4 does not mean and cannot be confined to 'existing Award' but includes any Award that would be made by an adjudicator wherein better terms of gratuity could be granted to the employees if the facts and circumstances warrant such grant. This decision cited by the learned counsel for the appellant is of no relevance and in no manner supports the appellant's case.

21. Learned counsel for the appellant relying upon the decision of this Court in *Bank of India & Ors. vs. P.O. Swarnakar & Ors.*[8] contended that once the employees have exercised their option to avail pension made available to them under the Old Pension Scheme, and having drawn the benefits thereunder cannot be permitted to resile from their stand. In that case a group of employees of the State Bank of India accepted the amount of ex-gratia under the scheme known as 'the Employees Voluntary Retirement Scheme' and thereafter made an attempt to resile from the very Scheme itself. It is under those circumstances this Court observed that "those who accepted the ex-gratia payment or any other benefit under the Scheme, in our considered opinion, could not have resiled therefrom." In the present case the real question that arises for our consideration is whether the employees having exercised their option to avail the benefits under the pension scheme are estopped from claiming the benefit under the provisions of the Act? The appellant being an establishment is under the statutory obligation to pay gratuity as provided for under Section 4 of the Act which is required to be read along with Section 14 of the

Act which says that the provisions of the Act shall have effect notwithstanding anything inconsistent therein contained in any enactment or in any instrument or contract having effect by virtue of any enactment other than this Act. The provisions of the Act prevail over all other enactment or instrument or contract so far as the payment of gratuity is concerned. The right to receive gratuity under the provisions of the Act cannot be defeated by any instrument or contract.

22. This Court in *Hindustan Lever and Anr. vs. State of Maharashtra & Anr.*[9] relying upon the decision of this Court in *Purshottam H. Judye vs. V.B. Poddar*[10] held that the word 'instrument' would include award made by the Industrial Tribunal. It is thus clear that notwithstanding the Desai and Shastry Awards and the subsequent settlements the members of the employees association are entitled to avail the benefit conferred upon them for payment of gratuity under the provisions of the Act. The employees cannot be deprived of their valuable statutory right conferred upon them to receive payment of gratuity.

23. There is no material placed before us that the employees while opting for the pension scheme at the time of their superannuation/retirement either expressly or impliedly waived their statutory right to claim payment of gratuity under the provisions of the Act. In the circumstances we find no merit in the submission made by the learned counsel for the appellant in this regard. For the aforesaid reasons we find no merit in the appeal.

24. During the pendency of the appeal this Court by its order dated 22.3.2006 directed the parties to appear before the Controlling Authority and the Controlling Authority was required to decide as to whether the benefits under the Allahabad Bank Employees Pension Scheme (Old) are more beneficial in comparison to that of the payment of Gratuity under the provisions of the Act. Following is the order passed by this Court:

"Though the order of the High Court speaks about the benefit of gratuity under the Payment of Gratuity Act, 1972 and a better Scheme, it does not indicate as to who is the Authority to decide which one of the schemes is better. According to the Bank, the employees concerned had accepted the particular Scheme which had the option of either the pension or the gratuity. It is pointed out that the there was no challenge to the legality of the arrangement made or the Scheme itself. On the other hand, Mr. Trivedi, learned counsel for respondent no. 1 submits that whether the Scheme is better is relatable to the benefits available under the Act and nothing beyond it. The High Court has come to an abrupt conclusion that a Statute overrides an agreement. There was no plea in this regard in the writ petition. Be that as it may, we permit the parties to appear before the controlling authority who shall take a decision within three months. The parties are given liberty to produce copy of the order before the controlling authority so that it can fix a date for hearing.

The parties are permitted to take all stands which are being raised in the present appeal. The matter shall be listed after four months."

25. The Controlling Authority held that the amount received by the employees under the said Scheme is much more than what they could have received under the Act. The benefits according to the Controlling Authority available under the Scheme are more beneficial than the gratuity payable under the Act.

26. Being aggrieved by the order of the Controlling Authority two writ petitions were filed, one by All India Allahabad Bank Retired Employees Association and the other by the Allahabad Bank Retirees' Association challenging the validity of the order of the Controlling Authority dated 25.9.2006.

27. Section 2 (d) of the Act defines Controlling Authority as an authority appointed by the appropriate Government under Section 3 of the Act. Under Section 3 the Controlling Authority is made responsible for the administration of the Act and it further provides for appointment of different authorities for different areas. Section 7 deals with for determination of the amount of gratuity. Every person who is eligible for payment of gratuity under the Act is required to send a written application to the employer in the prescribed form for payment of such gratuity. Sub-section (2) of Section 7 provides once the gratuity becomes payable, the employer shall, whether an application has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the Controlling Authority specifying the amount of gratuity so determined and arrange to pay the amount of gratuity to the person to whom the gratuity is payable. The Scheme envisaged under Section 7 of the Act, is that in case of any dispute to the amount of gratuity payable to an employee under the Act or as to the admissibility of any claim of, or in relation to, an employee payable to gratuity etc. the employer is required to deposit with the Controlling Authority the admitted amount payable as gratuity. In case of any dispute parties may make an application to the Controlling Authority for deciding the dispute who after due inquiry and after giving the parties to the dispute, a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as result of such inquiry any amount is found to be payable to the employee, the Controlling Authority shall direct the employer to pay such amount to the employee. Sub-section (7) of Section 7, provides for an appeal against the order of the Controlling Authority. The Act, nowhere confers any jurisdiction upon the Controlling Authority to deal with any issue under sub-section (5) of Section 4 as to whether the terms of gratuity payable under any Award or agreement or contract is more beneficial to employees than the one provided for payment of gratuity under the Act. This Court's order could not have conferred any such jurisdiction

upon the Controlling Authority to decide any matter under sub-section (5) of Section 4, since the Parliament in its wisdom had chosen to confer such jurisdiction only upon the appropriate Government and that too for the purposes of considering to grant exemption from the operation of the provisions of the Act. Even on merits the conclusions drawn by the Controlling Authority that the Pension Scheme (old) offered by the Bank is more beneficial since the amount of money the pensioners got under the Pension Scheme is more than the amount that could have been received in the form of gratuity under the provisions of the Act is unsustainable. The Controlling Authority failed to appreciate that sub-section (5) of Section 4 of the Act, protects the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer than the benefits conferred under the Act. The comparison, if any, could be only between the terms of gratuity under any award or agreement or contract and payment of gratuity payable to an employee under Section 4 of the Act. There can be no comparison between a Pension Scheme which does not provide for payment of any gratuity and right of an employee to receive payment of gratuity under the provisions of the Act. Viewed from any angle the order of the Controlling Authority is unsustainable. The order is liable to be set aside and the same is accordingly set aside.

28. However, the judgment of ours is applicable to only such of those employees/workmen who retired from the service between 1.1.1986 and 31.10.1992.

29. In the result, the appeal preferred by the bank is dismissed with costs quantified at Rs. 25,000/- and the writ petitions are allowed without any order as to costs.

K.K.T. Appeal dismissed and writ petitions allowed.

ORDER

(Dated 29.1.1.2010)
In
I.A. No. 6
In
Civil Appeal No. 1478 of 2004.

We have heard learned counsel for the petitioner as well as learned counsel appearing for the Bank.

Paragraph 28 of the Judgment shall now read as under:

"Judgment is, however, applicable to all the members of the Petitioner's Association/Pensioners in the respondent-Bank governed by the Pension Regulations (old) 1890 of the Bank as well as those pensioners who retired during the period 1.1.1986 to 31.10.1993.

It is made clear that such of the those officers of the Bank working prior to 1.7.1979 and have retired after coming into force of the said Act on 31st October, 1993, shall alone be entitled for the benefits.

I.A. Is disposed of accordingly.

K.K.T. I.A. disposed of.

SATNI BAI
v.
STATE OF M. P. (NOW CHHATTISGARH)
(Civil Appeal No. 212 of 2010)

JANUARY 29, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Penal Code, 1860: s.302 – Conviction under, on the basis of circumstantial evidence – Accused prosecuted for killing her own son – Evidence of close relatives that accused was found near dead body of her son with blood stained axe in her hand – Her sari was also blood stained – On seeing them, she tried to flee away from scene of crime – Circumstances pointing her involvement in the crime – Defence not able to dispel the chain of events which emerged from the testimony of these witnesses –Case of false implication also not made out – No reason to interfere with the order of conviction – Evidence – Circumstantial evidence.

Witness: Hostile witness – Testimony of – Evidentiary value – Girl who allegedly saw dead body of 4 years old boy declared hostile witness and contradictions in her testimony – Held: Witness was a 16 year old girl, with an impressionable mind – It was likely that she was shocked beyond belief at the sight of the dead body – With passage of time between the occurrence of the crime and recording of her testimony, her memory of the incident might have blurred – That by itself would not be enough to affect the prosecution case – Evidence.

Trial court convicted appellant for killing her own son and sentenced her to life imprisonment. The conviction was based on circumstantial evidence. High court upheld the conviction. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. When a case rests only on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. [Para 11] [193-G-H; 194-A]

State of U.P. vs. Satish, **(2005) 3 SCC 114;** *Joseph vs. State of Kerala*, **(2000) 5 SCC 197;** *Padala Veera Reddy v. State of Andhra Pradesh*, **AIR 1990 SC 79;** *Chenga Reddy and ors. v. State of Andhra Pradesh*, **AIR 1996 SC 3390,** *State of U.P. vs. Ashok Kumar Srivastava*, **(1992) 2 SCC 86, relied on.**

1.2. This case is not of direct evidence of committing murder of deceased by the accused/appellant, who is none other than the mother of the deceased, but is based on circumstantial evidence. The circumstances brought on record by the prosecution were of two categories. The accused was seen at the place of occurrence holding blood stained axe in her hand near the dead body of the deceased and she also tried to run away from the place of occurrence. The axe which was snatched from the accused by PW-2 and the saree of the accused were found stained with the blood. To prove the first circumstance, the prosecution examined PW-1, PW-2 and PW-4. The evidence of PW-1 was corroborated by the evidence of PW-2 and PW-4. In the cross-examination of these witnesses, the defence was not able to elicit any circumstance which shows that the accused was not present when PW-1 and PW-2 went to the scene of occurrence and, therefore, the presence of the accused

at the place of occurrence near the dead body of her son holding blood stained axe in her hand was established. These witnesses were closely related to the appellant. There are no inherent contradictions in the testimony of these witnesses. The defence was unable to dispel the chain of events which emerged from the testimony of these witnesses. [Para 17] [196-G-H; 196-A-D; 197-C; 197-D-E]

1.3. According to the doctor who prepared the post mortem report, wound No.2 was life endangering and undoubtedly was caused by the axe which was recovered from the hands of the accused. The post mortem report coupled with the testimony of the witnesses presents a very clear and cogent chain of the events which occurred on the fateful day unerringly points towards the guilt of the appellant. The picture emerging has also not been refuted satisfactorily by the defence. [Para 19] [198-C-D]

2. Motherhood is one of the most precious gifts endowed upon mankind and there is no relationship more pristine and pure than that of a mother and her child. No mother in normal circumstances can tolerate even a scratch on the body of her child. Basic instinct of a mother is well explained by a well known author Washington Irving in one of his books, wherein he has said, that, "a father may turn his back on his child; brothers and sisters may become inveterate enemies; husbands may desert their wives, and wives their husbands. But a mother's love endures through all; in good repute; in bad repute, in the face of the world's condemnation, a mother still loves on, and still hopes that her child may turn from his evil ways, and repent; still she remembers the infant smiles that once filled her bosom with rupture, the merry laugh, the joyful shout of his childhood, the opening promise of his youth; and she

can never be brought to think him an unworthy." In the present case, the appellant was found standing near the dead body of her son with a bloodstained axe in her hand. The normal reaction for any mother would have been to go hysterical and clutch the body of her son. But, the accused tried to flee away from the scene of the crime before being restrained. This kind of reaction and lack of remorse would not have been forthcoming had she been innocent. This unusual reaction to the death of her son who was aged 4 at the time of his death, in no uncertain terms point towards her involvement in the crime. This is an unusual case and therefore the plea that a mother is not capable of killing her own son, in the absence of any evidence to the contrary cannot be accepted. Apart from this, at the time of questioning under Section 313 Cr.P.C., the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculpating her and connecting her with the crime by her, totally denied everything when those circumstances were brought to her notice by the Sessions Court, and thus she not only lost the opportunity but also stood self condemned. [Para 21] [198-E-H; 199-A-E]

3. There is also no question of falsely implicating the appellant. The witnesses were her close relatives. PW-1 being the brother-in-law of the appellant and PW-2 being the sister-in-law of the appellant, had no enmity nor animosity against the appellant. With regard to the issue of PW-4, being declared a hostile witness by the prosecution and the contradictions in her testimony, it needs to be kept in mind that the witness is a 16 year old girl, with an impressionable mind. It is very likely that she was shocked beyond belief at the sight of the dead body and it is not possible to comprehend how she would have reacted. Different people react differently to crisis situations, so it is very much possible that with the

passage of time between the occurrence of the crime and recording of her testimony, her memory of the incident would have blurred. That by itself is not enough to set aside the conclusion reached at by the courts below. [Para 22] [199-F-H; 200-A]

Case Law Reference:

2005 3 SCC 114	**Relied on**	**Para 11**
2000 5 SCC 197	**Relied on**	**Para 12**
AIR 1990 SC 79	**Relied on**	**Para 13**
AIR 1996 SC 3390	**Relied on**	**Para 14**
1992 2 SCC 86	**Relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 212 of 2010.

From the Judgment & Order dated 21.3.2006 of the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No. 1383 of 1997.

Kiran Bhardwaj (AC) for the Appellant.

Dhramendra Kumar Sinha and Atul Jha for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J.

"A mother is the truest friend we have, when trials heavy and sudden, fall upon us; when adversity takes the place of prosperity; when friends who rejoice with us in our sunshine desert us; when trouble thickens around us, still she cling to us, and endeavor by her kind precepts and counsels to dissipate the clouds of darkness, and cause peace to return to our hearts"

- Washington Irving

Leave granted.

2. It is in this backdrop, we seek to introduce the facts of this case : A wicked mother is facing life sentence having been convicted under Section 302 of the Indian Penal Code for killing her own son with an axe by the Court of First Additional Judge, Ambikapur in Case no. 366 of 1996. On appeal, the conviction is upheld by the Division Bench of the Chhattisgarh High Court.

3. The appellant, Satni Bai is the mother of the deceased. She belongs to a tribal community. She has filed this appeal from prison, where she is undergoing her sentence of life imprisonment. She is represented by amicus curiae in this appeal.

4. The case of the prosecution is that, on 18.8.1996, Heera PW-1 and his elder brother Naihar Sai had gone to the forest in the morning to collect wood and at about 1.00 P.M., they returned to the house and when they were sitting inside the house, they heard the cries of his daughter, Sumitra PW-4 and Anita, the daughter of his younger brother. On hearing the cries, they came out of the house and went towards the side from where the sound of cries were heard and saw Kannilal (deceased) lying in a pool of blood. Heera lodged the report P-1 in the Police Station, Sitapur. A.K. Tiwari PW-7 was officiating in the post of Station House Officer, Sitapur. He had recorded the statements of Heera PW-1 Balobai PW-2 and Sumitra PW-4. Heera PW-1 had stated that the appellant/ accused was standing near the dead body of Kannilal with a bloodstained axe in her hand. As the appellant was attempting to run away from the scene of crime, he instructed his wife Balobai PW-2 to stop her and snatch the bloodstained axe from her. He had also stated, that, there were bloodstains on the clothes of the appellant as well. Balobai PW-2 in her statement before the police had stated, on the date of the incident they were sitting in the house and on hearing the cries of her daughter Sumitra PW-4, she came out of the house and saw appellant's son was lying dead and she saw the appellant

standing near the dead body with the wooden part of the axe in her hand and the metal part of the axe on the floor. She had also stated, that, when the appellant started running away from the place, on instructions from her husband, she caught hold of appellant and locked her inside the house.

5. After recording the report P-1, the Station House Officer, Sitapur, left for the scene of occurrence and after giving notice to the Panchas, he had prepared Panchanama of the dead body of Kannilal. He had taken into his possession the blood stained axe on production by Heera PW-1 and also blood stained saree of the accused. He had also taken into possession the blood stained soil and plain soil from the place of occurrence. The investigating officer had also prepared the site plan. Thereafter, the dead body of deceased Kannilal was sent to the hospital situated at Sitapur for post mortem examination. The post mortem was carried out by Dr. K.K Datta PW-8, who in his detailed report had stated that the axe wound on the left side of the head of the deceased was sufficient to cause the death. The blood stained articles were sent for examination to the Forensic Science Laboratory and, according to the report, blood was found on the saree of the accused and the weapon of offence – axe. After completion of the investigation, a charge sheet was filed against the appellant in the court of Judicial Magistrate, First Class, Ambikapur, who in turn committed the case to the Sessions Judge for trial.

6. The prosecution in order to establish the charge against the appellant/accused, examined eight witnesses including Heera PW-1, his wife Balobai PW-2 and their daughter Sumitra PW-4, but were declared hostile and cross examined by State counsel. The accused when questioned under Section 313 of the Criminal Procedure Code, denied all the incriminating circumstances brought against her and reiterated about her being innocent.

7. The trial court raised the following questions for determination:

(1) Whether the prosecution was successful in establishing that the death was homicidal in nature ?

(2) Whether the prosecution was successful in establishing that the accused with the intention of causing death, caused the death of Kannilal?

8. To answer the first question in the affirmative, the trial court has placed reliance on the post mortem report of the doctor. To answer the second question, the trial court has taken into consideration the circumstantial evidence available on record, since the sole eye witness Sumitra PW-4 has turned hostile. The trial court had also taken other factors into consideration like the recovery of bloodstained axe and saree of the appellant, for which there was no proper explanation on the part of the appellant. Based on these materials on record, the trial court after holding the appellant guilty for the commission of offence under Section 302 of the Indian Penal Code for committing the murder of her son Kannilal has sentenced her to undergo imprisonment for life.

9. Since the appeal filed against the judgment and order of the trial court is dismissed by the High Court, the accused is in appeal before us.

10. We have heard amicus curiae for the appellant and the learned counsel for the State. The learned amicus-curiae submitted that the evidence on record does not establish the case of homicide and that at any rate the chain of circumstances is not so complete as to lead to the hypothesis of guilt of the accused.

11. It has been consistently laid down by this Court, that, when a case rests only on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the

accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. [See *State of U.P. vs. Satish,* (2005) 3 SCC 114].

12. In *Joseph vs. State of Kerala,* [(2000) 5 SCC 197], the court has explained under what circumstances conviction can be based purely on circumstantial evidence. It is observed, that, "it is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."

13. This court in the case of *Padala Veera Reddy v. State of Andhra Pradesh,* (AIR 1990 SC 79), has observed that when a case rests on circumstantial evidence, the following tests must be satisfied:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from

the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be in consistent with this innocence.

14. In *C. Chenga Reddy and others v. State of Andhra Pradesh,* (AIR 1996 SC 3390), this Court has held that:-

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

15. In *State of U.P. vs. Ashok Kumar Srivastava,* [(1992) 2 SCC 86], it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of the guilt.

