S. NARAHARI RAO
*v.*
SATHYANARAYANA & ORS.
(Civil Appeal No. 1480 of 2010)

FEBRUARY 8, 2010

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

*Injunction:*

*Temporary injunction – Application for, filed in suit before trial court – Parties directed to maintain status quo – On defendants' bringing it to notice of court that the entire dispute was pending before Supreme Court, application for temporary injunction rejected – On the same ground appeal dismissed by High Court – HELD: Since the matter pending before Supreme Court has been decided, impugned orders passed by High Court and trial court set aside – Matter remitted to trial court to decide the application for temporary injunction and the suit in accordance with the judgment of date delivered by Supreme Court.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1480 of 2010.

From the Judgment & Order 8.6.2009 of the High Court of Karnataka at Bangalore in Misc. First Appeal No. 2519 of 2009.

Dushyant A. Dave and P. Vishwanath Shetty, S.U.K. Sagar, Bina Madhavan, Pantosh Gupta (for Lawyer's Knit & Co.) R.S. Hegde, Chandra Prakash, Rahul Tyagi, Ashwani Garg, P.P. Singh for the appearing parties.

The Order of the Court was delivered by

1. *S. Nagaraj (dead) by Lrs & Ors. vs. B.R. Vasudeva Murthy & Ors etc. etc.* 2010 (2) SCR 586.





**ORDER**

**A.K. PATNAIK, J.** Leave granted.

The background facts in which this Civil Appeal has been filed are that the appellant filed a suit being O.S. NO.1150 of 2009 in the City Civil Court, Bangalore, along with an application for temporary injunction (I.A.No.1 of 2009) for restraining the respondents from putting up any construction on the suit property. On 18.02.2009, the City Civil Court, Bangalore, while issuing summons/notices to the respondents, directed the parties to maintain the status quo in respect of the suit property. In response to the summons/notices, the respondents appeared in the suit and filed I.A. No.2 of 2009 praying to the City Civil Court to vacate the order of status quo on the ground that the entire dispute was pending before this Court in S.L.P. (C) No.10352 of 2007 and other connected SLPs filed against the common judgment dated 22.12.2006 of the Division Bench of the Karnataka High Court. The Trial Court took the view that since the entire dispute is pending before this Court, this Court alone has jurisdiction to consider grant of interim relief and by its order dated 02.04.2009 rejected the application for temporary injunction. The appellant thereafter filed Miscellaneous First Appeal No.2519 of 2009 before the Karnataka High Court against the order dated 02.04.3009 of the City Civil Court, but the Karnataka High Court by its order dated 08.06.2009 also dismissed the Miscellaneous First Appeal on the ground that the subject-matter of the suit was also the subject-matter of S.L.P. (C) No.10352 of 2007 before this Court.

We have heard learned counsel for the parties. On 12.07.2007, this Court granted leave in S.L.P. (C) No.10352 of 2007 and other connected SLPs. On grant of such leave, the matters were re-numbered as Civil Appeal Nos.3038 of 2007 and other connected Civil Appeals. We have heard these Civil Appeals and delivered a common judgment today setting aside

the common judgment dated 22.12.2006 of the Division Bench of the Karnataka High Court and allowing the writ petitions filed in the High Court.

Since we have decided the dispute pending before this Court, we set aside the impugned order dated 08.06.2009 passed by the Karnataka High Court in Miscellaneous First Appeal No.2519 of 2009 and the order dated 02.04.2009 passed by the City Civil Court, Bangalore, in I.A.Nos.1 and 2 of 2009 and remand the matter to the City Civil Court, Bangalore, to hear the parties and decide the application for temporary injunction and the suit in accordance with our judgment delivered today in Civil Appeal Nos.3038 of 2007 and other connected Civil Appeals.

The appeal stands disposed of accordingly. No costs. A copy of the judgment passed today in Civil Appeal Nos.3038 of 2007 and other connected Civil Appeals be sent to the City Civil Court, Bangalore.

R.P. Appeals disposed of.



S. NAGARAJ (DEAD) BY LRS. & ORS.
*v.*
B.R. VASUDEVA MURTHY & ORS. ETC. ETC.
(Civil Appeal No. 3038 of 2007)

FEBRUARY 08, 2010

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

*Mysore (Personal and Miscellaneous)Inam Abolition Act, 1954 – Abolition of Inams – During pendency of Inamdars' application for registration as occupants, the land granted to a Sangha for construction of house – Conversion fine paid – Inamdars initially challenging the grant, but later settled the matter out of Court agreeing for an amount in addition to the amount towards the price of the land – The competent authority later confirming the occupancy rights of the Inamdars – Layout plan for the allotted land sanctioned by Development Authority – Sites allotted to the members of the Sangh and houses constructed – Thereafter Legal Representatives of the Inamdars challenging the order of grant, in a suit and writ petition – Suit withdrawn – Writ petition and writ appeal thereagainst dismissed – In special Leave Petition, Supreme Court observing that occupancy rights having been granted in favour of Inamdars it was open to their Legal Representatives to approach the State for modification of the order granting the land to the Sangh – State Government's direction to acquire sites in the lay out developed plan for allotment of the same to the LRs of the Inamdars challenged by the 14 allottes – The wit petitions were allowed – Matter remitted to State to comply with direction issued by Supreme Court – States' direction to stop the construction on the site challenged – High Court directing the State to decide the matter within prescribed time – State directing to handover vacant civic amenity sites, and the vacant sites to the LRs of Inamdars and compensation to be*

*paid to them for the land utilized by BDA for construction of road – The order challenged – High Court gave the finding in favour of the LRs of Indamdars, but quashed the direction of the State for resumption and restoration of the sites in favour of Inamdars – Court directed to allot each LR of Inamdar a site in the same layout in lieu of the 182 sites and pay compensation to them – Review petition dismissed – On appeal, held: The issue having been decided in writ appeal and having attained finality, cannot be re-opened for fresh adjudication in subsequent challenge – The Inamadars by entering into the agreement with the Sangha, waived their occupancy right – Inamdars were bound by the agreement – The grant in favour of Sangha not liable to be cancelled – The grant was also not contrary to ss. 79A, 79B and 80 of Land Reforms Act as the conversion fine was paid u/s. 95 (2) and (7) of Land Revenue Act – Moreover, this issue was also not raised at initial stage – Karnataka Land Reforms Act,1961 – ss. 79A, 79B and 80 – Karnataka Land Revenue Act, 1964 – s. 95 (2) and (7).*

*Doctrines / Principles – Doctrine of merger – Order refusing special leave to appeal does not stand substituted in place of order under challenge – Such order could not come within meaning of Article 141 – Doctrine of merger will not be attracted in such case – Constitution of India, 1950 – Articles 136 and 141.*

*Judgment – Per-in-curium – Applicability of – Judgment passed per-in-curium is relevant to the doctrine of precedent and not to the doctrine of res-judicata.*

**After abolition of Inams every Inamdar was entitled to be registered as an occupant of the land. Two Inamdars made applications for registration as occupants in respect of the land in question. During pendency of the applications, the State granted the land to an Association (Sangha) for construction of house sites. State fixed the**



**price of the land and a conversion fine was also imposed which was deposited by the Sangha.**

**Both the Inamdars challenged the grant in a suit but the matter was settled out of court between the parties. The Sangha agreed to pay certain amount to the Inamdars in addition to the amount towards the price of the land.**

**Thereafter, the competent authority decided the claims of the Inamdars for occupancy rights and confirmed the occupancy rights in their favour. The Inamdars withdrew the amount deposited by the Sangha. The Sangha got the layout plan sanctioned from the Development Authority and allotted sites to its members and the members built the houses on some of the sites.**

**The Legal Representatives of the Inamdars, thereafter, filed writ petition challenging the order granting the land in favour of the Sangha. They also filed a suit challenging the same, but it was dismissed as withdrawn. Writ Petition was dismissed by the Single Judge of High Court. Writ appeal thereagainst was also dismissed. In Special Leave Petition against the same, Supreme court observed that in view of the proceedings regarding occupancy rights having been ended in favour of the Inamdars, it would be open to them to approach the State for modification of the order granting the land to the Sangha. The Resident Association which was impleaded as a party in the SLP, filed an application for recalling the order of Supreme Court, but the same was dismissed.**

**State directed to acquire 14 sites in the lay-out developed by the Sangha and to allot the same to the family members of the Inamdars. The owners of the 14 sites challenged the order in a writ petition which was allowed by High Court and the matter was remitted to the State to comply with the order passed by Supreme Court.**

**The legal representatives of the Inamdars also filed writ petitions seeking deletion of the condition of the grant made in their favour, but the same was withdrawn by them.**

**State directed to stop construction on the land in question till final disposal of the case. The same was challenged in writ petition. The High Court dismissed the same directing the State Government to decide the matter within specified time. On failure on the part of the State to comply with the order of Supreme Court, the Inamdars filed contempt petition.**

**The State passed an order dated 22.12.2003 directing that the vacant civil amenities to a certain extent to be handed over to the Inamdars free of cost; directed the Development Authority to pay compensation to the Inamdars for the land utilized by them for formation of road; directed transfer of 182 sites to the Inamdars and if not available, to pay compensation in lieu of the same. It also directed the State to examine to allot 20 acres of land to compensate for the losses. The order was challenged in the writ petitions separately by the Development Authority, the Sangha, residents' Association and different owners of house sites.**

**High Court by the impugned order held that the State has no power to pass the order according sanction for grant of the land in favour of the Sangha during pendency of the applications of the Inamdars for registration of their occupancy rights as the land did not rest in the State on that date; that the State was justified in passing the order dated 22.12.2003 canceling the grant and ordering resumption and restoration of 182 sites in favour of the Inamdars; that sanction of the grant of the land was void *ab initio* being in violation of s. 79A, 79B and 63(7) of Karnataka Land Reforms Act; that the**



**agreement in favour of the Sangha by the Inamdars, during pendency of the application for occupancy rights was not legal; that the order passed by the High Court in the earlier proceedings do not operate as *res judicata* as the case of the Inamdars with reference to the provisions of Inam Abolition Act were not considered therein, and the same was *per incurium.* However, in view of the facts that the members of the Sangha had already constructed the houses and were residing there, for considerable time, the High Court quashed the directions in the order dated 22.12.2003 for resumption and restoration of 182 sites and directed the Sangha to allot each LR of the Inamdars a site and in lieu of the 182 sites to pay compensation. High Court further held that the LRs were entitled to receive compensation in respect of the land acquired by the Development Authority for formation of the road. High Court also quashed the direction to examine whether further 20 acres of the land could be allotted to the Inamdars. The review petition filed by the LRs of Inamdars was dismissed. Hence, the present appeals by the LRs of Inamdars, the Development Authority, the Residents' Association and several owners of the house sites.**

**Disposing of the appeals, the Court**

**HELD: 1. The Division Bench of the Karnataka High Court decided three issues in its judgment dated 15.9.1998 in the Writ Appeal first, that the State Government had the power to sanction grant of the land in Survey Nos.45 and 47 in favour of the Sangha by the order dated 15.6.1979 notwithstanding the pendency of the claim of the Inamdars to be registered as occupants of the land before the Special Deputy Commissioner, Inam Abolition, and therefore the order dated 15.6.1979 of the State Government of Karnatka sanctioning the land in favour of the Sangha cannot held to be bad; second,**

**in the event the claim of the Inamdars to be registered as occupants of the land was subsequently allowed by the Special Deputy Commissioner or by the Tribunal, the Inamdars were not entitled to restoration of the land from the Sangha but were entitled for the price of the land; third, the Inamdars had waived their right of occupation of the land by the agreement dated 1.11.1980 and by withdrawing the suit in which they challenged the order dated 15.6.1979 of the State Government of Karnataka, sanctioning the grant of land in favour of the Sangha and by receiving Rs.2,000/- per acre and Rs.49,000/- in addition to the price of Rs.10,000/- per acre. [Para 29] [620-G-H; 621-A-D]**

**1.2. On interpreting the two orders dated 9.4.1999 and 28.8.2000 of Supreme Court, the decisions on the three issues in the judgment dated 15.9.1998 of the Division Bench of the High Court in the Writ Appeal were not disturbed by this Court in the SLP and, therefore, the decisions on the three issues of the Division Bench of the Karnataka High Court in the Writ Appeal became final and binding on the parties, namely, the legal representatives of the Inamdars, the State Government and the Sangha and its members. [Para 31] [622-C-D]**

**1.3. In order refusing special leave to appeal does not stand substituted in place of order under challenge and all that it means is that this Court was not inclined to exercise its discretion so as to allow the appeal being filed. If the order refusing leave to appeal makes a statement of law, such statement of law is declaration of law by this Court within the meaning of Article 141 of the Constitution of India and if the order records some finding other than the declaration of law such finding would bind the parties thereto and also the Court, Tribunal or Authority in any proceeding subsequent thereto by way of judicial discipline, the Supreme Court**



**being the Apex Court of the country. [Para 32] [622-F-G; 622-H; 623-A-B]**

**1.4. The judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in the Writ Appeal which was challenged in SLP before this Court, does not stand substituted by the order dated 9.4.1999 of this Court in the SLP because this Court has not granted special leave to appeal against such judgment. Further, the order dated 9.4.1999 of this Court does not contain any statement of law which would amount to declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution of India. In the order dated 9.4.1999 this Court has also not recorded any finding which would be binding on the legal representatives of the Inamdars, the State Government, the Sangha and its members, but has only granted liberty to the legal representatives of the Inamdars to approach the State Government for modification of the order granting land in favour of the Sangha and has given further direction to the State Government to dispose of such application within the period of three months from the receipt of the application of the legal representatives of the Inamdars. Hence, the contention raised on behalf of the legal representatives of the Inamdars that the judgment dated 15.9.1998 of the Division Bench of the High Court got merged in the order dated 9.4.1999 in the SLP and the findings on the three issues in the order dated 15.9.1998 in the Writ Appeal did not operate as *res judicata* and were not binding on the legal representatives of the Inamdars, the State Government, the Teachers' Colony Association or the Sangham and its members, is misconceived. [Para 33] [624-A-C; 624-E-H; 625-A]**

*Kunhayammed and Ors. v. State of Kerala and Anr.* **(2000) 6 SCC 359, relied on**

**2. The High Court in the impugned order has taken a view that the orders passed by the High Court in the earlier proceedings in the Writ Petition and the Writ Appeal do not operate as *res judicata* as the case of the Inamdars with reference to the provisions of the Inam Abolition Act and the law laid down by this Court on various aspects were not considered in the earlier writ petitions and writ appeal and the decisions rendered by the Division Bench of the High Court in the Writ Appeal were** *per incurium.* **The High Court has failed to appreciate that the principle of** *per incurium* **has relevance to the doctrine of precedents but has no application to the doctrine of *res judicata.* [Para 34] [625-B-D]**

*Tarini Charan Bhattacharjee and Ors. v. Kedar Nath Haldar* **AIR 1928 Calcutta 777, referred to**