16. The principles that would emerge from these decisions is that conviction can be based solely on circumstantial evidence, but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court.

17. Keeping in view the settled legal principle, we have re-appreciated the evidence on record. It is true that this case is not of direct evidence of committing murder of deceased Kannilal by the accused/appellant, who is none other than the mother of the deceased, but is based on circumstantial evidence and the circumstances brought on record by the prosecution are of two categories: That the accused was seen at the place of occurrence holding blood stained axe in her hand near the dead body of the deceased Kannilal and she also tried to run away from the place of occurrence; that the axe which was snatched from the accused by Balobai and the saree of the accused were found stained with the blood. To prove the first circumstance, the prosecution has examined Heera PW-1, Balobai PW-2 and Sumitra PW-4. PW-1 has stated that on the fateful day when he returned from the forest at about 1.00 P.M., he heard the cries of Sumitra and came out of the house, went towards the court yard of Naihar Sai and saw the dead body of Kannilal in the court yard. Accused was standing there holding axe in her hand and he lodged the report, P-1. This witness has been declared hostile by the prosecution. The prosecution was allowed to cross examine this witness, on which he has stated that the portion 'A' to 'A' of the report P-3 shows that the girls were crying that the aunt has murdered Kannilal. The accused was running away with the axe and the axe was snatched from her and she was tied, all this was informed by him while lodging the report, P-3. He had also stated in the report P-3, that the axe was smeared with blood and hair and accused's garments were also stained with blood. In the cross-examination, he has stated that the place of occurrence was the house of Naihar Sai who is his brother. His wife Balobai was scolding Satni (accused) and on their remonstrations, Satni (accused) tried to run away, but, before that the accused was sitting by the side of her son Kannilal (deceased). The above evidence of Heera PW-1 is corroborated by the evidence of Balobai PW-2 and Sumitra PW-4. In the cross-examination of these witnesses, the defence

has not been able to elicit any circumstance which shows that the accused was not present when Heera PW-1 and Balobai PW-2 went to the scene of occurrence and, therefore, the presence of the accused at the place of occurrence near the dead body of her son Kannilal holding blood stained axe in her hand is established. It is also established from the evidence of these witnesses that the accused tried to run away from the place of occurrence and she was caught by Balobai PW-2. These witnesses are closely related to the appellant. From their deposition, a clear and consistent picture emerges that when they gathered at the courtyard being alarmed by the cries of Sumitra (daughter of Heera) and Anita (daughter of the appellant), they saw that the appellant was standing with a bloodstained axe near the body of her son, Kannilal. She also tried to run away, and Balobai restrained her and seized the axe from her possession. The axe as well as the saree of the appellant was blood stained according to the witnesses. There are no inherent contradictions in the testimony of these witnesses. The defence has been unable to dispel the chain of events which emerge from the testimony of these witnesses.

18. Next comes the second circumstance. The blood stained axe and the blood stained saree of the accused was taken into possession by the investigating officer as has been recorded in the seizure memo. They were sent to Forensic Science Laboratory for examination and the report received mentions that both the articles were found blood stained. Therefore, it is proved beyond reasonable doubt that the accused was standing with the blood stained axe near the dead body of the deceased Kannilal.

19. The third circumstance is the post mortem report prepared by Dr. K.K Datta, which revealed the following wounds on the body of the deceased:

i. One incised wound measuring 12 X 1.5 cm till mandible bone deep in the cheek.

ii. Incised wound measuring 10 X 1.5 cm on left side behind the head, from which the brain was visible.

iii. Incised wound 6 X 1 cm deep till bone, on left side of the neck, deep till bone.

iv. Incised wound 7.5 X 1.5 cm deep till vertebrae.

According to Dr. Datta, wound No.2 was life endangering and there is no doubt this was caused by the axe which was recovered from the hands of the accused. We find that the post mortem report coupled with the testimony of the witnesses presents a very clear and cogent chain of the events which occurred on the fateful day unerringly points towards the guilt of the appellant. The picture emerging has also not been refuted satisfactorily by the defence.

20. The learned Amicus Curiae appearing for the appellant submits that the appellant is the mother of the deceased child and it is not possible for a mother to possibly kill her own child. She further submits that because of the illiteracy and ignorance of the appellant, she has been falsely implicated for the death of her child.

21. Motherhood is one of the most precious gifts endowed upon mankind and there is no relationship more pristine and pure than that of a mother and her child. No mother in normal circumstances can tolerate even a scratch on the body of her child. Basic instinct of a mother is well explained by a well known author Washington Irving in one of his books, wherein he has said, that, “a father may turn his back on his child; brothers and sisters may become inveterate enemies; husbands may desert their wives, and wives their husbands. But a mother’s love endures through all; in good repute; in bad repute, in the face of the world’s condemnation, a mother still loves on, and still hopes that her child may turn from his evil ways, and repent; still she remembers the infant smiles that once filled her bosom with rupture, the merry laugh, the joyful

shout of his childhood, the opening promise of his youth; and she can never be brought to think him an unworthy." In the present case, the appellant was found standing near the dead body of her son with a bloodstained axe in her hand. The normal reaction for any mother would have been to go hysterical and clutch the body of her son. But, what is the reaction of a mother in the present case, as stated by PW-1 and PW-2 in their evidence, who came near the scene of occurrence on hearing the cries of Anita and Sumitra, that the accused tried to flee away from the scene of the crime before being restrained. This kind of reaction and lack of remorse would not have been forthcoming had she been innocent. This unusual reaction to the death of her son who was aged 4 at the time of his death, in no uncertain terms point towards her involvement in the crime. In our view, this is an unusual case and therefore the plea that a mother is not capable of killing her own son, in the absence of any evidence to the contrary cannot be accepted. Apart from this, at the time of questioning under Section 313 Cr.P.C., the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculpating her and connecting her with the crime by her total denial of everything when those circumstances were brought to her notice by the Sessions Court, she not only lost the opportunity but stood self condemned.

22. There is also no question of falsely implicating the appellant. The witnesses are her close relatives. Heera PW-1 being the brother-in-law of the appellant and Balobai PW-2 being the sister-in-law of the appellant, had no enmity nor animosity against the appellant. With regard to the issue of Sumitra PW-4, being declared a hostile witness by the prosecution and the contradictions in her testimony, it needs to be kept in mind that the witness is a 16 year old girl, with an impressionable mind. It is very likely that she was shocked beyond belief at the sight of the dead body and it is not possible to comprehend how she would have reacted. Different people react differently to crisis situations, so it is very much possible

that with the passage of time between the occurrence of the crime and recording of her testimony, her memory of the incident would have blurred. That by itself is not enough to set aside the conclusion reached at by the courts below.

23. For all the reasons stated supra, we have no hesitation to agree with the findings of the Division Bench of the High Court holding the appellant guilty of the offence under Section 302 I.P.C. Accordingly, the appeal fails and it is dismissed.

D.G. Appeal dismissed.

HARIDWAR DEVELOPMENT AUTHORITY
v.
RAGHUBIR SINGH
(Civil Appeal No. 1150-1167 of 2010)

JANUARY 29, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Land Acquisition Act, 1894:

s. 23 – Land acquisition – Compensation – Belting method – HELD: In the instant case acquisition relates to a comparatively small extent of village land measuring about 38 bighas of compact contiguous land – The view of High Court that compensation should be awarded at an uniform rate does not call for interference – Guidelines for belting method, laid down.

s. 23 – Compensation – Enhancement on the basis of sale exemplar – HELD: Compensation awarded on the basis of the sale exemplar of more than one year prior to date of preliminary notification, increased by 12%.

s.23 – Compensation – Deduction towards development cost – HELD: 25% deduction adopted by Collector, need no alteration.

ss. 34 and 28 – Interest – HELD: In regard to compensation that is offered by Land Acquisition Collector, interest is payable u/s 34 – With respect to increase in compensation allowed by reference court or appellate court, interest is awarded u/s 28 – Sections 34 and 28 do not duplicate the award of interest, but together cover the entire amount of compensation awarded – Awarding interest on enhanced amount is the normal rule – Refusal to interest should be by assigning special/specific reasons.

Lal Chand vs. Union of India **2009 SCR 622 = 2009 (15) SCC 769 and** *Sardar Jogendra Singh vs. State of UP* **2008 (17) SCC 133, referred to.**

Case Law Reference:

2009 SCR 622	**referred to**	**para 9**
2008 (17) SCC 133	**referred to**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.1150-1167 of 2010.

From the Judgment & Order dated 22.6.2005 of the High Court of Uttaranchal at Nainital in Appeal Nos. 75, 76, 84, 87, 88, 90-92, 20, 68-74, 77-78 of 2003.

WITH

C.A. Nos. 1168-69, 1170, 1171-1178, 1179-1184, 1185-1195 of 2010.

A. K. Ganguly, Vinay Garg, Jyoti Sharma for the Appellant.

Lakshmi Raman Singh, Neelam Singh, Durga, Udita Singh, Prashant Chaudhary, Vishwajit Singh, Veera Kaul Singh, Siddharth Sengar, Abhindra Maheshwari, Pankaj Singh, Vinay Garg, Nagendra Singh, Vishwa Pal Singh, Sunil Kumar Singh, Mukti Singh, P.N. Gupta for the Respondents.

The Order of the Court was delivered by

O R D E R

R.V.RAVEENDRAN, J. 1. Leave granted. Heard the parties.

2. The first batch of appeals is filed by the Haridwar Development Authority ('the Authority', for short), the beneficiary of an acquisition. The connected appeals are filed by the claimants-landowners whose lands measuring 38.6.8 Bighas

(8,45,174 sq.ft.) in village Jwalapur, Tehsil and District Haridwar, were acquired for planned development of a housing colony, under preliminary notification dated 7.12.1991 and final notification dated 16.5.1992. As the ranks of parties in the appeals and counter-appeals vary, the appellant in the first batch (who is the second respondent in other appeals) will be referred to as the "Authority". The respondents in the first batch (who are the appellants in the other appeals) are referred to as the "claimants".

3. The Land Acquisition Collector made an award dated 9.5.1994. He divided the acquired lands into three belts and awarded compensation at the rate of Rs.26.25 per sq.ft. for the lands falling in the first belt, Rs.17.50 per sq.ft. for lands falling in second belt and Rs.13.12 per sq.ft. for the lands falling in the third belt. The Reference Court however limited the division of the acquired lands into only two categories, that is lands falling within 500 metres from the National Highway and lands falling beyond 500 metres from the National Highway. In regard to the first category, it awarded compensation at the rate of Rs.26.25 per sq.ft. and for the second category Rs.17.50 per sq.ft. Feeling aggrieved, both sides filed appeals. The High Court awarded a uniform rate of Rs.26.25 per sq.ft. for all the acquired lands and rejected the belting system adopted by the collector and the categorization adopted by the Reference Court. The High Court also confirmed that claimants will be entitled to all statutory benefits, that is additional amount under section 23(1A), solatium under section 23(2) and interest under section 28 of the Land Acquisition Act, 1894 ('Ac' for short).

4. Neither the Reference Court nor the High Court increased the base 'rate' of compensation arrived at by the Collector, that is Rs.26/25. . While the collector divided the acquired lands into three belts and reduced the rates for lands in the second and third belts (interior lands), the Reference Court restricted the division of the acquired land into two belts and adopted the rates fixed by the Collector for the first and

second belts. The High Court treated all the acquired lands uniformly and awarded the same compensation for all lands by adopting the base rate of Rs.26/25 fixed by the Collector. The Authority challenges the award on the following two grounds: (i) The High Court ought to have retained the three belt categorisation adopted by the collector instead of awarding a uniform rate for all the lands. (ii) The High Court ought not to have awarded interest under section 28 of the Act, when the Reference Court had not awarded any interest under the said section. On the other hand, the claimants in their appeals have contended that the compensation awarded was low and the Reference Court and High Court ought to have increased the compensation to at least Rs.40/00 per sq.ft. They also contend that the High Court was justified in awarding compensation at a uniform rate for all the acquired lands and in awarding interest under section 28 of the Act.

5. On the contentions urged, the following questions arise for consideration :

(i) Whether the High Court ought to have adopted the belt method for award of compensation?

(ii) Whether the compensation awarded requires to be increased?

(iii) Whether the award of interest under section 28 of the Act is not sustainable?

Re : Question (i)

6. The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate :

(A). When a small and compact extent of land is acquired

and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.

(B). If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.

(C) Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometres away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.

(D) Where a very large tract of land with a radius of one to two kilometres is acquired, but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one point to another point in the acquired lands, may be as much as two to three kilometres may not make any difference.

7. The acquisition with which we are concerned relates to a comparatively small extent of village land measuring about 38 bighas of compact contiguous land. The High Court was of the view that the size and situation did not warrant any belting and all lands deserved the same rate of compensation. The

Authority has not placed any material to show that any area was less advantageously situated. Therefore the view of the High Court that compensation should be awarded at an uniform rate does not call for interference.

Re : Question (ii)

8. The collector has referred to several sale transactions but relied upon only one document, that is sale deed dated 19.12.1990 relating to an extent of 11,550 sq.ft. of land sold for Rs.4,04,250/-, which works out to a price of Rs.35 per sq.ft. The collector deducted 25% from the said price, as the relied upon sale transaction related to a small extent of 11,550 sq.ft. and the acquired area was a larger extent 8,45,174 sq.ft. By making such deduction, he arrived at the rate as Rs.26.25 per sq. ft. The Reference Court and the High Court have also adopted the said sale transaction and valuation.

9. The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed, for arriving at the market value, in view of the following factors: (i) that the acquired lands were near to the main Bye-pass Road and had road access on two sides; (ii) that many residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and (iii) that the acquired land had the potential to be used an urban residential area. When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors (see : *Lal Chand vs. Union of India* – 2009 (15) SCC 769). Even if the acquired lands have situational advantages, the minimum deduction from the market value of a small presidential plot, to arrive at the market value of a larger

agricultural land, is in the usual course, will be in the range of 20% to 25%. In this case, the Collector has himself adopted a 25% deduction which has been affirmed by the Reference Court and High Court. We therefore do not propose to alter it.

10. Only one grievance of the claimants remains to be addressed. The claimants pointed out that the relied upon sale transaction is dated 19.12.1990, whereas the notification under section 4(1) of the Act in this case was of 7.12.1991; and as there is a gap of nearly one year, an appropriate increase in the market value should have been provided keeping in view the steady increase in prices. It is well settled that an increase in market value by about 10% to 12% per year can be provided, in regard to lands situated near urban areas having potential for non-agricultural development. (See : *Sardar Jogendra Singh vs. State of UP* – 2008 (17) SCC 133).

11. we are therefore of the view that the value arrived at by the Collector, and accepted by the Reference Court and the High Court requires to be increased by 12% in view of the fact that the preliminary notification was one year after the relied upon sale transaction. Accordingly by increasing the value of Rs.26/25 by 12%, we arrive at the market value as on 7.12.1991 as Rs.29/40, rounded off to Rs.29/50 per sq.ft.

Re : Question (iii)

12. The Authority points out that the Land Acquisition Collector had awarded interest under section 34 of the Act, but the Reference Court did not award any interest under section 28 of the Act. It is contended that when the Reference Court chose not to award any interest, the High court erred in awarding interest under section 28 of the Act, in addition to the interest awarded by the Collector under section 34 of the Act.

13. The collector awarded interest under section 34 of the Act, on the compensation offered, at the rate of 9% per annum for a period of one year from the date of taking possession and

thereafter at the rate of 15% per annum. The reference court did not specifically award any interest, because it did not 'increase' the market value, but merely reclassified the acquired land into two categories instead of three categories and adopted the first and second rates awarded by the collector for the two categories. However the High Court deleted the belting/ categorisation and awarded a uniform rate of Rs.26.25 per sq.ft. Therefore, there was in fact an increase in the compensation awarded for lands which were earlier classified by the Collector as second and third belt lands. Therefore, interest under section 28 of the Act had to be granted. The scheme of the Act is that in regard to compensation amount, interest is payable at the rate of 9% per annum for a period of one year from the date of taking possession and thereafter at 15% per annum until deposit is made. In regard to the compensation that is offered by the Land Acquisition Collector, the interest is payable under section 34 of the Act. In regard to the increase in such compensation, which is awarded by the Reference Court or any appellate court, such interest is awarded under section 28 of the Act. Sections 34 and 28 of the Act do not duplicate the award of interest, but together cover the entire amount of compensation awarded. The award of interest on the enhanced amount under section 28 of the Act is the normal rule. The refusal of interest should be by assigning special or specific reasons. The contention of the Authority that the High Court ought not to have awarded interest under section 28 is therefore untenable.

14. In view of the above, the appeals filed by the Authority are dismissed. The appeals filed by the claimants - landowners are allowed and the compensation is increased from Rs.26.25 per sq.ft. to Rs.29.50 per sq.ft. We reiterate that the claimants will be entitled to all the statutory benefits, that is additional amount under section 23(1A), solatium under section 23(2) and interest under section 28 of the Act. Parties to bear their respective costs.

R.P. Appeals disposed of.

STATE OF MADHYA PRADESH
v.
BALRAM MIHANI & ORS.
(Criminal Appeal Nos. 891-893 of 2007)

FEBRUARY 1, 2010

[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]

Code of Criminal Procedure, 1973:

Chapter VII-A – ss. 105-A to 105-C – Reciprocal arrangement for assistance in certain matters and procedure for attachment and forfeiture of property – Application by Police for initiating proceedings in respect of properties used in commission of offences or acquired from criminal activities – HELD: Provisions of Chapter VII-A would be applicable only to offences which have international ramifications and not to local offences generally and the properties earned out of such offences.

Interpretation of Statutes:

*Contextual background – Statement of Object and Reasons – **Held:** Has to be taken into consideration for arriving at clear interpretation where the language is extremely general and not clear.*

Police filed an application before the Judicial Magistrate for initiating proceedings against certain properties belonging to the respondents stated to have been used in commission of offences or acquired from criminal activities. The application was allowed by the Judicial Magistrate. However, the High Court in the petitions filed by the respondents u/s 482 Cr.PC, quashed the proceedings holding that the provisions of Chapter

VII of the Code were not applicable to local offences complained of. Aggrieved, the State filed the appeal. The Court by its order dated 19.1.2010 dismissed the appeal observing that reasons for the order would follow.