**3.1. From the judgment of the Division Bench of the Karnataka High Court in the Writ Appeal, it is not found that any contention was raised on behalf of the legal representatives of the Inamdars that grant of land in Survey Nos.45 and 47 could not be sanctioned in favour of the Sangha for house sites because of the restrictions in Sections 79-A, 79-B and 80 of the Land Reforms Act. If this ground of attack had not been taken by the legal representatives of the Inamdars while challenging the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha, this contention could not be raised by them before the High Court in a subsequent proceeding because of the principle of *constructive res judicata* underlying Explanation IV of Section 11 of the CPC which has been applied to writ petitions. [Para 35] [626-E-H]**

*Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors.* **(1990) 2 SCC 715, followed**



*Mathura Prasad Bajoo Jaiswal and Ors. v. Dossibai N.B. Jeejeebhoy*, **referred to**

**3.2. Chapter V of the Land Reforms Act is titled "Restrictions on holding on transfer of agricultural lands" and the language of Sections 79-A, 79-B and 80 shows that these provisions apply to only "agricultural lands". From the provisions of sub-sections (2) and (7) of Section 95 of the Karnataka Land Revenue Act, 1964 it is seen that the land held for agricultural purpose can be permitted to be diverted for other purposes on payment of fine. In the order dated 15.6.1979 of the State Government sanctioning the grant of the land in favour of the Sangha, it is clearly stipulated that the Sangha shall pay such conversion fine to be levied as per the rules made under the Revenue Act. The Karnataka Land Grants Rules, 1969 made under Section 179 of the Land Revenue Act and in particular Rule 18 has also made elaborate provisions for grant of building sites on payment of price. [Para 36] [627-E-H; 628-A]**

**3.3. Sections 79-A, 79-B and 80 of the Land Reforms Act, therefore, have to be read together with Section 95 of the Land Revenue Act as all these provisions deal with the same subject matter, namely, agricultural lands. The law permitted the grant of the agricultural land in favour of the Sangha for house sites on payment of conversion fine and the grant made by the State Government in favour of the Sangha by the order dated 15.6.1979 was not *void ab initio* on this count. [Para 36] [628-C-D]**

*'Principles of Statutory Interpretation' by Justice G.P. Singh **12th Edition*** **p. 298, referred to**

**4.1. It is correct to say that *res judicata* will not operate as a bar for entertaining a fresh cause of action and in the present case the order dated 22.12.2003 passed by the Minister, Revenue, Government of**

**Karnataka, gave rise to a fresh cause of action. But even where a fresh cause of action arises, issues between the parties which have been decided cannot be re-opened before the Court for fresh adjudication between the same parties. The findings of the Division Bench of the High Court in the judgment dated 15.9.1998 in the Writ Appeal that the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha was valid and that the Inamdars were only entitled to the price payable for the land when their claims for registration under Sections 9 and 10 of the Inam Abolition Act were allowed and that the Inamdars have waived their right of occupation in the land by entering into the agreement dated 1.11.1980 and by accepting the price of Rs.10,000/- per acre deposited by the Sangha and the additional amount paid by the Sangha were binding not only on the legal representatives of the Inamdars and the Sangha but also on the State Government. [Paras 37 and 38] [628-E-F; 629-C-E]**

*State of Haryana and Ors. v. M.P. Mohla* **(2007) 1 SCC 457, relied on.**

**4.2. While deciding the application of the legal representatives of the Inamdars for modification of the order dated 15.6.1979 sanctioning the grant of land in favour of the Sangha, therefore, the State Government could not ignore these findings of the Division Bench of the High Court in the judgment dated 15.9.1998. In the order dated 9.4.1999 of this Court in the SLP there was no mandamus to the State Government to modify or cancel the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha, but there was only a direction to the State Government to consider the application of the legal representatives of the Inamdars for modification of the order dated 15.6.1979. [Para 38] [629-E-G]**



*Madan Mohan Pathak and Anr. v. Union of India and Ors.* **(1978) 2 SCC 50, referred to.**

**4.3. The Revenu Minister, Government of Karnataka, while considering the application of the Inamdars, ignored the findings of the Division Bench of the High Court in the judgment dated 15.9.1998 and took the view in his order dated 22.12.2003 that on the competent authority granting occupancy right to the Inamdars by the order dated 23.6.1982, the Inamdars had become the rightful owners of the land and action would have to be taken to cancel the grant made in favour of the Sangha. [Para 38] [629-G-H; 630-A-B]**

**4.4. The judgment dated 15.9.1998 of the Division Bench of the High Court had held that on the occupancy rights of the Inamdars being confirmed, the Inamdars would be entitled to only the price and that the Inamdars had waived their right to occupy the land by accepting the price and by accepting further additional amounts from the Sangha and this judgment of the Division Bench of the High Court had not been disturbed by this Court in SLP and the Minister, Revenue, Government of Karnataka, could not have taken a view that on the confirmation of the occupancy rights of the Inamdars, the grant of the land made in favour of the Sangha was liable to be cancelled. [Para 39] [631-B-D]**

**4.5. Once it is held that the grant made in favour of the Sangha was not liable to be cancelled, the order of the Minister, Revenue, Government of Karnataka, directing that the vacant 182 sites have to be transferred to the Inamdars or compensation in lieu of the vacant 182 sites were to be paid by the Sangha to the Inamdars, has to be set aside. Further, the order that the vacant civic amenity sites to an extent of 2 acres 34 guntas must be**

**handed over to the Inamdars free of cost and the land, which is used by the BDA for formation of the ring road, has to be acquired by the BDA and the compensation has to be paid for this land to the Inamdars as if the same was private property, has also to be set aside. This is because the civic amenity sites measuring 2 acres 34 guntas and the ring road were part of the land measuring 34.03 acres given on grant to the Sangha. Moreover, at the time of sanctioning the layout plan of the Sangha, the BDA had stipulated that the roads, civic amenity sites, parks and all connections such as underground drainage, water supply lines, shall vest with the BDA free of cost. The civic amenity sites and the road, therefore, had become properties of the BDA and it was the BDA only which was empowered to deal with such properties subject to Section 38-A and other provisions of the Bangalore Development Authority Act, 976. The order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, directing that the civic amenity sites be handed over to the Inamdars free of cost and directing that the BDA will acquire the land comprised in the ring road after paying compensation for the same, was thus without the authority of law. [Para 40] [631-E-H; 632-A-C]**

*Taherakhatoon (D) by L.Rs. v. Salambin Mohammad* **(1999) 2 SCC 635;** *Kunhayammed and Ors. v. State of Kerala and Anr.* **(2000) 6 SCC 359;** *Virender Singh Hooda and Ors. v. State of Haryana and Anr.* **(2004) 12 SCC 588;** *Bangalore Medical Trust v. B.S. Muddappa and Ors.* **(1991) 4 SCC 54;** *Bangalore Development Authority and Ors. v. R. Hanumaiah and Ors.* **(2005) 12 SCC 508, referred to.**

**Case Law Reference:**

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|---|---|---|
| **(1974) 2 SCC 472** | **Referred to** | **Para 14** |
| **(1995) Supp. (2) SCC 549** | **Referred to** | **Para 14** |
| **(1996) 10 SCC 533** | **Referred to** | **Para 14** |



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| **(2004) 7 SCC 459** | **Referred to** | **Para 14** |
| **(1995) 5 SCC 709** | **Referred to** | **Para 15** |
| **(2004) 11 SCC 186** | **Referred to** | **Para 15** |
| **(1990) 1 SCC 207** | **Referred to** | **Para 16** |
| **(1988) 2 SCC 580** | **Referred to** | **Para 16** |
| **(2004) 1 SCC 712** | **Referred to** | **Para 17** |
| **(2004) 3 SCC 1** | **Referred to** | **Para 17** |
| **(1999) 2 SCC 635** | **Referred to** | **Para 20** |
| **(2004) 12 SCC 588** | **Referred to** | **Para 21** |
| **(1991) 4 SCC 54** | **Referred to** | **Para 24** |
| **(2005) 12 SCC 508** | **Referred to** | **Para 24** |
| **(2000) 6 SCC 359** | **Referred to** | **Para 33** |
| **AIR 1928 Calcutta 777** | **Referred to** | **Para 34** |
| **(1970) 1 SCC 613** | **Referred to.** | **Para 35** |
| **(1990) 2 SCC 715** | **Followed** | **Para 35** |
| **(2007) 1 SCC 457** | **Relied on** | **Para 37** |
| **(1978) 2 SCC 50** | **Referred to** | **Para 39** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3038 of 2007.