Giving the reasons for the order dated 19.1.2010, the Court

HELD: 1.1. The High Court has rightly held that the provisions of Chapter VII-A of the Code of Criminal Procedure, 1973 are not the ordinary law of land and would be applicable only to the offences which have international ramifications. Chapter VII-A of the Code has introduced stringent measures for attachment and forfeiture of the properties earned by the offences by way of reciprocal arrangement in the contracting countries. The whole chapter is the specific one relating to the specified offences indicated therein and has nothing to do with the local offences or the properties earned out of them. [Para 6,12 and 13] [218-G-H; 218-F-G; 219-A-B]

Union of India & Anr. v. W.N. Chadha **1993 Supp. (3) SCC 260;** *Jayalalitha v. State* **(2002) Crl.L.J. 3026; and** *Bhinka v. Charan Singh* **AIR 1959 SC 90 – referred to.**

1.2. In the Statement of Objects and Reasons to the Amending Act 40 of 1993 there is a clear cut reference that the Government of India had signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency transfer) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom. [Para 9] [217-A-C]

1.3. In the instant case, the applications filed by the Police as also the order passed by the trial court are only

and only in respect of the offences like gambling and the offences under I.P.C. which are local. Even the properties are not shown to be connected with crimes mentioned in the Objects and Reasons of the amending Act. Such properties are clearly not included in s.105-C of the Code. [Para 11] [217-G-H]

1.4. Though the language of s.105-C (1) is extremely general, its being placed in Chapter VII-A cannot be lost sight of. Where the language is extremely general and not clear, the contextual background has to be taken into consideration for arriving at clear interpretation. [Para 11] [218-A; 218-B-C]

1.5. The plea that sub-section (2) of s.105-B starts with the words "notwithstanding anything contained in this Code" is of no avail, as the sub-section, when read in entirety, makes reference to a person who is in "contracting State". Beside, ss.105-B and 105-C, which start with the words "Where a court in India", in their express language indicate that the Chapter was not meant for the general offences and the properties earned out of those general offences in India. Further, the Court cannot ignore the likely misuse of the provisions in Chapter VIIA if it is made applicable to the local offences generally. [Para 11 and 15] [218-C-D; 219-C-D]

Case Law Reference:

1993 Supp. (3) SCC 260	**referred to**	**para 7**
(2002) Crl.L.J. 3026	**referred to**	**para 7**
AIR 1959 SC 90	**referred to**	**para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 891-893 of 2007.

From the Judgment & Order dated 11.10.2006 of the High

Court of Judicature of M.P. at Jabalpur in Misc. Criminal Case Nos. 10496, 10497, 10538 of 2005.

D.A. Dave and Vibha Datta Makhija for the Appellant.

Ashiesh Kumar, Jagat Singh, P.D. Sharma for the Respondents.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. By our earlier order dated 19.01.2010, we have dismissed the appeals filed by the State of Madhya Pradesh. Now, we proceed to give reasons thereof.

2. The Station House Officer, Itarsi moved applications before the Judicial Magistrate, First Class, Itarsi for initiating proceedings against the respondents herein under Chapter VII-A of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") for attachment and forfeiture of the properties of the respondents. According to the applications, the said properties were derived from or used in commission of offences and were acquired from the criminal activities. The police further urged that the respondents were involved in the criminal activities since long and had accumulated huge wealth derived directly or indirectly by or such criminal and unlawful activities. According to the police some of these properties were in the names of their relatives which were clearly traceable to the respondents herein. The prayer thus was made under Section 105-D of the Code for authorization to take all necessary steps to trace out and identify such properties and further for the forfeiture and vesting thereof. Some other applications were also filed on identical facts against some other respondents also. The Trial Court having passed an order in pursuance of these applications allowing the same, the respondents challenged the same by way of a petition under Section 482 of the Code. Finding that there were divergent opinions on the tenability of the applications amongst two learned Single Judges of the Madhya Pradesh High Court, the matter was

referred to the Division Bench and the Division Bench by the impugned order quashed the proceedings holding that the provisions of Chapter VII-A were not applicable to such local offences complained of. It is this order which is in challenge before us at the instance of the State Government in these appeals.

3. Shri Dushyant A. Dave, learned Senior Counsel appearing on behalf of the State of Madhya Pradesh very painstakingly took us through Chapter VII-A containing Sections 105-A to 105-L. It will be useful to see the import of some of the Sections.

4. Section 105A(a) defines "contracting State" and refers to any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise. Section 105A (c) defines proceeds of crime as under:

> "(c) "proceeds of crime" means any property derived or obtained directly or indirectly, by any person as a result of criminal activity (including crime involving currency transfers) or the value of any such property"

Section 105A (d) defines the property as under:

> "(d) "property" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets derived or used in the commission of an offence and includes property obtained through proceeds of crime."

Section 105-B deals with assistance in securing arrest of persons on request from contracting states or the arrest in the contracting states. Sub-Section (1) thereof starts with the words

"Where a Court in India". So also Sub-Section (3) starts with the aforementioned words. Section 105C is as under:

> "*105C. Assistance in relation to orders of attachment or forfeiture of property.*
>
> (1) Where a court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may deem fit under the provisions of sections 105D to 105J (both inclusive).
>
> (2) Where the Court has made an order for attachment or forfeiture of any property under sub-section (1), and such property is suspected to be in a contracting State, the court may issue a letter of request to a court or an authority in the contracting State for execution of such order.
>
> (3) Where a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment or forfeiture of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the court, as it thinks fit, for execution in accordance with the provisions of sections 105D to 105J (both inclusive) or, as the case may be, any other law for the time being in force."

5. Section 105-D empowers the court to direct any police officer not below the rank of Sub-Inspector to take steps for tracing and identifying such property under Section 105C (1) or on receipt of letter of request under sub-section (3) of Section

105-C. Section 105-E empowers the officer conducting an inquiry or investigation to make an order of seizure of such property, if he has a reason to believe that such property is likely to be concealed, transferred or dealt with in any manner which will result in disposal of the property. Section 105-F relates to the power of court to appoint District Magistrate of any area or his nominee where the property situated to perform the functions of an administrator of such property. Section 105G provides for show cause notice before forfeiture. Section 105-H deals with the forfeiture of the property to Central Government while Section 105-I empowers the Court giving an option to the owner of such property to pay, in lieu of forfeiture, the fine equal to the market value of such property. Section 105-J takes care of the situation where after making an order under sub-section (1) of Section 105-E or the issue of a notice under Section 105-G, the property stands transferred by any mode whatsoever and further provides that such transfer shall be ignored and also that such transfer of property shall be deemed null and void. Section 105-L deals with the applications and powers in this Chapter.

6. The stress of the learned counsel is particularly on Section 105-D and the learned counsel is at pains to point out that Section 105-C and D can apply to any property in India which is derived or obtained from the commission of offence. Such offence could be even the offence which does not have international ramifications. The High Court, has taken stock of all these Sections and referred to the heading of the Chapter, the Statement of Objects and Reasons of the amending Act being Act No.40 of 1993 and the speech of the Hon'ble Minister for Home Affairs Shri S.B. Chavan (as he then was). From this the High Court has come to the conclusion that firstly the provisions of Chapter VII-A are not the ordinary law of land and further the provisions therein would be applicable only to the offences which have international ramifications. The High Court has further reached the conclusion that the said provisions override the provisions of Chapter V, VI AND VII of the Code

relating to search and seizure during investigation. The High Court has posed following questions:

(i) What was the law before the making of the amendment?

(ii) What was the mischief and defect for which the law did not provide?

(iii) What is the remedy that the amendment has provided? And

(iv) What is the reason of the remedy?

7. Answering all these questions and also taking into account the general provisions of search and seizure contained in Sections 91 to 101 of the Code, as also taking into consideration Sections 451, 452 and 457 of the Code dealing with the custody and disposal of the property involved in crime, the High Court ultimately came to the conclusion that the said provisions of Chapter VII-A would not apply to the cases in question. The High Court has also taken into consideration the provisions of Section 41(1)(g) of the Code, Sections 166-A and 166-B of the Code and has relied upon three other cases, namely, *Union of India & Anr. v. W.N. Chadha* [1993 Supp. (3) SCC 260], *Jayalalitha v. State* [(2002) Crl.L.J. 3026] and *Bhinka v. Charan Singh* [AIR 1959 SC 90]. It has ultimately held that Chapter VII-A has been incorporated with an intention to curb mischief or completely eliminate the terrorists activities and international crimes. According to the High Court, the provisions of this Chapter are supplemental to the special provisions contained in Sections 166-A and 166-B and had nothing to do with the investigation into offences in general.

8. We have considered the judgment as also the contentions raised by the learned counsel. We have also perused the heading of Chapter VII-A as also the Statement of Objects and Reasons. After perusing the same we are of the firm opinion that the well written judgment of the High Court

is correct and the High Court has taken a correct view.

9. In the Statement of Objects and Reasons to the Amending Act 40 of 1993 there is a clear cut reference that the Government of India had signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency transfer) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom. The statement further goes on to provide the three objectives, viz.:

(a) the transfer of persons between the contracting States including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings;

(b) attachment and forfeiture of properties obtained or derived from the commission of an offence that may have been or has been committed in the other country; and

(c) enforcement of attachment and forfeiture orders issued by a court in the other country.

10. We have even taken into consideration the speech of the then Home Minister Shri S.B. Chavan which leaves no doubt that this Chapter is not meant for the local offences.

11. When we see the applications as also the order passed by the Trial Court, it is clear that it is only and only in respect of the local offences like gambling and the offences under I.P.C. which are local. Even the properties are not shown to be connected with crimes mentioned in the Objects and Reasons of the amending Act. In fact, no connection is established also between crimes mentioned and the properties. Such properties are clearly not included in Section 105-C.

Though the language of Section 105-C (1) is extremely general, its being placed in Chapter VII-A cannot be lost sight of. Again there is a clear cut reference in Sub-section (2) thereof to the contracting state, the definition of which is to be found in Section 105-A (a). It is, therefore, clear that the property envisaged in Section 105-C (1) cannot be an ordinary property earned out of ordinary offences committed in India. Where the language is extremely general and not clear, the contextual background has to be taken into consideration for arriving at clear interpretation. Some assistance was tried to be taken from the language of Section 105-B(2) which starts with the words "notwithstanding anything contained in this Code". However, when the sub-section is read in entirety, it is clear that it makes reference to a person who is in "contracting State". Therefore, even that reference will not bring in any provision within the scope of general law. We again cannot ignore the express language of Sections 105-B and 105-C which starts with the words "where a court in India". If this chapter was meant for the general offences and the properties earned out of those general offences in India, then such a phraseology would not have been used by the Legislature.

12. Lastly we see the provisions of Section 105-L which are clear that the Central Government may by notification in the official gazette, direct that the application of this chapter in relation to a contracting State with which there are reciprocal arrangements would be subject to some conditions, exceptions and qualifications as would be specified in the said notification. It is, therefore, clear that the whole chapter is specific chapter relating to the specified offences therein and has nothing to do with the local offences or the properties earned out of those.

13. At this juncture, it is pointed out that there are specific other Central laws wherein the properties earned out of trading of Narcotic Drugs and Psychotropic Substances or the offences relating to smuggling or financial offences relating to foreign exchange are liable to be attached, seized and forfeitured.

Chapter VII-A is one such measure to introduce stringent measures for attachment and forfeiture of the properties earned by the offences, by way of reciprocal arrangement in the contracting countries. However, if we accept the State's contention that the provisions of Chapter VII-A are for all and sundry offences in India, it would be illogical.

14. If such a construction as claimed by the petitioner is given then it would mean that even for the offences which are local in nature and committed within the State, still the property connected with those offences shall be forfeitured to the Central Government. That would obviously be an absurd result.

15. Lastly, we cannot ignore the likely misuse of the provisions in Chapter VIIA if the whole Chapter is made applicable to the local offences generally. Such does not appear to be the intendment of the Legislature in introducing Chapter VII A.

16. In view of the above we approve the judgment of the Madhya Pradesh High Court and confirm the same. The appeals are dismissed.

R.P. Reasons for dismissing appeals.

UNION OF INDIA

v.

R.K. CHOPRA

(CIVIL APPEAL NO. 1096 OF 2010)

FEBRUARY 01, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Service law: Central Civil Services (Revision pay) Rules, 1997 – Rule 7, Note 3 – Subsistence allowance, revision of – Entitlement of suspended government servant

When revision of pay scale taking effect from a date prior to suspension – Held: Govt. servant is permitted to exercise option under FR23 even if the period during which he is to exercise the option falls within the period of suspension and then he would be entitled to the benefit of increase in pay and also in subsistence allowance for the period of suspension.

When revision of pay scale taking effect from a date falling within the period of suspension – Held: Not entitled – Benefit of option for revised pay scale would accrue to him in respect of period of suspension only after his reinstatement depending on the fact whether the period of suspension was treated as on duty or not – Fundamental Rules – Rules 23, 53 – Memorandum no.F.2(36)-Ests./III/58 dated 27.8.1958 – Constitution of India, 1950 – Article 309, proviso.

The question which arose for consideration in the present appeal is whether a government servant is entitled to revision of subsistence allowance based on the pay revision effected by the Central Civil Services (Revision pay) Rules, 1997 which came into force on 1st January, 1996 while he was under suspension from service.

Allowing the appeal, the Court

HELD: 1.1. The claim for payment of subsistence allowance of a Government servant is dealt within Chapter VIII of Fundamental Rules. Rule 53 provides that the Government servant under suspension shall be entitled to subsistence allowance at an amount equal to the leave salary which he would have drawn if he had been on leave on half average pay or on half pay and in addition, dearness allowance if admissible on the basis of such leave salary. The proviso to Rule 53 (1)(ii)(a) says that where the period of suspension exceeds three months, the authority is competent to vary the amount subject to some restrictions. [Paras 14 and 15] [230-A; 231-E-F]

1.2. Government of India order G.M.O.M. No. F-2(36)-Ests/-III/58 dated 27th August, 1958 given in the Swamy's compilation of Fundamental and supplementary Rules, deals with the revision of scale of pay while a Government Servant is under suspension. The two categories of cases are dealt with in that Office Memorandum. One refers to cases in which the revised scale of pay takes effect from a date prior to the date of suspension and other cases in which the revised scales of pay takes effect from a date falling within the period of suspension. The Fundamental Rules as well as the Memorandum dated 27th August, 1958 makes it clear that if there is a revision of pay scale in respect of a post held by a Government Servant, prior to the suspension period, he is permitted to exercise option under FR 23, even if the period during which he is to exercise the option falls within the period of suspension and then, he will be entitled to the benefit of increase in pay and also in subsistence allowance for the period of suspension, as a result of such option. But if the revised pay scale takes effect from a date falling within the period of suspension

then, the benefit of option, for revised pay scale will accrue to him in respect of the period of suspension only after his reinstatement depending on the fact whether the period of suspension is treated as duty or not. In the present case, the Revised Pay Rules, came into force on 1st day of January, 1996 when the respondent was under suspension. Therefore, even if he had exercised his option under FR 23 for the benefit of the pay revision, the same would have accrued to him only after his reinstatement depending on the fact whether the period of suspension is treated as 'on duty' or not. Respondent was dismissed from service on 4.8.2005, therefore the question of the benefit of the revised pay and the subsistence allowance thereon on the basis of Revised Pay Rules did not accrue to him. [Paras 16 and 17] [231-G-H; 232-A; 233-D-H; 234-A]

1.3. The Revised pay Rules, which came into force on 01.01.1996 are in conformity with the FR 53 and the Office Memorandum issued by the Government of India. On a combined reading of Rules 5 and 6, it is clear that a Government servant under suspension on the 1st day of January, 1996 is entitled to exercise his option within three months of the date of his return to duty if that date is later than the date prescribed in the sub rule and if the intimation is not received he is deemed to have elected to be governed by the revised scale of pay with effect on and from the 1st day of January, 1996 on his return to duty. Respondent did not return to duty since he was dismissed from service and hence there was no question either exercising the option or the application of the deeming provision. [Paras 18 and 20] [234-B; 235-C-E]

1.4. Note 3 under Rule 7 of the Central Civil Services (Revision Pay) Rules, 1997 states that when a Government servant was on leave on 1.1.1996, he would become entitled to pay in the revised pay scale from the

date he joined duty. However, in the case of a Government servant under suspension, he would continue to draw subsistence allowance based on the then existing scale of pay and his pay in the revised pay scale would be subject to final order on the pending disciplinary proceedings. The Revised Pay Rules were framed by the President of India in exercise of the powers conferred by the proviso to Article 309 and clause 5 of Article 148 of the Constitution. The proviso to Article 309 enables the President to make Rules to regulate the recruitment and conditions of service of the persons mentioned therein. The Rules framed by the President of India in exercise of the powers conferred by the proviso to Article 309 have the force of law. Further, Note 3 to Rule 7 of Revised Pay Rules, 1997 were not challenged. On a combined reading of Note 3 to Rule 7 of the Revised Pay Rules and FR 53(1)(ii)(a) with the clarification with Office Memorandum dated 27th August, 1958, it is clear that if the revision of pay takes effect from a date prior to the date of suspension of a Government servant then he would be entitled to benefit of increment in pay and in the subsistence allowance for the period of suspension, but if the revision pay scale takes effect from a date falling within the period of suspension then the benefit of revision of pay and the subsistence allowances will accrue to him, only after reinstatement depending on the fact whether the period of suspension is treated as duty or not. In view of the clear distinction drawn by the Rule making authority between the cases in which the revised pay scale takes effect from a date prior to the date of suspension and a date falling within the period of suspension, the plea of discrimination raised cannot be sustained especially when there is no challenge to the Rules. The benefit of pay revision and the consequent revision of subsistence allowance stand postponed till the conclusion of the departmental proceedings, if the pay revision has come into effect while the Government

servant is under suspension. The Tribunal as well as the High Court committed an error in holding that the respondent is entitled to the benefit of Revised Pay Rules. [Paras 24 to 26] [236-G-H; 237-A; 237-D-H; 238-A-B]

J.S. Kharat v. Union of India **2002-2003 (CAT) F***ull Bench Judgments 169; State of Maharashtra v. Chandrabhan Tale* **(1983) 3 SCC 387;** *Khem Chand v. Union of India* **1963 Supp. 1 SCR 229;** *Jagdamba Prasad Shukla v. State of U.P and others* **(2000) 7 SCC 90;** *P.L. Shah v. Union of India and Anr.* **(1989) 1 SCC 546;** *R.P. Kapur v. Union of India & Ors.* **(1999) 8 SCC 110;** *Umesh Chandra Misra v. Union of India* **1993 Supp. (2) SCC 210, referred to.**

Case Law Reference:

2002-2003 (CAT) Full Bench Judgments 169	**referred to**	**Paras 4, 5, 6**
(1983) 3 SCC 387	**referred to**	**Paras 7, 8**
1963 Supp. 1 SCR 229	**referred to**	**Paras 7, 9**
(2000) 7 SCC 90	**referred to**	**Paras 7, 10**
(1989) 1 SCC 546	**referred to**	**Paras 7, 11**
(1999) 8 SCC 110	**referred to**	**Paras 7, 12**
1993 Supp. (2) SCC 210	**referred to**	**Paras 7, 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1096 of 2010.

From the Judgment & Order dated 4.8.2008 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 1899 of 2007.

Mohan Parasaran, ASG, Rashmi Malhotra, D.S. Mahra for the Appellant.

R.K. Chopra (Respondent-in-person)

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. We are, in this case, concerned with a claim of a Government servant for revision of subsistence allowance based on the pay revision effected by the Central Civil Services (Revision Pay) Rules, 1997, which came into force on the 1st day of January, 1996, while he was under suspension from service.