From the Judgment & Order dated 22.12.2006 of the High Court of Karnataka at Bangalore in W.P. Nos. 20331, 7332, 10303, 12024, 12094, 14858, 15614, 16833, 17883, 20678, 22145, 25372, 26218, 32203, 36796, 10305 of 2004, 21620 of 2005 and Review Petition No. 107 of 2007.

WITH

C.A. Nos. 3037, 3049, 3040-3047, 3050 and 3941-3953 of 2007.

C.A. Nos.1477,1478 and 1479 of 2010

Dushyant A. Dave, P. Vishwanath Shetty, S.S. Jawali and P.P.Rao, S. U.K. Sagar, Ms. Bina Madhavan, Shwetank (for Lawyers' Knit & Co.), M. Gireesh Kuamar, A.A. Kalebudde, Vijay Kumar, G.V. Chandrashekar, Purushottam S.T. Sahar Bakht, Ustav Sidhu, Anjana Chandrashekar, R.S. Hegde, Chandra Prakash, Rahul Tyagi, Ashwani Garg, P.P. Singh, Bhaskar Y.Kulkarni,Ms. K.V. Bharathi Upadhyaya, Dr. Sushil Balwada, E.C. Vidya Sagar, K.K. Mani, Pantosh Gupta (for Lawyers' Knit & Co.), Sanjay R. Hegde, A. Rohen Singh, Ms. Deepa Kulkarni and D.P. Chaturvedi for the appearing parties.

The Judgment of the Court was delivered by

**A.K. PATNAIK, J.** Permission to file Special Leave Petition (C) Nos.18843/2007 and 18846/2007 granted. Delay condoned and leave granted in the Special Leave Petitions. We also condone the delay in filing the applications for substitution and allow the applications for substitution. We also allow the applications for impleadment.

2. These Civil Appeals are directed against the common judgment dated 22.12.2006 of the Division Bench of the High Court of Karnataka in a batch of Writ Petitions in relation to 34 acres and 3 guntas of Inam land in Bangalore District which was allotted by the State Government to an association of teachers for construction of houses and for which the Bangalore Development Authority has sanctioned a lay out plan. The Bangalore Development Authority has filed Civil Appeal No.3037/2007, the legal representatives of Inamdars have filed Civil Appeal No.3038/2007, the Teachers' Colony Residents



Association has filed Civil Appeal No.3049/2007 and several owners of the house sites have filed the remaining Civil Appeals.

**Facts**

3. The relevant facts briefly are that the Mysore (Personal & Miscellaneous) Inam Abolition Act, 1954 (for short 'the Inam Abolition Act') was enacted for abolition of personal Inams and other miscellaneous Inams in the State of Mysore, except Bellari District. On the Inam Abolition Act coming into force on 1.2.1959, all rights, title and interests vested in the Inamdars ceased and vested absolutely in the State of Mysore free from all encumbrances. Every Inamdar, however, was entitled to be registered as an occupant of land and could make an application before the Special Deputy Commissioner, Inam Abolition, for such registration as an occupant.

4. Sreenivasa Rao and Babu Rao, two Inamdars, filed applications for registration as occupants in respect of some lands in Survey Nos. 45 and 47 of Jakkasandra village, Bangalore South Taluk. When these applications were pending before the Special Deputy Commissioner, Kendra Upadhyayara Sangha (for short 'the Sangha'), an association of teachers, applied for grant of land for house sites to its members and the Special Deputy Commissioner, Bangalore District, proposed grant of land measuring 34 acres 3 guntas in Survey Nos. 45 and 47 of Jakkasandra village in favour of the Sangha. The Divisional Commissioner, Bangalore, while recommending the proposal of the Special Deputy Commissioner, Bangalore District, for grant of the land in favour of the Sangha, reported that the land in question was a Devadaya Inam Land in respect of which applications for occupancy rights were still pending settlement before the Special Deputy Commissioner, Inam Abolition. The Government of Karnataka in the Revenue Department by an order dated 15.6.1979 accorded sanction for grant of the land measuring 34 acres 3 guntas out of Survey Nos.45 and 47 of Jakkasandra village in favour of the General

Secretary of the Sangha for providing house sites to the Members of the Sangha subject to the decision in the dispute pending before the Special Deputy Commissioner, Inam Abolition. The Government also fixed a price of Rs.10,000/- per acre amounting to Rs.3,40,750/- for grant of the land and a conversion fine of Rs.4,000/- per acre in its order dated 15.06.1979 and the amounts were deposited by the Sangha.

5. On 4.8.1979, Sreenivasa Rao filed O.S. No.687/1979 in the Civil Court, Bangalore, questioning the grant made by the State Government in favour of the Sangha and praying for a decree of permanent injunction against the Sangha in respect of the land. On 1.11.1980, however, Sreenivasa Rao and Babu Rao entered into an agreement with the Sangha to withdraw the suit on receipt of Rs.2,000/- per acre in respect of 34 acres and 3 guntas of land in addition to the amount of Rs.3,40,750/- deposited by the Sangha towards the price of the entire land with the Government. Accordingly, on 8.11.1980 Sreenivasa Rao filed a memo in the Court saying that he does not want to press O.S. No.687/1979 as the suit has been settled out of court and on 10.11.1980 the Principal Munsif, Bangalore, dismissed the suit as not pressed.

6. In the meanwhile, the Karnataka Inam Abolition Laws (Amendment Act) 1979 amended the Inam Abolition Act providing that the Tribunal constituted under Section 48 of the Karnataka Land Reforms Act, 1961 (for short 'the Tribunal') instead of the Special Deputy Commissioner, Inam Abolition, will decide the claims for occupancy rights under the Inam Abolition Act. Thereafter, the Tribunal by its order dated 23.6.1982 passed in Case No. I.R.F. INA 419/1979-80 decided the claims of Sreenivasa Rao and Babu Rao for occupancy rights in respect of the land and ordered the confirmation of the occupancy rights in the suit land in favour of Sreenivasa Rao and Babu Rao jointly. Pursuant to the order dated 26.6.1982 of the Tribunal, Sreenivasa Rao and Babu Rao withdrew the amount of Rs.3,40,750/- deposited with the Government by the



Sangha. During the years 1982 to 1990, the Sangha got the layout plan of the land of 34 acres 3 guntas allotted to the Sangha sanctioned from the Bangalore Development Authority (for short the 'BDA') and allotted sites to its members and the members of the Sangha built houses on some of these sites and some members also transferred their house sites to others.