3. The Respondent herein was working as a Desk Officer in the Department of Industrial Policy and Promotion under the Ministry of Commerce and Industries. While so, a case was registered against him by Central Bureau of Investigation under the Prevention of Corruption Act and he was placed under suspension by the Department w.e.f. 06.06.1989 under rule 10 (2) of the CCS (CCA) Rules 1965. Subsistence allowance due to him under Fundamental Rules 53 (1) (ii) (a) was paid to him which was later enhanced to 50% vide order No. 5/7/99, dated 30.05.1991. At the time of suspension he was in the scale of pay of Rs. 2000-3500 and was drawing a basic pay of Rs. 2,825/-. While undergoing suspension he made a representation on 22.7.2002 for revision of subsistence allowance based on the 5th Pay Commission Report. Request was rejected by the Government of India, Ministry of Commerce and Industries vide Memorandum dated 29.10.2002 stating that a person under suspension is not entitled to draw either the increment during the period of suspension or get his pay fixed in the revised scale. Later he filed another representation on 05.07.2005 reiterating the same request which was replied by Memorandum dated 18.08.2005 stating that his earlier representation was already rejected. Respondent was later dismissed from service on 04.08.2005 since he was convicted by the Criminal Court vide its judgment dated 30.03.2002.

4. The Respondent after dismissal from service approached the Central Administrative Tribunal (Principal Bench), New Delhi and filed O.A. No.29/2006 challenging the above-mentioned orders dated 29.10.2002 and 18.08.2005 and sought a declaration that he was entitled to get subsistence allowance on the revised pay-scale with effect from 1.1.1996. Reliance was placed on a Full Bench order of the Tribunal in *J.S. Kharat* vs. *Union of India* [2002-2003 (CAT) Full Bench Judgments 169]. The Department took up the stand that in view of Note 3 to Rule 7 of Central Civil Services (Revised Pay) Rules, 1997, (for short 'Revised Pay Rules') the Respondent would not be entitled to get subsistence allowance on the revised pay-scale with effect from 1.1.1996. Further, it was also contended that the Full Bench of the Tribunal in the case of *J.S. Kharat* was not concerned with the applicability of the above-mentioned Rules. Rejecting the contention the Tribunal took the view that it would be unjust to deny the subsistence allowance on the basis of revised pay to the persons who stood suspended prior to 01.01.1996, especially when persons who were suspended after that date would be entitled to get subsistence allowance on the revised pay scale. This, according to the Tribunal, would lead to an anomalous situation. The Tribunal, however, held that since the respondent did not challenge the earlier communication dated 29.10.2002, rejecting his claim, he would not be entitled to any arrears on account of revised subsistence allowance till the said date. Further, it was ordered that he would be entitled to arrears of revision of subsistence allowance from 01.01.2002 till 04.08.2005 when he was dismissed from service.

5. Aggrieved by the order passed by the Tribunal, the Union of India took up the matter before the Delhi High Court *vide* Writ Petition (Civil) No.1899/2007. The High Court following its earlier judgment in *Commissioner of Police* v. *Randhir Singh* [Writ Petition (Civil) No.713/2008 decided on 29.01.2008] dismissed the appeal holding that it did not find

any infirmity in the order of the Full Bench of the Tribunal in *J.S. Kharat's case* (supra). Aggrieved by the said order dated 04.08.2008, this appeal has been preferred by the Union of India.

6. Shri Mohan Parasaran, Additional Solicitor General of India submitted that the Tribunal as well as the Delhi High Court have not properly appreciated the scope of Note 3 to Rule 7 of the Revised Pay Rules. Learned counsel submitted that the Full Bench of the Tribunal in *J.S. Kharat's case* (supra) was primarily concerned with the interpretation of Rule 6(1) the Railway Servants (Revised Pay) Rules 1986 and the validity of Note 3 to Rule 7 of the Revised Pay Rules, was not an issue before the Tribunal. Learned counsel also submitted that the High Court and Tribunal have failed to appreciate that the payment of subsistence allowance is based on leave salary (not pay) admissible during half pay leave and leave salary linked to pay drawn immediately before proceeding on leave. Learned counsel submitted that the respondent is, therefore, not entitled to the benefit of subsistence allowance linked to pay or revised pay which he would have drawn but for being placed under suspension. Learned counsel also submitted that the Government of India's decisions 3 (e) below FR 53 shows that the subsistence allowance cannot be revised with retrospective effect and in the instant case the respondent was dismissed from service and the question of revision of subsistence allowance did not arise. Learned counsel also pointed out that there was no challenge to the validity of Note - 3 to Rule 7 of Revised Pay Rules and the Tribunal committed an error in failing to apply to the said note to rule 7 to the instant case. The respondent appeared in person and submitted that there is no illegality in the order passed by the Tribunal which was confirmed by the High Court.

7. We notice both the High Court as well as the Tribunal has placed heavy reliance on the order of Full Bench of the tribunal in *J.S. Kharat's case* (supra) and took the view that the

delinquent officer would be entitled to enhanced subsistence allowance on the basis of the upward revision of pay based on the 5th Central Pay Commission Report, implemented by the Revised Pay Rules. Reference was also made to the decisions of this Court in *State of Maharashtra* vs. *Chandrabhan Tale* [(1983) 3 SCC 387]; *Khem Chand* vs. *Union of India* [1963 Supp. 1 SCR 229]; *Jagdamba Prasad Shukla* vs. *State of U.P and others* [(2000) 7 SCC 90]; *P.L. Shah* vs. *Union of India and Anr.* [(1989) 1 SCC 546]; *R.P. Kapur* vs. *Union of India & Ors.* [(1999) 8 SCC 110]; and *Umesh Chandra Misra* vs. *Union of India* [1993 Supp. (2) SCC 210]

8. We notice that in none of the aforesaid judgments the validity of Note 3 to rule 7 of the Revised Pay Rules came up for consideration. In *Chandrabhan's case* (supra), this Court was examining the validity of the second proviso to Rule 151 (1) (ii) (b) of the Bombay Civil Service Rules, 1959 which prescribed payment of subsistence allowance at the rate of Rs. 1 per month. Court struck down the proviso as void and unreasonable and ordered that the Civil Servant is entitled to the normal subsistence allowance. The above ruling is of no assistance to the respondent.

9. In *Khem Chand*'s case this Court was examining the validity of Rule 12(4) of the CCS (CC&A) Rules 1957 which has nothing do with the question involved in the present case. This Court was generally explaining the scope and effect of a suspension order stating that the real effect of a suspension order is that though a Government servant continues to be a member of the Service he is not permitted to work during the period of suspension and he is entitled to subsistence allowance which is normally less than the salary.

10. In *Jagdamba Prasad Shukla's* case (supra) subsistence allowance was denied to the Government Servant since he had omitted to furnish the certificate as required under the U.P. Fundamental Rules 53(2) indicating that he was not

employed elsewhere during the period of suspension. Non payment of subsistence allowance, this Court held, has vitiated the departmental enquiry and the consequent removal order.

11. In *P.L. Shah's* case (supra) this Court was dealing with a case of reduction of subsistence allowance from 50% to 25% of salary. Order was challenged before the Tribunal which dismissed the petition on the ground of delay. This Court set aside the orders of the Tribunal and the matter was remanded for fresh consideration, holding that the subsistence allowance should be sufficient for the bare sustenance in this world in which prices of the necessaries of life are increasing every day on account of conditions of inflation obtaining in the country. It was held that since Government Servant cannot engage himself in any other activity during the period of suspension and the amount of subsistence allowance payable to the Government Servant be reviewed from time to time when proceedings drag on long time even though there may be no express rule insisting of such review.

12. In *R.P. Kapur's* case (supra), this Court was dealing with the scope of Railway Services (Pension) Rules, 1993 and the effect of Note 1 and proviso to Rule 50 and the Court took the view that the above-mentioned proviso is not applicable to a case of compulsory retirement. The scope of Note 3 to Rule 7 was not in issue in *R.P. Kapur's case.*

13. In *Umesh Chandra Misra's* case (supra), this Court was dealing with the case of a railway employee who was denied subsistence allowance at the rate of 75% of the salary for the period from May 20, 1976 to February 17, 1977 and this Court directed the respondents to pay him the subsistence allowance from November 20, 1975 to May 19, 1976 at the rate of 50 per cent of the salary and from May 20, 1976 to February 17, 1977 at the rate of 75 per cent of the salary with interest on both the amounts with a further direction that the subsistence allowance be paid on the basis of the revised scale of pay. The legality of Note 3 to Rule 7 was never an issue in that case.

14. The claim for payment of subsistence allowance of a Government servant is dealt with in Chapter VIII of Fundamental Rules. FR 53 which relevant for our purpose reads follows:-

"F.R.53.(1) A Government servant under suspension or deemed to have been placed under suspension by an order of the appointing authority shall be entitled to the following payments, namely:-

(i) xxxx xxxx xxxx xxxx

(ii) in the case of any other Government servant—

(a) a subsistence allowance at an amount equal to the leave salary which the Government servant would have drawn, if he had been on leave on half average pay or on half-pay and in addition, dearness allowance, if admissible on the basis of such leave salary;

Provided that where the period of suspension exceeds three months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first three months as follows:-

(i) the amount of subsistence allowance may be increased by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons to be recorded in writing, not directly attributable to the Government servant;

(ii) the amount of subsistence allowance, may be reduced by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible

during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged due to reasons, to be recorded in writing, directly attributable to the Government servant;

(iii) the rate of dearness allowance will be based on the increased or, as the case may be, the decreased amount of subsistence allowance admissible under sub-clauses (i) and (ii) above.

(b) Any other compensatory allowances admissible from time to time on the basis of pay of which the Government servant was in receipt on the date of suspension subject to the fulfillment of other conditions laid down for the drawal of such allowances.

xxxx xxxx xxxx

15. The said Rule provides that the Government servant under suspension shall be entitled to subsistence allowance at an amount equal to the leave salary which the Government servant would have drawn if he had been on leave on half average pay or on half pay and in addition, dearness allowance if admissible on the basis of such leave salary. The proviso to Rule 53 (1)(ii) (a) says that where the period of suspension exceeds three months, the authority is competent to vary the amount subject to some restrictions.

16. We may in this connection refer to a Government of India order G.M.O.M. No. F-2(36)-Ests/-III/58 dated 27th August, 1958 given in the Swamy's compilation of Fundamental and supplementary Rules, which deals with the revision of scale of pay while a Government Servant is under suspension. The two categories of cases have been dealt with in that Office Memorandum. One refers to cases in which the revised scale of pay takes effect from a date prior to the date of suspension

and other cases in which the revised scales of pay takes effect from a date falling within the period of suspension.

Office Memorandum reads as follows:-

"(2) *Revision of scale of pay while under suspension*—A question having arisen as to whether a Government servant under suspension might be given an option to elect any revised scales of pay which might be introduced in respect of the post held by him immediately prior to suspension is revised, the Government of India have decided as follows:-

1. Cases in which the revised scale of pay takes effect from a date prior to the date of suspension.

In such cases the Government servant should be allowed to exercise the option under FR 23 even if the period during which he is exercise the option falls within the period of suspension. *He will be entitled to the benefit of increase in pay, if any, in respect of the duty period before suspension, and also in the subsistence allowance, for the period of suspension, as a result of such option.*

2. Cases in which the revised scale of pay takes effect from a date falling within the period of suspension.

(a) Under suspension a Government servant retains a lien on his substantive post. As the expression 'holder of a post' occurring in FR 23 includes also a person who holds a lien or a suspended lien on the post even though he may not be actually holding the post, *such a Government servant should be allowed the option under FR 23 even while under suspension. The benefit of option will, however, practically accrue to him in respect of the period of suspension, only after his reinstatement depending on*

the fact whether the period of suspension is treated as duty or not.

(b) A Government servant who does not retain a lien on a post the pay of which is changed, is not entitled to exercise the option under FR 23. If, however, he is reinstated in the post and the period of suspension is treated as duty, he may be allowed to exercise the option after such reinstatement. In such cases, if there is a time-limit prescribed for exercising the option and such period had already expired during the period of suspension, a relaxation may be made in each individual case for extending the period during which the option may be exercised.

17. The above mentioned Rules as well as the Memorandum makes it clear that if there is a revision of scale of pay in respect of a post held by a Government Servant, prior to the suspension period, he is permitted to exercise option under FR 23, even if the period during which he is to exercise the option falls within the period of suspension and then, he will be entitled to the benefit of increase in pay and also in subsistence allowance for the period of suspension, as a result of such option. But if the revised scale of pay takes effect from a date falling within the period of suspension then, the benefit of option, for revised scale of pay will accrue to him in respect of the period of suspension only after his reinstatement depending on the fact whether the period of suspension is treated as duty or not. In the present case, the Revised Pay Rules, came into force on 1st day of January, 1996 when the respondent was under suspension. Therefore, even if he had exercised his option under FR 23 for the benefit of the above pay revision, the same would have accrued to him only after his reinstatement depending on the fact whether the period of suspension is treated as 'on duty' or not. So far as the respondent is concerned, he was dismissed from service on 4.8.2005, therefore the question of the benefit of the revised

pay and the subsistence allowance thereon on the basis of Revised Pay Rules did not accrue to him.

18. The Revised pay Rules, which came into force on 01.01.1996 in our view are in conformity with the FR 53 and the above-mentioned Office Memorandum issued by the Government of India.

19. Rule 5 of Revised Pay Rules deals with drawal of pay in the revised scales which reads as follows:-

"5. *Drawal of pay in the revised scales.*—Save as otherwise provided in these rules, a Government servant shall draw pay in the revised scale applicable to the post to which he is appointed:

Provided that a Government servant may elect to continue to draw pay in the existing scale until the date on which he earns his next or any

subsequent increment in the existing scale or until he vacates his post or ceases to draw pay in that scale.

xxxx xxxx xxxx

Rule 6 which deals exercise of option reads as follows:-

6. *Exercise of Option.*—— (1) The option under the proviso to Rule 5 shall be exercised in writing in the form appended to the Second Schedule so as to reach the authority mentioned in sub-rule (2) within three months of the date of publication of these rules or where an existing scale has been revised by any order made subsequent to that date, within three months of the date of such order.

Provided that.—

(i) in the case of a Government servant who is, on the date of such publication or, as the case may be, date of such order, out of India on leave or

deputation or foreign service or active service, the said option shall be exercised in writing so as to reach the said authority within three months of the date of his taking charge of his post in India; and

(ii) *where a Government servant is under suspension on the 1st day of January, 1996, the option may be exercised within three months of the date of his return to his duty if that date is later than the date prescribed in this sub-rule.*

xxxx xxxx xxxxx

20. On a combined reading of Rules 5 and 6, it is clear that a Government servant under suspension on the 1st day of January, 1996 is entitled to exercise his option within three months of the date of his return to duty if that date is later than the date prescribed in the sub rule and if the intimation is not received he is deemed to have elected to be governed by the revised scale of pay with effect on and from the 1st day of January, 1996 on his return to duty. Respondent herein did not return to duty since he was dismissed from service and hence there was no question either exercising the option or the application of the deeming provision.

21. Rule 7 deals with the fixation of initial pay in the revised scale , which reads as follows:-

"7. Fixation of initial pay in the revised scale. – (1) The initial pay of a Government servant who elects, or is deemed to have elected under sub-rule (3) of the Rule 6 to be governed by the revised scale on and from the 1st day of January, 1996, shall, unless in any case the President by special order otherwise directs, be fixed separately in respect of his substantive pay in the permanent post on which he holds a lien or would have held a lien *if it had not been suspended,* and in respect of his pay in the officiating post held by him, in the following

manner, namely:-

xxx xxx xxx

xxx xxx xxx

Note 3. Where a Government servant is on leave on the 1st day of January, 1996, he shall become entitled to pay in the revised scale of pay from the date he joins duty. *In case of Government servant under suspension, he shall continue to draw subsistence allowance based on existing scale of pay and his pay in the revised scale of pay will be subject to final order on the pending disciplinary proceedings."*

22. The word "Existing scale" has been defined under Rule 3 (2) which reads as under:

"existing scale" in relation to a Government servant means the present scale applicable to the post held by the Government servant (or as the case may be, personal scale applicable to him) as on the 1st day of January, 1996 whether in a substantive or officiating capacity."

23. The word 'Revised scale' has been defined under Rule 3(5), which reads as under:

"revised scale" in relation to any post specified in column 2 of the First Schedule means the scale of pay specified against that post in column 4, thereof unless a different revised scale is notified separately for that post;".

24. Note 3 under Rule 7, therefore, indicates when a Government servant was on leave on 1.1.1996, he would become entitled to pay in the revised scale of pay from the date he joined the duty. However, in the case of a Government servant under suspension, he would *continue to draw subsistence allowance based on the then existing scale of*

pay and his pay in the revised scale of pay would be subject to final order on the pending disciplinary proceedings.

25. The Revised Pay Rules were framed by the President of India in exercise of the powers conferred by the proviso to Article 309 and clause 5 of Article 148 of the Constitution. The proviso to Article 309 enables the President to make Rules to regulate the recruitment and conditions of service of the persons mentioned therein. The Rules framed by the President of India in exercise of the powers conferred by the proviso to Article 309 have the force of law. Further, Note 3 to Rule 7 of Revised Pay Rules, 1997 were not challenged.

26. On a combined reading of Note 3 to Rule 7 of the Revised Pay Rules and FR 53(1)(ii)(a) with the clarification with Office Memorandum dated 27th August, 1958 it is clear that if the revision of pay takes effect from a date prior to the date of suspension of a Government servant then he would be entitled to benefit of increment in pay and in the subsistence allowance for the period of suspension, but if the revision scale of pay takes effect from a date falling within the period of suspension then the benefit of revision of pay and the subsistence allowances will accrue to him, only after reinstatement depending on the fact whether the period of suspension is treated as duty or not. In view of the clear distinction drawn by the Rule making authority between the cases in which the Revised scale of pay takes effect from a date prior to the date of suspension and a date falling within the period of suspension, the plea of discrimination raised cannot be sustained especially when there is no challenge to the Rules. The benefit of pay revision and the consequent revision of subsistence allowance stand postponed till the conclusion of the departmental proceedings, if the pay revision has come into effect while the Government servant is under suspension. So far as the present case is concerned, the Revised Pay Rules came into force on 1st January, 1996 when the respondent was under suspension and later he was dismissed from service on 04.08.2005 and

hence the benefit of pay revision or the revision of subsistence allowance did not accrue to him. The Tribunal as well as the High Court have committed an error in holding that the respondent is entitled to the benefit of Revised Pay Rules. We, therefore, allow the appeal and set aside those orders.

27. We are informed that the respondent herein has filed an appeal against the order of conviction passed by the Criminal Court and the same is pending consideration and if he is acquitted in appeal, the disciplinary authority would take appropriate decision on the respondent's claim for revised pay scale and the subsistence allowance in accordance with law.

D.G. Appeal allowed.

RAKHI RAY & ORS.

v.

THE HIGH COURT OF DELHI & ORS.