7. In the year 1990, however, Nagaraj, Venkojirao and Narhari, the legal representatives of Sreenivasa Rao filed W.P. No.11412/1990 in the Karnataka High Court challenging the order dated 15.6.1979 of the State Government of Karnataka granting the land in favour of the Sangha. On 8.7.1992, the legal representatives of Sreenivas Rao, namely, Nagaraj, Venkojirao and Narhari also filed the suit O.S. No.4349/1992 for declaring the grant of the aforesaid land in favour of the Sangha as null and void and for declaring all acts of the BDA sanctioning the layout in respect of the suit land in favour of the Sangha as illegal and for delivery of vacant possession of the suit land to them. On 17.6.1995, the three legal representatives of Sreenivasa Rao filed a memo in the Court of Additional Civil Judge, Bangalore, for withdrawal of the suit O.S. No.4349/1992 and on 24.9.1995 the suit was dismissed as withdrawn by the Court. On 28.6.1996, W.P. No. 11412/1990 was dismissed by the learned Single Judge of the Karnataka High Court. Nagaraj, Venkojirao and Narhari, however, filed Writ Appeal No.7574/1996 against the order passed by the learned Single Judge but the Division Bench of the Karnataka High Court by its order dated 15.9.1998 after deciding various issues raised by the parties dismissed the writ appeal. Nagaraj and Narhari then filed SLP (C) No.2833/1999 against the order dated 15.9.1998 passed by the Division Bench before this Court and on 9.4.1999 this Court, without issuing notice in the SLP and while disposing of the SLP, made observations that if the proceedings pending before the Special Deputy Commissioner with regard to the claim of Inamdars have ended in favour of the petitioners who have filed the SLP, it will be open to them to approach the State Government for modification of the order

granting land to the Sangha. The Teachers' Colony Residents Association (for short the 'Association') which was impleaded as respondent No.5 in SLP(C) 2833/1999 filed an application before this Court for recalling the order dated 9.4.1999, but this Court in its order dated 28.8.2000 in SLP(C) 2833/1999 observed that there was nothing adverse to respondent No.5-Society and accordingly dismissed the application for recalling.

8. Thereafter, on 6.8.2002 the State Government of Karnataka directed the Special Commissioner to acquire 14 sites in the layout developed by the Association with a further direction to the Special Deputy Commissioner to allot 14 sites to the family members of the Inamdars. The owners of the 14 sites filed W.P. Nos.32462-473/2002 in the Karnataka High Court, challenging the order dated 6.8.2002 of the State Government and by an order dated 28.11.2002 the learned Single Judge of the High Court allowed the Writ Petitions and remitted the matter to the State Government with the direction to comply with the order dated 9.4.1999 of this Court after hearing the petitioners and the respondents in the writ petitions and any other person interested in the matter. The legal representatives of the Inamdars also filed Writ Petition Nos.39046-48/2002 seeking deletion of a condition of the grant made in their favour, but on 9.1.2003 they withdrew the writ petitions as not pressed. The State Government of Karnataka by its order dated 10.2.2003 then directed the Special Deputy Commissioner to stop construction on the land in dispute till disposal of the final proceedings and this order dated 10.2.2003 was challenged before the Karnataka High Court in W.P. No.8551/2003, but by an order dated 6.3.2003 the High Court while dismissing the writ petitions directed the State Government to decide the matter within two months. The Special Deputy Commissioner then submitted his report to the Statement Government on 28.5.2003 and when the State Government did not pass any order in compliance of the order of this Court in SLP(C) 2833/1999, the Inamdars filed I.A. No.3 in the aforesaid SLP alleging contempt and this Court issued



notice in the I.A. on 8.9.2003.

9. The Minister, Revenue, Government of Karnataka, then passed the order on 22.12.2003 directing that :

(a) The vacant civic amenity sites to an extent of 2 acres 34 guntas available be handed over to the Inamdars free of cost.

(b) The land which is utilized by the BDA for formation of the ring road has to be acquired by the BDA and the compensation paid as this was private property.

(c) The vacant 182 sites which were available as on the day of the inspection by the Special Deputy Commissioner, Bangalore, on 28.5.2003 would be transferred to the Inamdars or if the same was not available on date, compensation in lieu of it from Sangha be paid to the Inamdars.

(d) The Government will examine to allot 20 acres of land in Survey No.148 of Kudlu village of Jigani Hobli, Anekal Taluk, to compensate for the losses.

10. This order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, was challenged before the Karnataka High Court by the BDA in W.P. No.15614 of 2004, the Sangha in W.P. No.26218 of 2004, the Teachers' Colony Residents Association in W.P. No.7332 of 2004 and different owners of house sites in W.P. Nos.20331, 10303, 12024, 12094, 14771, 14858, 16833, 17883, 20678, 22145, 25372, 32203, 36796 of 2004 and 21620 of 2005. The writ petitions were heard analogously and decided by a common judgment delivered by a Division Bench of the Karnataka High Court on 22.12.2006. The legal representatives of the Inamdars filed Review Petition No.107/2007 against the common judgment dated 22.12.2006 of the Division Bench of the Karnataka High Court but the same was dismissed on 19.04.2007.

**Findings in the impugned Judgment of the High Court**

11. In the impugned judgment dated 22.12.2006, the High Court has recorded the following findings and conclusions:

(i) The 34 acres 3 guntas of land in Survey Nos. 45 and 47 of Jakkasandra village, Bangalore South Taluk, did not vest in the Government on 15.6.1979 because the applications of the Inamdars for registration as occupants in respect of the land under in Sections 9 and 10 of the Inam Abolition Act were pending before the Special Deputy Commissioner and therefore the State Government had no power to pass the order dated 15.6.1979 according sanction for grant of the land in favour of the Sangha and the Minister, Revenue, Government of Karnataka, was justified in passing the order dated 22.12.2003 cancelling the grant in favour of the Sangha and ordering resumption and restoration of 182 house sites in favour of the Inamdars pursuant to the order dated 9.4.1999 of this Court.

(ii) The order dated 15.6.1979 of the State Government sanctioning the grant of the land in favour of the Sangha for allotment of house sites to its members was void ab initio in law as Sections 79-A, 79-B and 63(7) of the Karnataka Land Reforms Act provided for allotment of land only for agricultural purposes and the rights given under the provisions of the Act to Inamdars in respect of land in question could not be whittled down by the State Government in exercise of its power under the Karnataka Land Grant Rules, 1969.

(iii) The Agreement executed by the Inamdars on 1.11.1980 in favour of the Sangha when the claim of the Inamdars for registration had not been



decided by the Tribunal was not legal and was void and being an unregistered agreement could not affect the rights of the Inamdars to immovable property.

(iv) The orders passed by the Karnataka High Court in the earlier proceedings in W.P. No.11412/1990 and W.A. No.7574/1996 do not operate as res judicata as the case of the Inamdars with reference to the provisions of the Inam Abolition Act and law laid down by this Court on various aspects were not considered in the earlier writ petitions and writ appeal and the decisions rendered by the Division Bench of the Karnataka High Court in W.A. No.7574/1996 was per incurium.

(v) The writ petitions filed by the allottees/purchasers of the house sites against the order passed by the Minister, Revenue, Government of Karnataka dated 22.12.2003 directing the Deputy Commissioner to resume and restore 182 sites from the land earlier sanctioned in favour of the Sangha to the Inamdars were maintainable as the order entailed serious consequences for the allottees/purchasers of the sites.

(vi) The order dated 22.12.2003 passed by the Minister, Revenue, Government of Karnataka, pursuant to the order of this Court dated 9.4.1999 in SLP(C) 2833 of 1999 canceling the grant in favour of the Sangha and directing the Deputy Commissioner of the district to resume and restore the lands to the extent of 182 sites which were vacant was legal and valid.

(vii) In the facts and circumstances of the case, particularly, when the members of the Sangha have already constructed houses in the house sites and

have been residing for more than two decades, the reliefs claimed in the writ petitions should be moulded. The High Court accordingly quashed the direction in the order dated 22.12.2003 of Minister, Revenue, Government of Karnataka for resumption and restoration of 182 sites in favour of the Inamdars and directed the Sangha to allot to each legal representative of the Inamdars a site measuring 40 X 60 feet in the same layout and in lieu of the 182 sites, pay compensation for each site @ of Rs.1,00,000/- for 30 X 40 feet, Rs.1,75,000/- for 40 X 60 feet or proportional amount for any other lesser or higher dimension sites to the legal representatives of the Inamdars equally. The High Court further directed that until allotments of the sites and payment of the compensation are made by the Sangha, no construction shall be put up on the vacant sites and status quo shall be maintained. The High Court further held that the legal representatives of the Inamdars are entitled to receive compensation in respect of the land acquired by the BDA for formation of the road, if any. The High Court also quashed the direction in the order dated 22.12.2003 to examine whether further 20 acres of land can be allotted to the Inamdars.

**Contentions of the parties before this Court**

12. Mr. Dushyant Dave, learned senior counsel appearing for the legal representatives of the Inamdars (the appellants in Civil Appeal No.3038 of 2007), referred to sub-Section (1) of Section 3 of the Inam Abolition Act which states the consequences of a notification under sub-Section (4) of Section 1 in respect of any inam and submitted that the expression "save as otherwise expressly provided in the Act" in this provision saves the right of Inamdar under Section 9 of



the Act to be registered as an occupant in respect of the land from the consequences of vesting even after a notification was issued under sub-section (4) of Section 1 of the Act. He submitted that clause (c) of sub-section (1) of Section 3 makes this position further clear by stating that upon an issue of a notification under sub-section (4) of Section 1 of the Act in respect of any inam, the Inamdar shall cease to have any interest in the inam "other than the interests expressly saved by or under the provisions" of the Act. He contended that clause (a) of sub-Section (3) of Section 10 of the Inam Abolition Act further provides that no person shall be entitled to be registered as an occupant under Section 9 unless the claimant makes an application to the Tribunal (earlier the Special Deputy Commissioner) within three years from the date of vesting of the inam concerned or 31.12.1999 whichever was later and clause (b) of sub-section (3) of Section 10 provides that where no application is made within a period specified in clause (a), the right of any person to be registered as an occupant shall stand extinguished and the land shall vest in the State absolutely and such land shall be disposed of in accordance with the rules relating to grant of land. He submitted that the legislative intent of the Inam Abolition Act, therefore, was that so long as the application of Inamdar to be registered as an occupant has been filed within the period specified in clause (a) of sub-section (3) of Section 10 of the Act and such application is pending before the Tribunal (earlier the Special Deputy Commissioner) the land in respect of the inam does not vest in the State and such land cannot be disposed of in accordance with the rules relating to grant of land. He submitted that the High Court was thus right in coming to the conclusion in the impugned order that the State Government had no power to pass the order dated 15.6.1979 according sanction for grant of land in favour of the Sangha, because on 15.6.1979 the application of the Inamdars to be registered as occupants in respect of the land was still pending before the Special Deputy Commissioner. Mr. Dave submitted that a reading of the order dated 15.6.1979 of the State Government sanctioning the grant

of land in favour of the Sangha was "subject to" the pending proceedings of the Inamdars for grant of occupancy rights and therefore once the Tribunal passed the order dated 23.6.1982 in favour of the Inamdars confirming their occupancy rights, the Inamdars were entitled to become occupants of the land and the order dated 15.6.1979 of the State Government was liable to be cancelled. He submitted that since the Sangha did not challenge the order of the Tribunal, the Sangha or its members cannot, at this stage, question the right, title and interest of the Inamdars to the land.

13. Mr. Dave next submitted that the High Court was also right in coming to the conclusion in the impugned order that the grant of land by the State Government by the order dated 15.6.1979 in favour of the Sangha for allotment of house sites to its members was void ab initio as the land could only be allotted for agricultural purposes and not for house sites under the Karnataka Land Reforms Act (for short 'the Land Reforms Act'. He also submitted that Section 79-A of the Land Reforms Act prohibits acquisition of any land by any person or a family or a joint family which has an assured annual income of not less than Rs.2 lakhs from sources other than agricultural lands. He further submitted that Section 79-B of the Land Reforms Act prohibits any person other than the person cultivating land personally from holding any land and Section 80 of the Act further prohibits transfer of land to non-agriculturists. He submitted that Section 81 of the Land Reforms Act, however, provides that nothing in Section 79-A or Section 79-B or Section 80 of the Act shall apply to the transactions or to the institutions and companies mentioned therein, but this Section does not exempt the grant of the land made in favour of the Sangha. He argued that the order dated 15.6.1979 of the State Government making the grant or land in favour of the Sangha was, therefore, hit by the statutory provisions of Sections 79-A, 79-B and 80 of the Land Reforms Act.

14. Mr. Dave further submitted that the finding of the High



Court in the impugned order that the agreement executed by the Inamdars in favour of the Sangha was not legal and void and did not affect the rights of the Inamdars in respect of the immovable property was also correct. He argued that under Section 23 of the Contract Act, an agreement which is opposed to public policy is void and the agreement dated 1.11.1980 is contrary to the public policy laid down in Sections 9 and 10 of the Act conferring a statutory right of occupancy on the Inamdar in respect of the inam land. He cited the decision of this Court in *Murlidhar Aggarwal and Another v. State of Uttar Pradesh and Others* [(1974) 2 SCC 472] in which Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 was held to be based on public policy. He also relied on the decision of this Court in *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde and Another* [(1995) Supp. (2) SCC 549] in which an agreement entered into with a tribal for purchase of 5 acres of land without prior permission of the competent authority was held to be contrary to public policy laid down in Article 46 of the Constitution of India and as void under Section 23 of the Contract Act. He also referred to the decision of this Court in *Papaiah v. State of Karnataka and Others* [(1996) 10 SCC 533] for the proposition that there can be no estoppel against a statute. He submitted that in *Jayamma v. Maria Bai Dead by proposed L.Rs. and Another* [(2004) 7 SCC 459], this Court has held that when an assignment or transfer is made in contravention of statutory provisions, the consequence whereof would be that the same is invalid and thus opposed to public policy and the same shall attract the provisions of Section 23 of the Indian Contract Act.

15. Mr. Dave submitted that Section 17 of the Registration Act provides that any non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards to or in immovable property has to be registered compulsorily. He submitted that since the agreement dated 1.11.1980 executed by the Inamdars in favour of the Sangha

is not registered, it cannot affect the right, title and interest of the Inamdars in respect of the land. In support of this proposition, he relied on *Bhoop Singh v. Ram Singh Major and Others* [(1995) 5 SCC 709] and *Appineni Vidyasagar v. State of A.P. and Others* [(2004) 11 SCC 186].