(Civil Appeal Nos. 1133-1135 of 2010)

FEBRUARY 01, 2010

[K.G. BALAKRISHNAN CJI., DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Delhi Higher Judicial Services Rules, 1970 – Appointment of District Judges – Filling up vacancies over and above the number of vacancies advertised – Permissibility of – Held: Not permissible – It amounts to filling up of future vacancies – It is violative of Articles 14 and 16(1), thus, a nullity – In case vacancies notified stand filled up, process of selection comes to an end – Waiting list cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement – Only in a exceptional circumstance, such rule can be deviated, only after adopting policy decision based on some rational – More so, person whose name appears in the select list does not acquire any indefeasible right of appointment – On facts, thirteen vacancies of General Category advertised, stood filled up according to merit, thus, selection process in that respect stood exhausted and there is no scope of making any further appointment – Constitution of India, 1950 – Articles 14 and 16(1) – Judiciary.

Respondent No.1-High Court of Delhi issued an advertisement to fill up 20 vacancies of District Judges in Delhi. All the 13 vacancies in the General category were filled up according to the merit list of General Category candidates. However, the three posts reserved for Scheduled Caste candidates and four for Scheduled Tribe candidates could not be filled up due to non-availability of suitable candidates. Certain unsuccessful

candidates filed writ petition on the ground that 13 vacancies which came into existence during the pendency of the selection process, could have also been filled up from the said select list. High Court held that only three vacancies which came into existence subsequent to the date of advertisement could have been filled up from the said list. Out of the said three vacancies, two could be offered to General Category candidates and one to the Scheduled Caste candidate. It issued direction to appoint two more candidates whose names appeared at Serial Nos.14 and 15 in General Category Merit List. Appellants belonging to General Category had gone through selection process and were placed much below in the merit list. Hence the present appeals by appellants seeking directions for appointment.

Dismissing the appeal, the Court

HELD: 1.1. Vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. [Para 9] [247-F-H; 248-A]

1.2. Any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/ advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more. [Para 14] [250-C-E]

Union of India and Ors. v. Ishwar Singh Khatri and Ors. **(1992) Supp 3 SCC 84;** *Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors.* **(1994) Supp 2 SCC 591;** *State of Bihar and Ors. v. The Secretariat Assistant S.E. Union 1986 and Ors.* **AIR 1994 SC 736;** *Prem Singh and Ors. v. Haryana State Electricity Board and Ors.* **(1996) 4 SCC 319;** *Ashok Kumar and Ors. v. Chairman, Banking Service Recruitment Board and Ors.* **AIR 1996 SC 976;** *Surinder Singh and Ors. v. State of Punjab and Ors.* **AIR 1998 SC 18;** *Madan Lal v. State of J & K & Ors.* **AIR 1995 SC 1088;** *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta and Ors.* **AIR 1998 SC 1021;** *Sri Kant Tripathi v.State of U.P. and Ors.* **(2001) 10 SCC 237;** *State of J & K v. Sanjeev Kumar and Ors.* **(2005) 4 SCC 148;** *State of U.P. v. Raj Kumar Sharma and Ors.* **(2006) 3 SCC 330;** *Ram Avtar Patwari and Ors. v. State of Haryana and Ors.* **AIR 2007 SC 3242;** *State of Punjab v. Raghbir Chand Sharma and Ors.* **AIR 2001 SC 2900;** *Mukul Saikia and Ors. v. State of Assam and Ors.* **AIR 2009 SC 747, relied on.**

2.1. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to

record room. [Para 15] [250-E-F]

2.2 It is clear that this Court in *Malik Mazhar Sultan's* **case clarified that selection was to be made as per the existing Rules and direction was issued for amending the existing laws to adopt the recommendations of Justice Shetty Commission as approved by this Court for the future. [Para 21] [253-C-D]**

Malik Mazhar Sultan and Anr. v. U.P. Public Service Commission and Ors. **(2007) 2 SCALE 159;** *All India Judges' Association and Ors. v. Union of India and Ors.* **AIR 1993 SC 2493;** *All India Judges' Association and Ors. v. Union of India and Ors.* **AIR 2002 SC 1752;** *Syed T.A. Naqshbandi and Ors. v. State of J & K and Ors.* **(2003) 9 SCC 592, referred to.**

Hemani Malhotra v. High Court of Delhi and Ors. **AIR 2008 SC 2103, distinguished.**

2.3. The appointments had to be made in view of the provisions of the Delhi Higher Judicial Service Rules, 1970. The said rules provide for advertisement of the vacancies after being determined. The rules further provide for implementation of reservation policies in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. As the reservation policy is to be implemented, a number of vacancies to be filled up is to be determined, otherwise it would not be possible to implement the reservation policy at all. Thus, the question of taking into consideration the anticipated vacancies, as per the judgment in *Malik Mazhar Sultan's* **case which had not been determined in view of the existing statutory rules could not arise. It cannot be said that the High Court could have filled vacancies over and above the vacancies advertised on 19.5.2007, as per the directions issued by this Court in** *Malik Mazhar Sultan's* **case. More so, no explanation could be furnished by appellants as to why they could not challenge the advertisement itself,**

if it was not in conformity with the directions issued by this Court in the said case. [Paras 24 and 25] [254-D-F; 254-G-H; 255-A]

2.4. It was submitted that the Delhi High Court had issued directions to offer appointment to two persons implementing the judgment in *Malik Mazhar Sultan's* case whose names appeared in select list at Sl. Nos. 14 and 15, and, as the High Court had implemented the said directions, the appellants could not be treated with such hostile discrimination. Undoubtedly, the directions had been issued to fill up two vacancies over and above the vacancies notified. However, that part of the judgment is not under challenge. In such a fact situation, it is neither desirable nor permissible in law to make any comment on that. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment. [Para 26] [255-B-E]

Case Law Reference:

(1992) Supp 3 SCC 84	**Relied on.**	**Para 9**
(1994) Supp 2 SCC 591	**Relied on.**	**Para 9**
AIR 1994 SC 736	**Relied on.**	**Para 9**
(1996) 4 SCC 319	**Relied on.**	**Para 9**
AIR 1996 SC 976	**Relied on.**	**Para 9**
AIR 1998 SC 18	**Referred to.**	**Para 10**

AIR 1995 SC 1088	**Relied on.**	**Para 11**
AIR 1998 SC 1021	**Relied on.**	**Para 11**
(2001) 10 SCC 237	**Relied on.**	**Para 11**
(2005) 4 SCC 148	**Relied on.**	**Para 11**
(2006) 3 SCC 330	**Relied on.**	**Para 11**
AIR 2007 SC 3242	**Relied on.**	**Para 11**
AIR 2001 SC 2900	**Relied on.**	**Para 12**
AIR 2009 SC 747	**Relied on.**	**Para 13**
AIR 1993 SC 2493	**Referred to.**	**Para 17**
AIR 2002 SC 1752	**Referred to.**	**Para 18**
(2003) 9 SCC 592	**Referred to.**	**Para 19**
(2007) 2 SCALE 159	**Referred to.**	**Paras 21, 24, 25, 26**
AIR 2008 SC 2103	**Distinguished.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1133-1135 of 2010.

From the Judgment & Order dated 3.10.2008 of the High Court of Delhi at New Delhi in W.P. (C) No. 2688, 2913 and 3932 of 2008.

Ranjit Kumar and Mariarputham, S.S. Ray, Bina Gupta, Annam, D.N. Rao, Neelam Jain, Vimal Dubey and Naresh Kumar for the appearing Parties.

Mariarputham, V.N. Raghupathy, N.K. Jha, C.S.N. Mohan Rao, Annam, D.N. Rao, Neelam Jain, Vimal Dubey for the appearing Parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Applications for permission to file Special Leave Petitions are granted.

2. Leave granted.

3. These appeals have been filed for seeking directions to the respondents i.e. the High Court of Delhi and the Lt. Governor of Delhi to offer the appointment to the appellants on the posts in the cadre of District Judges in Delhi Judicial Service.

4. Facts and circumstances giving rise to these appeals are that in order to fill up 20 vacancies in the cadre of District Judge in Delhi, the respondent No.1, the High Court of Delhi, issued an advertisement dated 19.5.2007. Out of these 20 vacancies, 13 were to be filled up from the General Category candidates; 3 from Scheduled Castes; and 4 from Scheduled Tribes. Appellants who belong to General Category, faced the selection process. The result was declared on 3.1.2008. Appellants found place in the merit list but much below. All the 13 vacancies in the said category were filled according to the merit list of General Category candidates. However, two posts reserved for Scheduled Castes candidates and four posts meant for Scheduled Tribes candidates could not be filled up for non availability of suitable candidates.

5. Certain unsuccessful candidates approached the Delhi High Court by filing Writ Petition Nos. 2688/2008, 2913/2008 and 3932/2008 on the ground that 13 vacancies came into existence between 29.2.2008 and 23.5.2008 i.e. during the pendency of the selection process which could have also been filled up from the said select list in view of the judgment of this Court in *Malik Mazhar Sultan & Anr. v. U.P. Public Service Commission & Ors.* (2007) 2 SCALE 159. The High Court disposed of all the petitions vide its judgment and order dated 3.10.2008 taking a view that only three vacancies came into existence subsequent to the date of Advertisement which could have been filled up from the said list. Out of the said three

vacancies, two could be offered to General Category candidates and one to the Scheduled Caste candidate and issued direction to appoint two more candidates whose names appeared at Serial Nos.14 and 15 in General Category Merit List. Hence, these appeals are for seeking directions to the respondents for offering appointment to the appellants also.

6. Shri Ranjit Kumar, learned senior counsel appearing for the appellants has submitted that the judgment in *Malik Mazhar Sultan's* case (supra) was delivered by this Court on 4.1.2007. A large number of directions had been issued in the said case and it also formulated the calendar for conducting the examinations for filling up the vacancies in the Judicial Service. It also provided that while determining the number of vacancies, the concerned Authority would also consider alongwith the existing vacancies, as what would be the anticipated vacancies that may arise within one year due to retirement, due to elevation to the High Court, death or otherwise, say 10% of the number of posts; and to take note of the vacancies arising out of deputation of Judicial Officers to other departments. It also provided that the select list so prepared shall be valid till new select list is published. The examination is to be conducted every year. The High Courts were directed to give strict adherence to the aforesaid schedule fixed by this Court. So far as the Delhi High Court was concerned, it was provided that the High Court would amend its calendar accordingly. In view of the above, it has been submitted that while making the advertisement, the Delhi High Court had not taken note of the anticipated vacancies which could be available during the next year. As per the direction of this Court, as 13 more vacancies came into existence, those vacancies must be filled up from the select list so prepared. As the appellants are in the select list they should be offered appointments.

7. On the contrary, Shri A. Mariarputham, learned senior counsel appearing for the respondents has vehemently opposed the appeals contending that the law does not permit

filling up the vacancies over and above the number of vacancies advertised. Thirteen vacancies of the General Category were advertised; the same had been filled up according to merit, therefore, selection process in that respect stood exhausted. The waiting list does not survive. The appellants had not challenged the advertisement in spite of the fact that the judgment in *Malik Mazhar Sultan's* case (supra) was delivered on 4.1.2007 and vacancies were advertised on 19.5.2007. The appellants were not aggrieved for not offering the appointment to them, as they did not even approach the High Court for any relief. The Special Leave Petitions were filed at much belated stage on 24.10.2008, though the result had been declared on 3.1.2008, and appointments had been made on 3.4.2008. The directions of the Court could not supersede the statutory rules as there was a direction to fill up the vacancies as per the existing statutory rules. Appointments had been made according to law. Thus, the appeals have no merit and are liable to be dismissed.

8. We have considered the rival submissions made by learned counsel for the parties and perused the record.

9. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up

of future vacancies and thus, not permissible in law. (Vide *Union of India & Ors. v. Ishwar Singh Khatri & Ors.* (1992) Supp 3 SCC 84; *Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors.* (1994) Supp 2 SCC 591; *State of Bihar & Ors. v. The Secretariat Assistant S.E. Union 1986 & Ors* AIR 1994 SC 736; *Prem Singh & Ors. v. Haryana State Electricity Board & Ors.* (1996) 4 SCC 319; and *Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board & Ors.* AIR 1996 SC 976).

10. In *Surinder Singh & Ors. v. State of Punjab & Ors.* AIR 1998 SC 18, this Court held as under:

> "A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there *is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound.* This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointment, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from

service…..Exercise of such power has to be tested on the touch-stone of reasonableness….It is *not a matter of course that the authority can fill up more posts than advertised."*

(Emphasis added)

11. Similar view has been re-iterated in *Madan Lal v. State of J & K & Ors.* AIR 1995 SC 1088; *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta & Ors*. AIR 1998 SC 1021; *Sri Kant Tripathi v. State of U.P. & Ors.* (2001) 10 SCC 237; *State of J & K v. Sanjeev Kumar & Ors.* (2005) 4 SCC 148; *State of U.P. v. Raj Kumar Sharma & Ors.* (2006) 3 SCC 330; and *Ram Avtar Patwari & Ors. v. State of Haryana & Ors.* AIR 2007 SC 3242).

12. In *State of Punjab v. Raghbir Chand Sharma & Ors.* AIR 2001 SC 2900, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:–

"With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."

13. In *Mukul Saikia & Ors. v. State of Assam & Ors.* AIR 2009 SC 747, this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the

State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.

14. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

15. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room.

16. So far as the submission made by Shri Ranjit Kumar that directions issued by this Court in *Malik Mazhar Sultan* (supra) had to be given effect to is concerned, the same requires consideration elaborately.

17. In *All India Judges' Association & Ors. v. Union of India & Ors.* AIR 1993 SC 2493, several directions had been issued by this Court in respect of the service conditions of the Judicial Officers. In view thereof, a notification dated 21st

March, 1996 was issued appointing Justice K.J. Shetty Commission to consider about their service conditions.

18. In *All India Judges' Association & Ors. v. Union of India & Ors.* AIR 2002 SC 1752, this Court considered various aspects of Justice Shetty Commission Report and approved the same. However, the question arose as to whether the recommendations so accepted by this Court could be implemented as such or was it required to be incorporated in the statutory rules governing the service conditions of the Judicial Officers or alteration of the rules applicable to them? This Court held as under:

> "We are aware that it will become necessary for service and other rules to be amended so as to implement this judgment…."

19. In *Syed T.A. Naqshbandi & Ors. v. State of J & K & Ors.* (2003) 9 SCC 592, this Court reconsidered the same issue while examining the appointments to the post of District & Sessions Judges (Selection Grade) in the State of Jammu & Kashmir and relying upon its earlier judgment in **All India Judges' Association** (supra) held as under:

> *"Reliance placed upon the recommendations of Justice Jagannatha Shetty Commission or the decision reported in All India Judges' Assn. v. Union of India or even the resolution of the Full Court of the High Court dated 27-4-2002 is not only inappropriate but a misplaced one and the grievances espoused based on this assumption deserve a mere mention only to be rejected. The conditions of service of members of any service for that matter are governed by statutory rules and orders, lawfully made in the absence of rules to cover the area which has not been specifically covered by such rules, and so long as they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored*

> *yielding place to certain policy decisions taken even to alter, amend or modify them.* Alive to this indisputable position of law only, this Court observed at SCC p. 273, para 38, that "we are aware that it will become necessary for service and other rules to be amended so as to implement this judgment". Consequently, the High Court could not be found at fault for considering the matters in question in the light of the Jammu and Kashmir Higher Judicial Service Rules, 1983 and the Jammu and Kashmir District and Sessions Judges (Selection Grade Post) Rules, 1968 as well as the criteria formulated by the High Court. Equally, the guidelines laid down by the High Court for the purpose of adjudging the efficiency, merit and integrity of the respective candidates cannot be said to be either arbitrary or irrational or illegal in any manner to warrant the interference of this Court with the same. Even de hors any provision of law specifically enabling the High Courts with such powers in view of Article 235 of the Constitution of India, unless the exercise of power in this regard is shown to violate any other provision of the Constitution of India or any of the existing statutory rules, the same cannot be challenged by making it a justiciable issue before courts. The grievance of the petitioners, in this regard, has no merit of acceptance".
>
> (Emphasis added)

20. In *Malik Mazhar Sultan's* case (supra), this Court made it clear that appointments in Judicial Service have to be made as per the existing statutory rules. However, direction was issued to amend the rules for future selections. This Court considered the correspondences between various authorities of the States and also the decision taken in the conference of the Chief Ministers and Chief Justices held on 11.3.2006, and observed as under:

> "… Before we issue general directions and the time schedule to be adhered to for filling vacancies that may

arise in subordinate courts and district courts, *it is necessary to note that selections are required to be conducted by the concerned authorities as per the existing Judicial Service Rules in the respective States/* Union Territories…… As already indicated, the *selection is to be conducted* by authorities empowered to do so *as per the existing Rules.* … In view of what we have already noted about *the appointments to be made in accordance with the respective Judicial Services Rules in the States,* the apprehension of interference seems to be wholly misplaced…." (Emphasis added).

21. Therefore, it is clear that this Court clarified that selection was to be made as per the existing Rules and direction was issued for amending the existing laws to adopt the recommendations of Justice Shetty Commission as approved by this Court for the future.

22. So far as the judgment of this Court in *Hemani Malhotra v. High Court of Delhi & Ors.* AIR 2008 SC 2103 is concerned, the facts are quite distinguishable. The Delhi High Court did not frame any statutory rule providing for cut-off marks in interview for assessing the suitability for selection. After the selection process had been initiated, such a resolution was adopted. Therefore, the basic issue for consideration before this Court had been as to whether it was permissible for the High Court to change the selection criteria at the midst of the selection process. The Court placing reliance upon its earlier judgments held that once the selection process starts, it is not permissible for the competent authority to change the selection criteria and in that view observation was made that a fresh merit list is to be prepared ignoring the said resolution of the High Court taking cut-off marks in interview. Undoubtedly, the Court had taken note of Justice Shetty Commission Report in this regard and held that such a criteria could not have been provided. In absence of any statutory rule governing a particular issue, directions issued by this Court would prevail.

23. Therefore, it is evident from the aforesaid judgment that in spite of acceptance of the recommendations made by Justice Shetty Commission, this Court insisted that the existing law/statutory rules in making the appointment of Judicial Officers be amended accordingly. In *Syed T.A.Naqshbandi* (supra), this Court repealed the contention which is being advanced by the learned counsel for the petitioners therein and the Court in crystal clear words held that appointments have to be made giving strict adherence to the existing statutory provisions and not as per the recommendations made by Justice Shetty Commission. Of course, in absence of statutory rule to deal with a particular issue, the High Courts are bound to give effect to the directions issued by this Court.

24. The appointments had to be made in view of the provisions of the Delhi Higher Judicial Service Rules, 1970. The said rules provide for advertisement of the vacancies after being determined. The rules further provide for implementation of reservation policies in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. As the reservation policy is to be implemented, a number of vacancies to be filled up is to be determined, otherwise it would not be possible to implement the reservation policy at all. Thus, in view of the above, the question of taking into consideration the anticipated vacancies, as per the judgment in *Malik Mazhar Sultan* (supra), which had not been determined in view of the existing statutory rules could not arise.

25. In view of above, we do not find any force in the submissions that the High Court could have filled vacancies over and above the vacancies advertised on 19.5.2007, as per the directions issued by this Court in *Malik Mazhar Sultan's* case (supra). More so, no explanation could be furnished by Shri Ranjit Kumar, learned senior counsel for the appellants as to why the appellants could not challenge the advertisement itself, if it was not in conformity with the directions issued by this court in the said case.