16. Mr. Dave also supported the conclusion of the High Court in the impugned order that the orders passed by the Karnataka High Court in earlier proceedings in W.P. No.11412/1990 and W.A. No.7574/1996 do not operate as *res judicata.* He submitted that the question of res judicata does not arise because the order dated 15.6.1979 of the State Government sanctioning the land in favour of the Sangha was *void ab initio.* He cited the decisions of this Court in *Mathura Prasad Bajoo Jaiswal and Others. v. Dossibai N.B. Jeejeebhoy* [(1970) 1 SCC 613] and *Smt. Bismillah v. Janeshwar Prasad and Others* [(1990) 1 SCC 207] in which it has been held that an earlier decision will not be res judicata when the earlier decision declares valid a transaction which is prohibited by law. He submitted that in any case the order dated 15.9.1998 passed by the Division Bench of the Karnataka High Court in W.A. No.7574/1996 was challenged before this Court by the legal representatives of the Inamdars in SLP(C) No.2833/1999 and by an order dated 9.4.1999 passed in the SLP, this Court permitted the legal representatives of the Inamdars to apply to the State Government for modification of the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha. He argued that since there was a merger of the order passed by the Division Bench of the Karnataka High Court in W.A. No.7574/1996 in the order dated 9.4.1999 passed by this Court in SLP(C) 2833/1999, the order passed by the Division Bench of the Karnataka High Court cannot operate as res judicata. In support of this submission he relied on *Union of India v. All India Services Pensioners' Association and Another* [(1988) 2 SCC 580] and *Kunhayammed and Others v. State of Kerala and Another* [(2000) 6 SCC 359].



17. Mr. Dave submitted that in any case this Court has held in *State of Haryana and Others v. M.P. Mohla* [(2007) 1 SCC 457] that if a subsequent cause of action arises in the matter of implementation of a judgment and order, the fresh cause of action can be subjected to a legal challenge. He also cited the decision of this Court in *Dharam Dutt and Others v. Union of India and Others* [(2004) 1 SCC 712] in which it was held that a challenge to Ordinance withdrawn does not operate as res judicata to challenge the Act. He also relied on *Ashok Leyland Ltd. v. State of T.N. and Another* [(2004) 3 SCC 1] for the proposition that if a jurisdictional question is wrongly decided, the principle of res judicata would not be attracted.

18. Mr. Dave vehemently contended that the High Court having recorded its findings and conclusions in favour of the representatives of the Inamdars on all points should not have denied the reliefs sought by the legal representatives of the Inamdars and should not have quashed the directions in the order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, for resumption and restoration of 182 sites in favour of the Inamdars. He submitted that in this appeal this Court should restore the order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, for resumption and restoration of 182 sites in favour of the Inamdars and for examination to allot 20 acres of land in favour of the Inamdars and should set aside the order passed by the Division Bench of the Karnataka High Court.

19. Mr. P.P. Rao, learned senior counsel appearing for the Teachers' Colony Residents Association (the appellants in Civil Appeal Nos.3049/2007), on the other hand, submitted that Inamdars were only entitled to the occupancy price of Rs.10,000/- per acre amounting to Rs.3,40,750/- for the entire land measuring 34 acres 3 guntas which was given as grant by the State Government to the Sangha and they have in fact withdrawn the amount of Rs. 3,40,750/-. He submitted that in addition to the price of Rs.10,000/- per acre, the Inamdars

agreed by the agreement dated 1.11.1980 to take from the Sangha a further amount of Rs.2,000/- per acre and on receipt of Rs.2,000/- per acre withdrew O.S. No.687/1979 from the Court of Principal Munsif, Bangalore, in which the grant of land made by the State Government in favour of the Sangha by order dated 15.6.1979 had been challenged. He submitted that after the suit of the Inamdars were dismissed as withdrawn, the right to challenge the grant made in favour of the Sangha by the State Government by order dated 15.6.1979 did not survive and, therefore, the legal representatives of the Inamdars had no locus standi to approach the Court again to challenge the grant of land made by the State Government in favour of the Sangha. He submitted that after the Inamdars have opted to receive the price or compensation in lieu of the land, their legal representatives cannot claim occupancy rights in respect of the land now granted to the Sangha by the order dated 15.6.1979 of the State Government.

20. Mr. Rao next submitted that by the order dated 9.4.1999 passed by this Court in SLP (C) No.2833/1999 no special leave to appeal against the order dated 15.9.1998 of the Division Bench in W.A. No.7574/1996 was granted and, therefore, the order of the Division Bench of the Karnataka High Court, which was challenged by the SLP, was not disturbed by the ex-parte order dated 9.4.1999 of this Court. He submitted that this is also clear from the order dated 28.8.2000 passed in I.A. No.1 in which this Court has observed that the Court did not find anything adverse to the respondent-society in the order dated 9.4.1999 and with this observation dismissed I.A. No.1 which was filed by the respondent-society to recall the order dated 9.4.1999. He cited *Taherakhatoon (D) by L.Rs. v. Salambin Mohammad* [(1999) 2 SCC 635] in which this Court has taken a view that even where SLP is admitted and special leave is granted, the appellant has to show special circumstances to justify this Court's interference. He relied on *Kunhayammed and Others v. State of Kerala and Another* [(2000) 6 SCC 359] in which this Court has further held that an



order refusing special leave to appeal does not stand substituted in place of the order under challenge and, therefore, an order refusing special leave to appeal does not attract the doctrine of merger. He vehemently argued that the judgment of the Division Bench of the Karnataka High Court in W.A. No.7574/1996 did not get merged in the order dated 9.4.1999 of this Court in the SLP in which the judgment of the Division Bench of Karnataka High Court was under challenge. He agued that as no special leave was granted by this Court against the said order of the Division Bench of the Karnataka High Court in W.A. No.7574/1996, the contention of Mr. Dave that the judgment of the Division Bench of the Karnataka High Court in W.A. No.7574/1996 got merged with the order dated 9.4.1999, is misconceived.

21. Mr. Rao next submitted that the judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in W.A. No.7574/1996 had, therefore, become final and binding on the parties and the rights which had accrued in favour of the Sangha and its members to occupy the land granted to its members by the Sangha under the judgment dated 15.9.1998 could not be taken away by an executive order and yet the Minister, Revenue, Government of Karnataka, passed orders on 22.12.2003 canceling the grant of land made in favour of the Sangha and issuing directions for resumption and restoration of land to the extent of 182 sites in favour of the legal representatives of the Inamdars. Mr. Rao relied on the decision of this Court in *Madan Mohan Pathak and Another v. Union of India and Others* [(1978) 2 SCC 50] in which the Life Insurance Corporation claimed that it was absolved of its obligation to carry out the writ of mandamus issued by the Court because of the provisions of an amending Act but this Court did not accept this plea of the Life Insurance Corporation and held that there was nothing in the amending Act which set at naught the effect of the judgment of the Calcutta High Court or the binding character of the writ of mandamus issued against the Life Insurance Corporation. He also cited *Virender Singh*

*Hooda and Others v. State of Haryana and Another* [(2004) 12 SCC 588] in which this Court has held that the legislature can change the basis on which a decision is given by the Court but without changing the basis of a decision given by the Court cannot set aside the individual decision of the Court inter parties because this will amount to exercise of the judicial power by the legislature which is against the concept of separation of power. Learned counsel appearing for the owners of the house sites in the Civil Appeals and the Special Leave Petitions adopted all the arguments of Mr. Rao.