26. It has further been submitted on behalf of the appellants that the Delhi High Court vide its judgment and order dated 3.10.2008 had issued directions to offer appointment to two persons implementing the said judgment in *Malik Mazhar Sultan's* case (supra) whose names appeared in select list at SI. Nos. 14 and 15, and, as the High Court had implemented the said directions, the appellants could not be treated with such hostile discrimination. Undoubtedly, the directions had been issued to fill up two vacancies over and above the vacancies notified. However, that part of the judgment is not under challenge before us. In such a fact situation, it is neither desirable nor permissible in law to make any comment on that. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment.

27. In view of the above, we do not find any force in these appeals which are accordingly dismissed.

JUDGMENT

SLP (C) NO. 28488 and 29248 of 2008.

Navin Kumar Jha

v.

Lt. Governor & Ors.

DR. B.S. CHAUHAN, J. In view of our judgment pronounced today in CA Nos. 1133-1135 of 2010 @ SLP(C) Nos. 3662-3664/2010@ CC Nos. 14852-14854 of 2008 (*Rakhi Ray & Ors. vs. High Court of Delhi & Ors.*) these Special Leave Petitions are dismissed.

N.J. Appeals and Special Leave Petitions dismissed.

RAMESH KUMAR

v.

HIGH COURT OF DELHI & ANR.

(Writ Petition (Civil) No. 57 of 2008)

FEBRUARY 01, 2010

[K.G. BALAKRISHNAN CJI., DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Delhi Higher Judicial Service Rules, 1970 – r. 10 – Fixation of minimum Bench Marks for interview by High Court – Permissibility of – Appointment on the post of District Judges – Three vacancies reserved for Scheduled castes candidates – Three such candidates went through selection process – Two petitioners found unsuitable on failure to secure required minimum marks in interview – Writ petition seeking directions to High Court to appoint them on the said posts – Held: r. 10 does not provide for any particular procedure/criteria for holding the tests rather it enables High Court to prescribe the criteria – In absence of any statutory requirement of securing minimum marks in interview, High Court ought to have followed the principle to offer appointment to candidates who had secured the requisite marks in aggregate in written examination as well as interview, ignoring the requirement of securing minimum marks in interview in view of the directions issued by this court earlier in respect of the same issue – Out of the two petitioners' one of them having secured more than the required marks in aggregate, to be appointed – Judiciary – Service law.

Respondent no. 1 issued an advertisement for filling up twenty vacancies of District Judges. Three of the said vacancies were to be filled up from the Scheduled Castes candidates. Three candidates including two petitioners, belonging to the Scheduled Castes category went through selection process and stood qualified in the

written test. Respondent no. 1 found only one person suitable for the post. Two petitioners were not found suitable since they did not secure the required minimum marks in interview. Hence the present writ petitions seeking directions to the respondents to offer appointment to the petitioners on the posts in the cadre of District Judge.

Allowing the appeal, the Court

HELD: 1. In case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as well as for viva-voce. [Para 13] [266-B-C]

State of U.P. v. Rafiquddin and Ors. **AIR 1988 SC 162;** *Dr. Krushna Chandra Sahu and Ors. v. State of Orissa and Ors.* **AIR 1996 SC 352;** *Majeet Singh, UDC and Ors. v. Employees' State Insurance Corporation and Anr.* **AIR 1990 SC 1104;** *K.H. Siraj v. High Court of Kerala and Ors.* **AIR 2006 SC 2339;** *Lila Dhar v. State of Rajasthan and Ors.* **AIR 1981 SC 1777;** *Ashok Kumar Yadav and Ors. v. State of Haryana and Ors.* **AIR 1987 SC 454;** *Shri Durgacharan Misra v. State of Orissa and Ors.* **AIR 1987 SC 2267;** *B.S. Yadav and Ors. v. State of Haryana and Ors.* **AIR 1981 SC 561;** *P.K. Ramachandra Iyer andOrs. v. Union of India and Ors.* **AIR 1984 SC 541;** *Umesh Chandra Shukla v. Union of India and Ors.* **AIR 1985 SC 1351;** *K Manjusree v. State of Andhra Pradesh and Anr.* **AIR 2008 SC 1470, relied on.**

2.1. The advertisement for appointment to the post of District Judges provided that selection process would be in two stages as it would comprise of written examination carrying 750 marks and Viva-Voce carrying

250 marks. Respondent No.1-Delhi High Court furnished detailed information about the pattern of selection process in the instructions annexed to the application form. It provided 50% minimum qualifying marks in the written examination as well as in the interview for General Category candidates and 45% for Scheduled Castes and Scheduled Tribes candidates; and that final merit list will be drawn up from among the candidates who have secured the stipulated minimum marks in the written examination and also the stipulated minimum marks in the viva-voce by adding up the marks in the written examination and the viva-voce. The petitioners were found unsuitable on the ground that they failed to secure minimum Bench Marks i.e. 112.50 in interview. [Para 6] [262-D-F]

2.2. Rule 10 of the Delhi Higher Judicial Service Rules, 1970 does not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in *All India Judges' Association's* case accepted Justice Shetty Commission's Report in this regard which had prescribed for not having minimum marks for interview. The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. [Para 14] [266-D; 267-E]

2.3. In pursuance of the directions issued in *All India Judges'* case to offer the appointment to candidates who had secured the requisite marks in aggregate in the written examination as well as in interview, ignoring the requirement of securing minimum marks in interview, the Delhi High Court offered the appointment to such candidates. Selection to the post involved has not been completed in any subsequent years to the selection process under challenge. Therefore, in absence of any

statutory requirement of securing minimum marks in interview, and in view of the earlier judgment of the court in Himani Malhotra's case of the High Court ought to have followed the same principle. In such a fact-situation, the question of acquiescence would not arise. [Paras 16 and 17] [267-E-F; 267-F-G]

2.4. The petitioner having secured 46.25% marks in aggregate and as he was required only to have 45% marks for appointment, the writ petition is allowed. The connected writ petition is dismissed as the said petitioner failed to secure the required marks in aggregate. The respondents are requested to offer appointment to petitioner at the earliest, preferably within a period of two months from the date of submitting the certified copy of this order before the Delhi High Court. It is, however, clarified that he shall not be entitled to get any seniority or any other perquisite on the basis of his notional entitlement. Service benefits shall be given to him from the date of his appointment. [Para 18] [268-A-C]

All India Judges' Association and Ors. v Union of India and Ors. **AIR 2002 SC 1752;** *Syed T.A. Naqshbandi and Ors. v. State of J & K and Ors.* **(2003) 9 SCC 592;** *Malik Mazhar Sultan and Anr. v. Union Public Service Commission* **(2007) 2 SCALE 159;** *Rakhi Ray & Ors. v. The High Court of Delhi and Ors.* **Civil Appeal No. 1133-1135 of 2010 decided by SC on 1.2.2010;** *Nand Kishore v. State of Punjab* **(1995) 6 SCC 614;** *Hemani Malhotra v. High Court of Delhi* **AIR 2008 SC 2103, referred to.**

Case Law Reference:

AIR 1988 SC 162	**Relied on.**	**Para 9**
AIR 1996 SC 352	**Relied on.**	**Para 9**
AIR 1990 SC 1104	**Relied on.**	**Para 9**
AIR 2006 SC 2339	**Relied on.**	**Para 9**

AIR 1981 SC 1777	**Relied on.**	**Para 10**
AIR 1987 SC 454	**Relied on.**	**Para 10**
AIR 1987 SC 2267	**Relied on.**	**Para 11**
AIR 1981 SC 561	**Relied on.**	**Para 11**
AIR 1984 SC 541	**Relied on.**	**Para 11**
AIR 1985 SC 1351	**Relied on.**	**Para 11**
AIR 2008 SC 1470	**Relied on.**	**Para 12**
AIR 2002 SC 1752	**Referred to.**	**Para 14**
(2003) 9 SCC 592	**Referred to.**	**Para 14**
(2007) 2 SCALE 159	**Referred to.**	**Para 14**
(1995) 6 SCC 614	**Referred to.**	**Para 15**
AIR 2008 SC 2103	**Referred to.**	**Para 16**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 57 of 2008.

Petition Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 66 of 2008.

V. Shekhar and Mariarputham, S. Ganesh, Jatin Rajput, Deepakshi Jain, Ashwani Bhardwaj, Pradeep Dueby, Dharam Raj, Shwetank Saikwal (for Lawyer's Knit & Co.) Annam D.N. Rao, Neelam Jain and Vimal Dubey for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These two petitions have been filed under Article 32 of the Constitution of India for seeking directions to the respondents i.e. the High Court of Delhi and

Govt. of NCT of Delhi to offer appointment to the petitioners on the posts in the cadre of District Judge.

2. The facts and circumstances giving rise to these petitions are that in order to fill up 20 vacancies in the cadre of District Judge in Delhi, the Respondent No.1, the High Court of Delhi issued an advertisement on 19.5.2007. Out of these 20 vacancies, 13 were to be filled up from the General Category candidates, 3 from Scheduled Castes candidates and 4 from Scheduled Tribes candidates. The petitioners who belong to Scheduled Castes category faced the selection process. The result was declared on 3.1.2008. All the three vacancies reserved for Scheduled Castes candidates could not be filled up as the Respondent No. 1 found only one person suitable for the post. The two petitioners herein were found unsuitable on the ground that they did not secure the required minimum marks in interview. Hence, these petitions.

3. Shri V. Shekhar, learned senior counsel appearing for the petitioners has submitted that in view of decision taken by the Respondent No. 1, a candidate belonging to Scheduled Castes Category would be called for interview provided he secured 45% marks in written test. Only three candidates belonging to the said category stood qualified in the written test, thus, they could have been offered the appointment without asking them to complete the formality of facing the interview. It was not permissible for the Respondent No. 1 to fix minimum Bench Marks at the interview level also for the purpose of selection. The petitions deserve to be allowed and the respondents be directed to offer the appointment to the petitioners.

4. Per contra, Shri A. Mariarputham, learned senior counsel appearing for the respondents has vehemently opposed the petitions contending that mere passing the written test is not sufficient for appointment as some of the required qualities of a candidate can be assessed only in viva-voce/oral

examination. The competent authority is permitted in law to fix the minimum marks at interview level also. In case, the candidate does not secure the marks so fixed, the candidate cannot claim the appointment to the post. Decision for fixing the cut-off marks in the written test and further for securing the minimum Bench Marks in the interview had been taken prior to initiation of selection process and was made public at the same time. The petitioners did not challenge the said criteria at the appropriate stage. Once they had appeared in the examination and could not succeed, petitioners cannot be permitted to take U-turn and challenge the selection process on this ground at all. The petitions lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. The advertisement dated 19.5.2007 provided that selection process would be in two stages as it would comprise of written examination carrying 750 marks and Viva-Voce carrying 250 marks. Respondent No.1, the Delhi High Court furnished detailed information about the pattern of selection process in the instructions annexed to the application form. It provided 50% minimum qualifying marks in the written examination as well as in the interview for General Category candidates and 45% for Scheduled Castes and Scheduled Tribes candidates.

The relevant part of the said instruction reads as under:

> "A candidate shall be eligible to appear in the viva-voce only in case he secures 50% marks in the written examination i.e. aggregate of both parts (objective/ descriptive) in the case of general category, and 45% marks in the case of reserved category.
>
> Interview/viva-voce will carry 250 marks. A candidate of general category must secure a minimum of 50% marks

and a candidate of reserved category must secure a minimum, of 45% marks in the viva-voce".

It was also provided that final merit list will be drawn up from among the candidates who have secured the stipulated minimum marks in the written examination and also the stipulated minimum marks in the viva-voce by adding up the marks in the written examination and the viva-voce.

RESULT OF THE PETITIONERS REMAINED AS UNDER

Name	Marks obtained in written test **Out of 750**	Marks obtained in interview **Out of 250**	Grand total **Out of 1000**	**Result**
Ramesh Kumar	357.50	105.00	462.50	Not qualified in interview
Desh Raj Chalia	341.50	83.00	424.50	Not qualified in interview

It is thus evident that the petitioners were found unsuitable on the ground that they failed to secure minimum Bench Marks i.e. 112.50 in interview.

7. As per the submissions advanced by the learned counsel for the Respondent No.1, the High Court of Delhi had fixed the said criteria being empowered by the statutory provisions contained in The Delhi Higher Judicial Service Rules, 1970 (hereinafter called 'the Rules"). Rule 10 thereof reads as under:

"The High Court shall before making recommendations to the Administrator invite applications by advertisement and

may require the applicants to give such particulars as it may prescribe and may further hold *such tests as may be considered necessary."* (_Emphasis added)

8. The aforesaid statutory provision undoubtedly does not fix any particular criteria or minimum Bench Marks either in the written test or in interview for the purpose of selection. Rule 10 provides that the High Court *"may hold such tests as may be considered necessary",* it impliedly provides for requirement necessary for assessment of suitability of a candidate. There is no challenge to the validity of Rule 10 in these writ petitions. The question does arise as to whether the Rules enabled the High Court to fix the minimum Bench Marks for interview?

9. In *State of U.P. v. Rafiquddin & Ors.,* AIR 1988 SC 162; *Dr. Krushna Chandra Sahu & Ors. v. State of Orissa & Ors.* AIR 1996 SC 352; *Majeet Singh, UDC & Ors. v. Employees' State Insurance Corporation & Anr.* AIR 1990 SC 1104; and *K.H. Siraj v. High Court of Kerala & Ors.* AIR 2006 SC 2339, this Court held that Commission/Board has to satisfy itself that a candidate had obtained such aggregate marks in the written test as to qualify for interview and obtained "sufficient marks in viva voce" which would show his suitability for service. Such a course is permissible for adjudging the qualities/capacities of the candidates. It may be necessary in view of the fact that it is imperative that only persons with a prescribed minimum of said qualities/capacities should be selected as otherwise the standard of judiciary would get diluted and sub-standard stuff may get selected. Interview may also be the best mode of assessing the suitability of a candidate for a particular position as it brings out overall intellectual qualities of the candidates. While the written test will testify the candidate's academic knowledge, the oral test can bring out or disclose overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc. which are also essential for a Judicial Officer.

10. Re-iterating similar views, this Court has given much emphasis on interview in *Lila Dhar v. State of Rajasthan & Ors.,* AIR 1981 SC 1777; and *Ashok Kumar Yadav & Ors. v. State of Haryana & Ors.* AIR 1987 SC 454 stating that interview can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, co-operativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity with some degree of error.

11. In *Shri Durgacharan Misra v. State of Orissa & Ors.* AIR 1987 SC 2267, this Court considered the Orissa Judicial Service Rules which did not provide for prescribing the minimum cut-off marks in interview for the purpose of selection. This Court held that in absence of the enabling provision for fixation of minimum marks in interview would amount to amending the rules itself. While deciding the said case, the Court placed reliance upon its earlier judgments in *B.S. Yadav & Ors. v. State of Haryana & Ors.* AIR 1981 SC 561; *P.K. Ramachandra Iyer & Ors. v Union of India & Ors.* AIR 1984 SC 541; and *Umesh Chandra Shukla v. Union of India & Ors.* AIR 1985 SC 1351, wherein it had been held that there was no "inherent jurisdiction" of the Selection Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules. Selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm.

12. Similarly, in *K Manjusree v. State of Andhra Pradesh & Anr.* AIR 2008 SC 1470, this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the

statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.

13. Thus, law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as well as for viva-voce.

14. In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in *All India Judges' Association & Ors. v Union of India & Ors.* AIR 2002 SC 1752 accepted Justice Shetty Commission's Report in this regard which had prescribed *for not having minimum marks for interview.* The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. A similar view has been reiterated by this Court while dealing with the appointment of Judicial Officers in *Syed T.A. Naqshbandi & Ors. v. State of J & K & Ors.* (2003) 9 SCC 592; and *Malik Mazhar Sultan & Anr. v. Union Public Service Commission* (2007) 2 SCALE 159. We have also accepted the said settled legal proposition while deciding the connected cases, i.e., Civil Appeals @ SLP (Civil) Nos….. in CC 14852-14854 of 2008 (*Rakhi Ray & Ors. v. The High Court of Delhi & Ors.*) vide judgment and order of this date. It has been clarified in *Ms. Rakhi Ray* (supra) that where statutory rules do not deal with a particular subject/issue, so far as the appointment of the Judicial Officers is concerned, directions

issued by this Court would have binding effect.

15. The view taken hereinabove is in conformity with the law laid down by this Court in *Nand Kishore v. State of Punjab* (1995) 6 SCC 614, wherein it has been observed as under :-

> "Their Lordship's decisions declare the existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is."

16. These cases are squarely covered by the judgment of this Court in *Hemani Malhotra v. High Court of Delhi* AIR 2008 SC 2103, wherein it has been held that it was not permissible for the High Court to change the criteria of selection in the midst of selection process. This Court in *All India Judges'* case (supra) had accepted Justice Shetty Commission's Report in this respect i.e. that there should be no requirement of securing the minimum marks in interview, thus, this ought to have been given effect to. The Court had issued directions to offer the appointment to candidates who had secured the requisite marks in aggregate in the written examination as well as in interview, ignoring the requirement of securing minimum marks in interview.

17. In pursuance of those directions, the Delhi High Court offered the appointment to such candidates. Selection to the post involved herein has not been completed in any subsequent years to the selection process under challenge. Therefore, in the instant case, in absence of any statutory requirement of securing minimum marks in interview, the High Court ought to have followed the same principle. In such a fact-situation, the question of acquiescence would not arise.

18. In view of the above, as it remains admitted position

that petitioner Ramesh Kumar had secured 46.25% marks in aggregate and as he was required only to have 45% marks for appointment, writ petition No.57 of 2008 stands allowed. The connected writ petition filed by Desh Raj Chalia as he failed to secure the required marks in aggregate, stands dismissed. The respondents are requested to offer appointment to petitioner Ramesh Kumar, at the earliest, preferably within a period of two months from the date of submitting the certified copy of this order before the Delhi High Court. It is, however, clarified that he shall not be entitled to get any seniority or any other perquisite on the basis of his notional entitlement. Service benefits shall be given to him from the date of his appointment. No costs.

N.J. Appeal allowed.

CANTONMENT BOARD, MEERUT & ANR.
v.
K.P. SINGH & ORS.
(Civil Appeal No. 1091 of 2010)

FEBRUARY 01, 2010

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

Tender – Toll tax – Collection of – Respondent nos.1 and 2 made highest bid of Rs.1.02 lakhs per day – Bid approved – Challenge by Respondent no.5 – He filed writ petition – Offered to pay 1.25 lakhs per day – Respondent Nos. 1 and 2 suo motu offerred to pay Rs.1.31 lakhs per day, pursuant to which, the High Court, vide interim order, directed respondent nos.1 and 2 to deposit Rs.1.31 lakhs per day for the right to collect toll tax – Writ petition ultimately dismissed being not pressed by respondent no.5 – High Court held that since the petition was dismissed, the interim order would merge with the final order and, relying upon maxim "actus curiae neminem gravabit", it directed refund of Rs.29,000/- (Rs.1.31 lakhs less Rs.1.02 lakhs) per day in favour of respondent nos.1 and 2 – On appeal, held: Appellant was not liable to refund anything in favour of respondent nos.1 and 2 who enjoyed rights of collection of toll tax on basis of their own voluntary offer made before the High Court which the High Court merely accepted by its interim order – Maxim "actus curiae neminem gravabit" was not applicable since respondent nos.1 and 2 did not suffer any prejudice which they would not have suffered but for the interim order of the High Court and the act of respondent no.5 – Maxims – Maxim "actus curiae neminem gravabit" – Inapplicability of.

Appellant Cantonment Board floated tender for letting out the rights to collect toll tax from the

commercial motor vehicles passing through the territorial limits of the Meerut Cantonment for the period 5-10-2006 to 4-10-2007. Respondent nos.1 and 2 offered the highest bid of Rs. 1,02,000/- per day which was approved. This was challenged by respondent no.5. He filed writ petition before the High Court praying for a mandamus to the appellant to float fresh tender alongwith a further prayer that till finalization of the fresh tender, he be allowed to pay at the rate of 1,25,000/- per day for the right to collect toll tax. On this, respondent nos.1 and 2 *suo motu* made an offer to pay Rs.1,31,000/- per day, pursuant to which, the High Court, vide interim order dated 8-11-2006, directed respondent nos.1 and 2 to deposit Rs.1,31,000/- per day for the right to collect toll tax.

Respondent No.5 chose not to press the writ petition as in the meanwhile fresh tender was ordered by the appellant for letting out the rights to collect toll tax. The High Court dismissed the petition as not pressed and held that since the petition was dismissed, the interim order dated 8-11-2006 would merge with the final order and if any of the parties had gained something under the interim order that effect of the interim order shall be neutralized. By applying the maxim '*actus curiae neminem gravabit*', the High Court held that since the final offer of respondent nos.1 and 2 which was accepted by the appellant was only of Rs.1,02,000/- per day, they would be entitled to get refund of the excess amount of Rs.29,000/- (Rs.1,31,000/- less Rs.1,02,000/-) per day.

In appeal to this Court, it was contended that the High Court erred in relying upon the maxim "*actus curiae neminem gravabit*" and on that basis ordering the refund.

Allowing the appeal, the Court

HELD: 1.1. The High Court completely misunderstood the maxim *actus curiae neminem gravabit*

and committed an error in applying it to the facts of the present case. For applying the maxim, it has to be shown that a party has been prejudiced on account of any order passed by the Court, but herein no prejudice was caused to the respondent nos.1 and 2. Respondent no.5 had made an offer of Rs.1,25,000/- per day. This offer was matched by respondent nos.1 and 2 by raising the bid to Rs.1,31,000/- per day. Surely respondent nos.1 and 2 got into this arrangement with the open eyes. Nobody can even think that they would unnecessarily suffer losses for matching and exceeding the offer made by respondent no.5, after all they were doing business and they would certainly not be interested in suffering the losses by matching the offer made by respondent no.5 and exceeding the same by Rs.6,000/- per day. Even ultimately, the petition was not dismissed as being a merit less petition. Respondent no.5 chose not to press the petition in view of the fact that a fresh auction was ordered by the appellant herein perhaps because the higher authorities did not choose to give sanction for all this exercise by the appellant. Therefore, there was no question of respondent nos.1 and 2 suffering any prejudice because of the interim order passed by the High Court. They were welcome not to make any offers. All that would have happened was that respondent no.5 would have then acquired the rights to collect the toll tax and not the respondent nos.1 and 2. But they did not want to lose their right to collect the toll tax and it is with this idea that they matched the offer of respondent no.5 and exceeded it by Rs.6,000/- per day. There is, thus, no question of any prejudice having been suffered by respondent nos.1 and 2. [Para 11] [277-F-G; 278-A-F]

1.2. It was not on account of respondent No.5 that the Court was persuaded to pass an order. In fact respondent no.5 had given its offer. However, respondent

nos. 1and 2 not only matched that offer but they exceeded the same. This was the voluntary action on the part of respondent nos.1 and 2 and they were not directed by the order to match the order of respondent No.5. It was their voluntary act which was well calculated to earn profits by winning the rights to collect the toll tax. Secondly, the Writ Petition was not held to be untenable nor was it held that respondent no.5 was not entitled to file the Writ Petition, in fact, respondent No.5 did not press the Writ Petition at all. [Para 12] [279-E-G]

1.3. There was no question of respondent nos.1 and 2 having suffered any impoverishment which they would not have suffered but for the order of the Court and the act of respondent no.5. In fact, it was on account of the voluntary act of respondent Nos.1 and 2 that the Court was persuaded to pass the order dated 8-11-2006 allowing respondent nos.1 and 2 to collect the toll tax. There was no question of any benefit having been earned by respondent no.5 under the interim order nor was there any question of making restitution of anything that was lost by respondent nos.1 and 2 since they had lost nothing. [Para 13] [279-G-H; 280-A-B]

1.4. The appellants cannot take advantage and claim refund because of the fact that this was their voluntary offer and they were not directed to pay the amount that they did. In view of this, the High Court's order is quite unsustainable. Therefore, that order is set aside and it is held that the Cantonment Board would not be liable to refund anything in favour of respondent nos.1 and 2 who have enjoyed the rights of collection of toll on the basis of their own voluntary offer made before the High Court which the High Court has merely accepted by its order dated 8-11-2006. [Para 15] [281-E-G]

Karnataka Rare Earth & Anr. v. Senior Geologist Department of Mines & Geology & Anr. **2004 (2) SCC 783**

and *South Easter Coalfields Ltd. v. State of M.P. & Ors.* **2003 (8) SCC 648, referred to.**

Case Law Reference:

2004 (2) SCC 783	**referred to**	**Para 11**
2003 (8) SCC 648	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1091 of 2010.

From the Judgment & Order dated 26.3.2007 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 60135 of 2006.

Gourab Banerjee, Arvind K. Sharma, Saurabh Mishra, Rekha Pandey for the Appellants.

Dr. Rajiv Dhawan, Dinesh Kumar Garg, Manzoor Ali Khan, V.K. Biju, Dhanjayan Garg for the Respondents.

The Judgment of the Court was delivered by

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

2. Correct scope and applicability of the maxim *actus curiae neminem gravabit* falls for consideration in this appeal. This appeal has been filed challenging the judgment in Civil Miscellaneous Writ Petition No.60135 of 2006 passed by the High Court of Judicature at Allahabad. The High Court, by the impugned order, has held that the respondents herein, namely, Shri K.P. Singh and Gaurav Traders would be entitled to the refund of the amount deposited by them over and above the bid given by them. Cantonment Board, the appellant herein has been directed to dispose of the application made by respondent Nos. 1 and 2 for refund expeditiously. Needless to say, in the light of the observation made by the High Court favouring the refund of amount, few facts would be necessary.

3. Under Section 60 of the Cantonment Act, the Cantonment Board was empowered to impose toll tax. Accordingly, on 08.01.2005, a Gazette Notification was issued for the imposition of the toll tax on such commercial motor vehicles passing through the Meerut Cantonment.

4. In pursuance of this, a tender was floated and bids were invited relating to 2005-2006 for levying toll tax upon the entry of the commercial motor vehicles within the territorial limits of Meerut Cantonment in the sense that the bidders were expected to pay the agreed amount to the Cantonment Board and the successful bidder was entitled to levy and collect toll tax upon the entry of the commercial motor vehicles in the territorial limits of Meerut. Twenty persons submitted their tenders in response to the notice inviting tenders whereupon the tender submitted by respondent Nos.1 and 2 herein jointly came to be accepted. The highest offer by respondent Nos. 1 and 2 for the collection between 01.10.2005 to 04.10.2006 was for 3,57,30,000/-. This was challenged by one Gajraj Singh. Earlier, validity of the imposition of tax on the commercial vehicles by the Cantonment Board was challenged by the Civil Writ Petition Tax No.1601 of 2005. That Writ Petition was allowed and the High Court quashed the Notification dated 08.01.2005. The Cantonment Board filed a Special Leave Petition against the impugned order of the Allahabad High Court dated 23.03.2006 and leave was granted resulting in the main Notification authorizing the appellant to collect toll tax remaining intact.

5. The appellant, therefore, issued a fresh Notification inviting tenders, on 14.09.2006. By this, the contract for collection of tolls for the period of one year w.e.f 05.10.2006 to 04.10.2007 was advertised. Again, respondent Nos.1 and 2 herein stood as the highest bidders in the auction dated 27.09.2006 and offered the highest bid of Rs.3,61,57,727/- (Rs.1,02,000/- per day) for the said period of one year. This

was approved by the appellant vide its resolution No.229 dated 29.09.2006. After the finalization of the tender, respondent No.5 Umesh Kumar submitted an application offering to pay 1,05,000/- per day with the advance deposit of 5 days at the said rate in the account of the Cantonment Board. A Writ Petition was filed by respondent No.5 being Writ Petition No.60135 of 2006 claiming therein a Writ of Mandamus commanding the appellant herein to start the process of holding fresh auction or tenders for letting out the rights to collect toll tax from the commercial motor vehicles passing through the territorial limits of Meerut Cantonment by issuing advertisement within the stipulated time. It was further prayed that till the finalization of fresh auction, respondent No.5 should be allowed to pay at the rate of 1,25,000/- per day for the collection of toll tax.

6. Ordinarily, this Writ Petition should never have been entertained. However, it was actually entertained and the High Court at the time of passing the orders on the application for stay found that though respondent No.5 was willing to pay Rs.1,25,000/- per day for the right to collect toll tax, yet respondent Nos.1 and 2 herein had *suo motu* made an offer to pay Rs.1,31,000/- per day for the right to collect toll tax. The High Court as an interim order directed respondent Nos.1 and 2 to deposit Rs.1,31,000/- per day to levy and collect the toll tax during the interregnum. Some other orders were also passed with certain directions. This order was passed on 08.11.2006.

7. The Writ Petition was opposed by the appellant on the ground that the claim made by respondent No.5 was contrary to the terms of the tender and that in fact, there was collusion between the respondents who had colluded and quoted lesser price and that was to result into losses to the appellant-Cantonment Board.

8. It so happened thereafter that the said auction not having been approved by the senior officers, a fresh auction was

ordered for letting out the rights to collect the toll. In that view, the Writ Petition was not pressed by respondent No.5, and as a result, the petition was dismissed as not pressed. However, the High Court did not stop at that and noted that the original bid by respondent Nos.1 and 2 was only for Rs.1,02,000/- w.e.f. 09.11.2006 for which they had been given the right of collection of toll tax. The High Court, therefore, took the view that since the petition was dismissed, the interim order, if any, more particularly dated 08.11.2006 would merge with the final order and if the petition was dismissed, it would mean as if the petition had not been filed and if any of the parties had gained something under the interim order that effect of the interim order should be neutralized. Since the petition had been dismissed as not pressed, the interim order dated 08.11.2006 accepting the bid of the respondent Nos. 5 and 6 of Rs.1,31,000/- would merge with the final order and respondent No.1 and 2 would be entitled to get refund of the excess amount of Rs. 29,000/- per day since their final offer which was accepted by the Cantonment Board was only of Rs.1,02,000/-. The Court took the view that in view of the maxim *actus curiae neminem gravabit,* no party could be allowed to take benefit of its own wrongs by getting the interim orders and thereafter blaming the Court. In that view, the High Court directed refund in favour of respondent Nos. 1 and 2 of the excess amount i.e. Rs. 29,000/- per day w.e.f. 09.11.2006 till the end of the contract period. It is this order which has fallen for our consideration at the instance of the Cantonment Board.

9. It was argued by the learned Additional Solicitor General of India, Shri G. Banerjee that the High Court was completely in error firstly, in relying upon the maxim *actus curiae neminem gravabit* and on that basis ordering the refund of the amount. According to Shri Banerjee, there was no question of any prejudice being caused to respondent Nos.1 and 2 on account of any order passed by the High Court much less the order dated 08.11.2006. He pointed out that in fact, the High Court was only guarding the interests of the Cantonment Board

inasmuch as the petitioner before the High Court (respondent No.5) had offered to pay at the rate of Rs.1,25,000/- as against the accepted bid of Rs.1,02,000/- by respondent Nos.1 and 2 herein. It was the voluntary offer of respondent Nos.1 and 2 who matched the offer by Shri Umesh Kumar and accepted it for the amount of Rs. 1,31,000/- per day. In lieu thereof, respondent Nos.1 and 2 acquired the rights to collect the toll tax. This offer was given by these respondents with open eyes and there was no question of prejudice being caused because of the interim arrangement ordered by the High Court by the interim order dated 08.11.2006 and, therefore, the High Court was completely unjustified in ordering the refund merely because the Writ Petition was dismissed as not pressed.

10. As against this, Dr. Dhawan, learned Senior Counsel supported the order, contending that but for the order, the petitioners would have been required to pay at the rate of Rs. 1,02,000/- per day and ultimately the Writ Petition in which the said order was passed as the interim arrangement thereby was dismissed. The respondent Nos.1 and 2 would have a right to refund of the amount paid by them in excess of their original offer because that would be the natural result of the dismissal of the Writ Petition.

11. In our view, the High Court has completely misunderstood the maxim *actus curiae neminem gravabit* and has committed an error in applying it to the facts of the present case. For applying the maxim, it has to be shown that any party has been prejudiced on account of any order passed by the Court. We do not find any prejudice having been caused to the respondents herein. If the High Court had decided to entertain the Writ Petition filed by the 5th respondent, ordinarily, it could have stayed the whole process thereby depriving the first and the second respondents of their rights to collect the toll tax on the basis of their bid in the tender. However, the High Court did not want to stop the process of tax collection. The tax had to be collected since the Notification imposing the tax was

intact (thanks to the orders passed by this Court in SLP No.7682/2006). Then it was a question as to at what rates should the rights to collect the toll tax be leased out and to whom. The respondent No.5-petitioner had made an offer of Rs.1,25,000/- per day. This offer was matched by respondent Nos.1 and 2 by raising the bid to Rs.1,31,000/- per day. We are sure that respondent Nos.1 and 2 thus got into this arrangement with the open eyes. Nobody could even think that the respondents would unnecessarily suffer losses for matching and exceeding the offer made by respondent No.5, after all they were doing business and they would certainly not be interested in suffering the losses by matching the offer made by the 5th respondent and exceeding the same by Rs.6,000/- per day. They entered into this arrangement with absolutely open eyes. Even ultimately, the petition was not dismissed as being a merit less petition. The respondent No.5 chose not to press the petition in view of the fact that a fresh auction was ordered by the appellant herein perhaps because the higher authorities did not choose to give sanction for all this exercise by the appellant. Therefore, there was no question of respondent Nos.1 and 2 suffering any prejudice because of the interim order passed by the High Court. They were welcome not to make any offers. All that would have happened was that respondent No.5 would have then acquired the rights to collect the toll tax and not the respondent Nos.1 and 2. But they did not want to lose their right to collect the toll tax and it is with this idea that they matched the offer of respondent No.5 and exceeded it by Rs.6,000/- per day. There is, thus, no question of any prejudice having been suffered by respondent Nos.1 and 2. The High Court, in our opinion, has completely misread the law laid down in *Karnataka Rare Earth & Anr. v. Senior Geologist Department of Mines & Geology & Anr.* [2004 (2) SCC 783]. The concerned paragraph which has also been quoted by the High Court is as under:

> "The doctrine of *actus curiae neminem gravabit* is not confined in its application only to such acts of the Court

which are erroneous; the doctrine is applicable to all such acts as to which it can be held that the Court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the Court to pass an order, which at the end is held as not sustainable, has resulted in only gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the Court would not have been passed. The successful party can demand;(a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost."

12. Applying the principles in the above paragraph, it was not on account of respondent No.5 that the Court was persuaded to pass an order. In fact the 5th respondent had given its offer. However, the first and second respondents not only matched that offer but they exceeded the same. This was the voluntary action on the part of respondent Nos.1 and 2 and they were not directed by the order to match the order of respondent No.5. It was their voluntary act which was well calculated to earn profits by winning the rights to collect the toll tax. Secondly, the Writ Petition was not held to be untenable nor was it held that respondent No.5 was not entitled to file the Writ Petition, in fact, respondent No.5 did not press the Writ Petition at all.

13. There was no question of respondent Nos.1 and 2 having suffered any impoverishment which they would not have suffered but for the order of the Court and the act of respondent No.5. In fact, it was on account of the voluntary act of respondent

Nos.1 and 2 that the Court was persuaded to pass the order dated 08.11.2006 allowing respondent Nos.1 and 2 to collect the toll tax. There was no question of any benefit having been earned by respondent No.5 under the interim order nor was there any question of making restitution of anything that was lost by respondent Nos.1 and 2 since they had lost nothing.

14. In the above reported decision, the leases in favour of the appellants were challenged by way of the public interest litigation and grants in their favour were quashed. They filed Writ Appeals and approached this Court. When they approached this Court, there was an interim order by which this Court had directed that the renewals of the exceeding grants in favour of the appellants would continue till the next date of hearing. This order was also modified and the lease hold rights were directed to continue till further orders of the Court. The Karnataka Government, after the dismissal of appeals, issued orders calling upon the appellants to pay the price calculated at the minimum rates. The order was challenged by way of a Writ Petition which was dismissed and that is how the matter reached this Court. It was argued that the act of the appellants quarrying the granite stones and exporting the same was accompanied by payment of royalty and issuance of transport permits by the authorities of the State and though done under the interim orders of this Court was nevertheless a lawful and *bona fide* act. According to the appellant, the mining lease in favour of the appellants were bound to be held to be valid in view of the interim orders passed by this Court that they could not be held liable for the payment of price of granite blocks. The Court held that the demand of the State of Karnataka of the price of mineral could not be said to be a levy of penalty or penal action. It was further observed that though the appellants were allowed the mining by way of an interim order during the pendency of the earlier appeals, *the factual transport permits were obtained by the appellants only after the dismissal of their appeals.* The court recorded a final order that the appellants' plea that they were ignorant of the dismissal of the

appeals could not be accepted and entertained. The Court then referred to the decision in *South Easter Coalfields Ltd. v. State of M.P. & Ors.* [2003 (8) SCC 648] where the doctrine of *actus curiae neminem gravabit* was considered and elaborated, holding this doctrine to be the principle of restitution. Considering the facts of the case in paragraph 11, this Court observed that:

> " but for the interim orders passed by this Court there was no difference between the appellants and any other person raising, without any lawful authority, any mineral from any land, attracting applicability of sub-Section(5) of Section 21. *As the appellants have lost from the Court, they cannot be allowed to retain the benefit earned by them under the interim orders of the Court.* The Court affirmed the High Court's finding that the appellants were liable to be placed in the same position in which they would have been if this Court would not have protected them by issuing interim orders."

15. We have already explained the observations of this Court in paragraph 10 in the light of the facts of this case and it is clear that the respondents 1 and 2 cannot take advantage and claim refund because of the fact that this was their voluntary offer and they were not directed to pay the amount that they did. In view of this, we find that the High Court's order is quite unsustainable. We therefore, set aside that order and hold that the Cantonment Board would not be liable to refund anything in favour of respondent Nos.1 and 2 who have enjoyed the rights of collection of toll on the basis of their own voluntary offer made before the High Court which the High Court has merely accepted by its order dated 08.11.2006. With this observation, the appeal is allowed. It shall not now be necessary for the respondent to consider the representation made by respondent Nos.1 and 2. The direction to that effect by the High Court is also set aside. Costs are estimated at Rs.50,000/-.

B.B.B. Appeal allowed.

ASSISTANT COMMISSIONER OF INCOME TAX AND ANR.

v.

M/S. HOTEL BLUE MOON

(Civil Appeal No. 1198 of 2010)

FEBRUARY 2, 2010

[S.H. KAPADIA AND H.L. DATTU, JJ.]

Income Tax Act, 1961*: s.143(2) – Issuance of notice on assessee under s.143(2) for block assessment proceedings – Requirement of –* ***Held****: Is mandatory.*

The question which arose for consideration in these appeals was whether service of notice on the assessee under Section 143(2) of the Income Tax Act, 1961 within the prescribed period of time for framing the block assessment under Chapter XIV-B is mandatory for assessing the undisclosed income detected during search conducted under Section 132 of the Act.

Dismissing the appeals, the Court

HELD: 1.1. Chapter XIV-B of the Income Tax Act, 1961 provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the *sine qua non* **for the Block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. The special procedure of Chapter XIV-B is not intended to be substitute for regular assessment. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence**

found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the assessing officer. Therefore, the income assessable in Block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of search under Section 132 or requisition under Section 132A of the Act. [Para 12] [292-B-E]

1.2. Section 158 BC stipulates that the Chapter XIV-B would have application where search has been effected under Section 132 or on requisition of books of accounts, other documents or assets under Section 132A. By making the notice issued under this Section mandatory, it makes such notice the very foundation for jurisdiction. Such notice under the Section is required to be served on the person who is found to be having undisclosed income. The Section itself prescribes the time limit of 15 days for compliance. In respect of searches on or after 1.1.1997, the time limit may be given up to 45 days instead of 15 days for compliance. Such notice is prescribed under Rule 12(1A). Section 158 BC(b) is a procedural provision for making a regular assessment applicable to Block assessment as well. Section 158 BC(b) provides for enquiry and assessment. The said provision reads "that the assessing officer shall proceed to determine the undisclosed income of the Block period in the manner laid down in Section 158 BB and the provisions of Section 142, sub-section (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be, apply." An analysis of this sub section indicates that, after the return is filed, this clause enables the assessing officer to complete the assessment by following the procedure like issue of notice under Sections 143(2)/142 and complete the assessment under Section 143(3). This Section does not provide for accepting the return as provided under Section 143(i)(a).

The assessing officer has to complete the assessment under Section 143(3) only. In case of default in not filing the return or not complying with the notice under Sections 143(2)/142, the assessing officer is authorized to complete the assessment *ex-parte* under Section 144. Clause (b) of Section 158 BC by referring to Section 143(2) and (3) would appear to imply that the provisions of Section 143(1) are excluded. But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with Section 158-BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under Section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with. The other important feature is that the Section 158 BC(b) specifically refers to some of the provisions of the Act which requires to be followed by the assessing officer while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This Section even speaks of sub-sections which are to be followed by the assessing officer. Had the intention of the legislature was to exclude the provisions of Chapter XIV of the Act, the legislature would have or could have indicated that also. A reading of the provision would clearly indicate if the assessing officer, if for any reason, repudiates the return filed by the assessee in response to notice under Section 158 BC(a), the assessing officer must necessarily issue notice under Section 143(2) of the Act within the time prescribed in the proviso to Section 143(2) of the Act. Where the legislature intended to exclude certain

provisions from the ambit of Section 158 BC(b) it has done so specifically. Thus, when Section 158 BC(b) specifically refers to applicability of the proviso thereto cannot be exclude. The CBDT in its circular No.717 dated 14th August, 1995, has a binding effect on the department, but not on the Court clarified the requirement of law in respect of service of notice under sub-section (2) of Section 143 of the Act. Accordingly, even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of Section 158 BC, the provisions of Section 142 and sub-sections (2) and (3) of Section 143 are applicable and no assessment could be made without issuing notice under Section 143(2) of the Act. Where the assessing officer in repudiation of the return filed under Section 158 BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143. [Paras 12 to 16] [292-F-H; 293-A-H; 294-A-H; 295-A-F]

Dr. Pratap Singh v. Director of Enforcement **1985 155 ITR 166 (SC);** *Maganlal v. Jaiswal Industries, Neemach and Ors,* **(1989) 4 SCC 344, referred to.**

Circular No.717 dated 14th August, **1995, (1995) 215 ITR 70, referred to.**

1.3. Section 158 BH provides for application of the other provisions of the Act. It reads : "Save as otherwise provided in this Chapter, all the other provisions of this Act shall apply to assessment made under this Chapter." This is an enabling provision, which makes all the provisions of the Act, save as otherwise provided, applicable for proceedings for block assessment. The provisions which are specifically included are those which are available in Chapter XIV-B of the Act, which includes Section 142 and sub-sections (2) and (3) of Section 143. [Paras 17] [292-G-H; 296-A]

Case Law Reference:

1985 155 ITR 166 (SC)	**referred to**	**Paras 5, 15**
(1989) 4 SCC 344	**referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1198 of 2010.

From the Judgment & Order dated 9.2.2007 of the High Court of Guwahait at Guwahati in Income Tax Appeal No. 41 of 2004.

WITH

C.A. Nos. 1199, 1200, 1201, 1202, 1203 of 2010.

V. Shekhar, Arijit Prasad, Kunal Bahri, B.V. Balaram Das, Hrishikesh Baruah, Balvir Singh Dosanjh, Jagjit Singh Chhabra, Dr. Rakesh Gupta, Amboj Kumar Sinha and Aarti Sain for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU,J. 1. Leave granted in all the special leave petitions.

2. These six appeals have been heard together. They arise out of similar facts and the question of law arising therefrom is the same.

3. The facts in the lead case are : This is an appeal against the judgment of the High Court of Guwahati in a appeal under Section 260A of the Income Tax Act, 1961, hereinafter referred to as 'the Act', and the point that is raised for our determination is, whether issue of notice under Section 143(2) of the Act within the prescribed time for the purpose of block assessment under Chapter XIV-B of the Act is mandatory for assessing undisclosed income detected during search conducted under

Section 132 of the Act. While, according to the department, issue of a notice under Section 143(2) is not essential requirement in block assessment under Chapter XIV-B of the Act. According to the assessee, service of notice on the assessee under Section 143(2) of the Act within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Act. The Appellate Tribunal held, while affirming the decision of the CIT(A) that non-issue of notice under Section 143(2) is only a procedural irregularity and the same is curable. In the appeal filed by the assessee before the Guwahati High Court, the following two questions of law were raised for consideration and decision of the High Court, they were : -

> "(1) Whether on the facts and in circumstances of the case the issuance of notice u/s 143(3) of the Income Tax Act, 1961 within the prescribed time limit for the purpose of making the assessment under Section 143(3) of the Income Tax Act, 1961 is mandatory? And
>
> (2) Whether, on the facts and in the circumstances of the case and in view of the undisputed findings arrived at by the Commissioner of Income Tax (Appeals), the additions made u/s 68 of the Income Tax Act, 1961 should be deleted or set aside."

4. The High Court, disagreeing with the Tribunal, held, that the provisions of Section 142 and sub-sections (2) and (3) of Section 143 will have mandatory application in a case where the assessing officer in repudiation of return filed in response to a notice issued under Section 158 BC(a) proceeds to make an inquiry. Accordingly, the High Court answered the question of law framed in affirmative and in favour of the appellant and against the revenue. The revenue thereafter applied to this Court for special leave under Article 136, and the same was granted, and hence this appeal.

5. The learned counsel Sri Shekhar for the revenue

submitted, that, Chapter XIV B of the Act provides a special procedure for search cases and is a complete code in itself dealing with both the substantive as well as procedural aspects of search cases and, therefore, there is a distinction between the procedure for regular assessment under Chapter XIV and the procedure of Block assessment under Chapter XIV B. Therefore, it is submitted for the purpose of block assessments the assessing authority need not follow the procedure prescribed under Chapter XIV which includes issuance of notice under Section 143(2). The learned counsel has further contended that in a proceeding under Section 158 BC, there is no requirement of a notice to be issued under Section 143(2), since issuance of notice for the purpose of Section 158 BC is separately prescribed. It is further submitted that Block assessment is in addition to regular assessment, and what is included in regular assessment, cannot be assessed again in the course of a Block assessment and similarly, what is assessed in Block assessment, cannot be the subject matter of regular assessment. It is further submitted that Section 143(2) of the Act is in two parts. The first part deals with jurisdiction and the second with the procedure. The proviso to Section 143(2) puts an embargo on the assessing officer to exercise jurisdiction after the expiry of 12 months from the end of the month in which the return was filed by the assessee. It is the discretion of the assessing officer to accept the return as it is or to proceed further with the assessment of income, once the assessing officer decides to proceed, he has to issue notice under Section 143(2) within the prescribed time limit to make the assessee aware that his return has been selected for scrutiny assessment. In distinction to this procedure, under the special procedure prescribed in Chapter XIV B, there is no discretion left with the assessing officer. It is further contended that the source and origin of a Block assessment is the search which has been conducted under Section 132 of the Act. Once the search has been carried out, the assessing officer is left with no discretion but to proceed with the Block assessment. It is also submitted that in search cases the material is already

found and is in the knowledge of the assessing officer. This is distinct and different from the situation of an ordinary assessment, where, the assessing officer does not have any material other than the return filed by the assessee. Therefore, the requirement of notice under Section 143(2) is essential for production of material by the assessee. This is so because in regular assessments the assessing officer in the first instance has no material available to him except the return filed by the assessee. It is further submitted that the computation of undisclosed income of the Block period has to be done in accordance with the provisions of Section 158 BB and on the basis of evidence found as a result of search or requisition of books of account, or other documents and such other materials or information as are available with the assessing officer and relatable to such evidence and, therefore, issuance of notice under Section 143(2) is not required for Block assessment proceedings. It is further submitted that the provisions of Section 143(2) and other provisions mentioned in Section 158 BC(b) are to be applied only to the extent possible, since the provisions incorporated in the Chapter XIV B constitute a special Code to assess the undisclosed income in search cases, they would override the provisions of Chapter XIV being the procedure for normal assessments. In support of this contention, reference is made to the decision of this Court in the case of *Dr. Pratap Singh vs. Director of Enforcement,* [1985] 155 ILR 166 (SC). Lastly, it is submitted, that, since both the schemes under Chapter XIV for a regular assessment and under Chapter XIV B for Block assessments are different that while no assessment under Section 143(3) could be completed without the issuance of notice under Section 143(2), the same restriction would not be applicable in the case of Block assessment.

6. Per contra, the contention on behalf of the assessee(s) is that, for the purpose of Block assessment under Section 158 BC, the provisions of Section 142 and Sub-sections (2) and (3) of Section 143 are applicable and, therefore, no Block

assessments could be made without issuing notice under Section 143(2) of the Act. It is further contended that notice under Section 143(2) could have been dispensed with by the assessing officer if he proceeds to determine the income on the basis of the return without going for scrutiny. Referring to the provisions in clause (v) of the Second Proviso to Section 158 BC, it is submitted by the learned counsel that the words "so far as may be" does not give any discretion to the assessing officer to dispense with the requirement of such a notice under Section 143(2), when he proceeds to make an enquiry within the scope and ambit of Section 143(2). It is further contended that after a notice under Section 158 BC is issued, the assessee is required to file a return within a stipulated period. Once the return is filed, it is open to the assessing officer to accept the same or to require further investigation. If he accepts the return of undisclosed income as it is, then, there would be no necessity of issuing any notice under Section 143(2) of the Act. However, if the assessing officer is not satisfied with the return so filed, then he is required to issue further notice under Section 143(2) before an assessment order is passed under Chapter XIV-B of the Act.

7. The only question that arises for our consideration in this batch of appeals is, whether service of notice on the assessee under Section 143(2) within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961?

8. Chapter XVI-B prescribes the special procedure for making the assessment of search cases.

9. Section 158 B defines "undisclosed income", and "block period" which are the two basic factors for framing the block assessments.

10. Section 158 BA is an enabling section, empowering the assessing officer, to assess "undisclosed income" as a result of search initiated or requisition made after June 30,

1995, in accordance with the provisions of this Chapter and tax the same at the fixed rate specified in Section 113. Section 158 BB provides the methodology for computation of undisclosed income of the block period. Section 158 BC prescribes the procedure for making the Block assessment of the searched person. Section 158 BD enables assessment of any person, other than the searched person. Section 158 BE sets the time limits for completion of the Block assessments. Section 158 BF provides for immunity from levy of interest under Sections 234A, 234B and 234C and penalties under Section 271(1)(C), 271A and 271B. Section 158 BFA provides for levy of interest and penalty in cases of search on or after January 1, 1997. Section 158 BG specifies the authorities competent to make the block assessment. Section 158 BH provides for application of all the other provisions of this Act, except those as provided in Chapter XIV-B. Section 158 BI provides for abolition of the scheme in cases of search after 31.5.2003.

11. The scheme of Block assessment has been explained by Central Board of Direct Taxes in paragraph 39.3 of Circular No.717 dated 14th August, 1995 ([1995] 215 ITR.70). We may only notice clause (e) of the circular which provides for the procedure for making Block assessment. Omitting what is not necessary for the purpose of this case, clause (e) is extracted and it reads as under :-

> "(e) *Procedure for making block assessment:* (i) The Assessing Officer shall serve a notice on such person requiring him to furnish within such time, not being less than 15 days, as may be specified in the notice, a return in the prescribed form and verified in the same manner as a return under clause (i) of sub-section(1) of section 142 setting forth his total income including undisclosed income for the block period. The officer shall proceed to determine the undisclosed income of the block period and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall apply accordingly."

12. Chapter XIV-B provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the *sine qua non* for the Block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. It is not intended to be substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the assessing officer. Therefore, the income assessable in Block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of search under Section 132 or requisition under Section 132A of the Act.

13. Section 158 BC stipulates that the Chapter would have application where search has been effected under Section 132 or on requisition of books of accounts, other documents or assets under Section 132A. By making the notice issued under this Section mandatory, it makes such notice the very foundation for jurisdiction. Such notice under the Section is required to be served on the person who is found to be having undisclosed income. The Section itself prescribes the time limit of 15 days for compliance. In respect of searches on or after 1.1.1997, the time limit may be given up to 45 days instead of 15 days for compliance. Such notice is prescribed under Rule 12(1A) which in turn prescribes Form 2B for block return.

14. Section 158 BC(b) is a procedural provision for

making a regular assessment applicable to Block assessment as well. Section 158 BC(c) would require the assessing officer to compute the income as well as tax on completion of the proceedings to be made. Section 158 BC(d) would authorise the assessing officer to apply the assets seized in the same manner as are applied under Section 132B.

15. We may now revert back to Section 158 BC(b) which is the material provision which requires our consideration. Section 158 BC(b) provides for enquiry and assessment. The said provision reads "that the assessing officer shall proceed to determine the undisclosed income of the Block period in the manner laid down in Section 158 BB and the provisions of Section 142, sub-section (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be, apply." An analysis of this sub section indicates that, after the return is filed, this clause enables the assessing officer to complete the assessment by following the procedure like issue of notice under Sections 143(2)/142 and complete the assessment under Section 143(3). This Section does not provide for accepting the return as provided under Section 143(i)(a). The assessing officer has to complete the assessment under Section 143(3) only. In case of default in not filing the return or not complying with the notice under Sections 143(2)/142, the assessing officer is authorized to complete the assessment ex-parte under Section 144. Clause (b) of Section 158 BC by referring to Section 143(2) and (3) would appear to imply that the provisions of Section 143(1) are excluded. But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with Section 158-BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under Section 143(2) cannot be a procedural

irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with. The other important feature that requires to be noticed is that the Section 158 BC(b) specifically refers to some of the provisions of the Act which requires to be followed by the assessing officer while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This Section even speaks of sub-sections which are to be followed by the assessing officer. Had the intention of the legislature was to exclude the provisions of Chapter XIV of the Act, the legislature would have or could have indicated that also. A reading of the provision would clearly indicate, in our opinion, if the assessing officer, if for any reason, repudiates the return filed by the assessee in response to notice under Section 158 BC(a), the assessing officer must necessarily issue notice under Section 143(2) of the Act within the time prescribed in the proviso to Section 143(2) of the Act. Where the legislature intended to exclude certain provisions from the ambit of Section 158 BC(b) it has done so specifically. Thus, when Section 158 BC(b) specifically refers to applicability of the proviso thereto cannot be exclude. We may also notice here itself that the clarification given by CBDT in its circular No.717 dated 14th August, 1995, has a binding effect on the department, but not on the Court. This circular clarifies the requirement of law in respect of service of notice under sub-section (2) of Section 143 of the Act. Accordingly, we conclude even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of Section 158 BC, the provisions of Section 142 and sub-sections (2) and (3) of Section 143 are applicable and no assessment could be made without issuing notice under Section 143(2) of the Act. However, it is contended by Sri Shekhar, learned counsel for the department that in view of the expression "So far as may be" in Section 153 BC(b), the issue of notice is not mandatory but optional and are to be applied to the extent practicable. In support of that contention, the learned counsel has relied on the observation made by this

Court in *Dr. Pratap Singh's* case [1985] 155 ITR 166(SC). In this case, the Court has observed that Section 37(2) provides that "the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under Section 37(2). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in Section 165 has to be generally followed. The expression "so far as may be" has always been construed to mean that those provisions may be generally followed to the extent possible. The learned counsel for the respondent has brought to our notice the observations made by this Court in the case of *Maganlal vs. Jaiswal Industries, Neemach and Ors.,* [(1989) 4 SCC 344], wherein this Court while dealing with the scope and import of the expression "as far as practicable" has stated "without anything more the expression `as far as possible' will mean that the manner provided in the code for attachment or sale of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied."

16. The case of the revenue is that the expression 'so far as may be apply' indicates that it is not expected to follow the provisions of Section 142, sub-sections 2 and 3 of Section 143 strictly for the purpose of Block assessments. We do not agree with the submissions of the learned counsel for the revenue, since we do not see any reason to restrict the scope and meaning of the expression 'so far as may be apply'. In our view, where the assessing officer in repudiation of the return filed under Section 158 BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143.

17. Section 158 BH provides for application of the other provisions of the Act. It reads : "Save as otherwise provided in this Chapter, all the other provisions of this Act shall apply to assessment made under this Chapter." This is an enabling provision, which makes all the provisions of the Act, save as

otherwise provided, applicable for proceedings for block assessment. The provisions which are specifically included are those which are available in Chapter XIV-B of the Act, which includes Section 142 and sub-sections (2) and (3) of Section 143.

18. On a consideration of the provisions of Chapter XIV-B of the Act, we are in agreement with the reasoning and the conclusion reached by the High Court.

19. The result is that the appeals fail and are dismissed. No order as to costs.

D.G. Appeals dismissed.