22. Mr. S.S. Javali, learned senior counsel appearing for the BDA (the appellant in Civil Appeal No.3037 of 2007) submitted that after the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha, a private layout plan was submitted by the Sangha in respect of the land and the BDA sanctioned the private layout plan subject to conditions inter alia that the roads, civic amenity sites, parks and all connections such as underground drainage, water supply lines, shall vest with the BDA free of cost. He referred to sub-section (5) of Section 32 of the Bangalore Development Authority Act, 1976 to show that the BDA may call upon an applicant for layout plan to agree to transfer the ownership of the roads, drains water supply lines and open space laid out to the BDA permanently without claiming any compensation therefor. He submitted that the road, civic amenity sites, parks in the Survey Nos.45 and 47 in Jakkasandra village had, therefore, become the property of the BDA and yet by the order dated 22.12.2003 passed by the Minister, Revenue, Government of Karnataka, the vacant civic amenity sites to an extent of 2 acres 34 guntas of the layout plan were directed to be handed over to the Inamdars free of cost and the land utilized by the BDA for formation of the Ring Road as per the sanctioned layout plan was directed to be acquired by the BDA and compensation paid to the Inamdars as if such land was the private property of the Inamdars. He submitted that the BDA, therefore, filed Writ Petition No.15614/



2004 before the Karnataka High Court challenging the order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, directing handing over of the civic amenity sites to the Inamdars free of cost and directing acquisition of the land forming the Ring Road and payment of compensation to the Inamdars for such acquisition, but these directions in the order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, have not been set aside by the Division Bench of the Karnataka High Court in the impugned judgment.

23. Mr. Javali referred to earlier judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in W.A. No.7574/1996 to show that the Inamdars had filed petitions before the BDA saying that they had entered into an agreement with the Sangha and waived their right to challenge the grant of land by the State Government in favour of the Sangha and had also agreed not to take or prosecute legal proceedings in respect of the disputed land and, therefore, had acquiesced to the grant in favour of the Sangha. He also referred to the aforesaid order of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 to show that the Inamdars had agreed to carry out some work in the land by the Sangha to co-operate with the Sangha for removal of sheds which they claimed to be belonging to them. He submitted that considering all these aspects, the BDA went ahead and sanctioned the private layout plan of the Sangha.

24. Mr. Javali submitted that sub-section (2) of Section 38-A of the Bangalore Development Authority Act, 1976 prohibits the BDA to sell or dispose of any area reserved for public parks and playgrounds and civic amenities for any other purpose and it further provides that any disposition so made by the BDA shall be null and void. He submitted that in *Bangalore Medical Trust v. B.S. Muddappa and Others* [(1991) 4 SCC 54], this Court interpreting Section 38-A of the Act held that the legislative intent of Section 38-A of the aforesaid Act was to prevent the diversion of the user of area reserved for public parks or civic

amenities or for any other purpose. He submitted that under Section 65 of the Bangalore Development Authority Act, 1976, the Government has the power to give such directions to the authority as in its opinion are necessary or expedient for carrying out the purposes of the Act but in exercise of such power the State Government cannot direct the BDA to hand over the properties of the BDA free of cost to the Inamdars or to acquire the roads which were already owned by the BDA and pay compensation to the Inamdars. He relied on *Bangalore Development Authority and Others v. R. Hanumaiah and Others* [(2005) 12 SCC 508] in which this Court has held that the power of the Government under Section 65 of the Bangalore Development Authority Act, 1976 is not unrestricted and the directions which can be issued are those which are to carry out the objective of the Act and not those which are contrary to the Act and further held that the directions issued by the Chief Minister to release the lands were destructive of the purposes of the Act and the purposes for which the BDA was created. He submitted that the directions in the order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, to handover the vacant civil amenities sites to the Inamdars and to acquire the land forming the Ring Road, therefore are contrary and destructive of the objects of the Act and cannot be sustained.

25. Mr. Sanjay Hegde, learned counsel appearing for State of Karnataka, supported the order dated 22.12.2003 passed by the Minister, Revenue, Government of Karnataka, by referring to the reasons indicated in the order itself. He further submitted that this order was passed by the Minister, Revenue, Government of Karnataka, because of the pressure of contempt put by the legal representatives of the Inamdars on the Government saying that the order dated 9.4.1999 of this Court in SLP (C) No.2833/1999 was not being complied with by the State Government. He submitted that Minister, Revenue, Government of Karnataka, has taken an equitable view of the entire matter and has not disturbed those members of the



Teachers' Association or Sangha who have already utilized the house sites for construction of the houses and has directed resumption and restoration of only the 182 vacant sites in the land in favour of the Inamdars and cancelled the earlier grant of land in respect of these 182 sites in favour of the Sangha in exercise of powers under Rule 25 of the Karnataka Land Grants Rules, 1969.

**Our conclusions with reasons**

26. The order dated 15.6.1979 of the State Government sanctioning the grant of 34 acres 3 guntas of land in favour of the Sangha was earlier challenged before the Karnataka High Court by the legal representatives of the Inamdars first before the learned Single Judge in W.P. No. 11412/1990 and on dismissal of the writ petition by learned Single Judge, before the Division Bench in W.A. No.7574/1996 and the Division Bench dismissed the writ appeal of the legal representatives of the Inamdars by its judgment dated 15.9.1998. We also find that some of the contentions raised before us were also raised before the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 and the Division Bench of the Karnataka High Court has recorded its findings on the contentions in the judgment dated 15.9.1998. Hence, the main question that we will have to decide is whether findings recorded by the Division Bench in the judgment dated 15.9.1998 in Writ Appeal No.7574/1996 had become final and binding on the parties, namely, the legal representatives of the Inamdars, the State of Karnatka and the Sangha or Teachers' Colony Residents Association.

27. On a reading of the judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996, it appears that contentions were raised on behalf of the legal representatives of the Inamdars that so long as the claim petition for registration of the occupancy rights under Sections 9 and 10 of the Inam Abolition Act was pending

decision before the Special Deputy Commissioner, the State Government had no power to sanction grant of the land measuring 34 acres 3 guntas in Survey Nos. 45 and 47 of Jakkasandra village in favour of the Sangha and that in any case the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha was subject to claim of the Inamdars to occupancy rights in respect of the inam land. In the judgment dated 15.9.1998, the Division Bench of the Karnataka High Court held:

> "In the order it is specifically mentioned that the land in question is required for public purpose and if there are claims, they are eligible for occupancy certificate by price payable for the land. Therefore, it is manifestly clear that in case the rights of the claimants/inamdars are upheld, they are entitled for price payable for the land. Though the grant is subject to the order of the grant in favour of inamdars, it is made clear that the grant order in favour of Respondent No.3 that the Inamdars are entitled for the price of the land. Therefore, on this count, the order cannot be set back."

Thus, the Division Bench of the Karnataka High Court in the judgment dated 15.9.1998 in Writ Appeal No.7574/1996 negatived the contention that the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha was bad because the claim of the Inamdars for registration under Sections 9 and 10 of the Inam Abolition Act was pending before the Special Deputy Commissioner and instead held that in case the claims of the Inamdars to occupancy in respect of the inam land were upheld, they would be entitled for the price payable for the land.

28. On a reading of the judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996, we further find that it was contended on behalf of the Sangha that the Inamdars have waived their occupancy rights in respect of the inam land by entering into the agreement



dated 1.11.1980 and by receiving the amounts towards the land price apart from the compensation of Rs.3,40,750/- and the Division Bench of the Karnataka High Court accepted the contentions raised on behalf of the Sangha and recorded the following findings:

> "The above two paras in the Agreement make it clear that the Inamdars have agreed not to claim any right, not to prosecute with any legal proceedings and the agreement further shows that they agreed that it is open to Respondent No.3 - Society Members to enjoy the lands as they like and it is also stated that the existing sheds can be removed by Respondent No.3 - Society itself, for which they will co-operate and they also agreed to withdraw the suit filed in O.S. No.687/1979 pending on the file of the II Munsiff's Court, Bangalore. In pursuance of the agreement, they have filed a petition to withdraw the suit and the suit came to be withdrawn as settled out of court by an order dated 3.11.1980. Thus, the Inamdars have acted upon the agreement by withdrawing the suit voluntarily. It is also not disputed that the Inamdars have received an amount of Rs.2,000/- per acre in one installment and another sum of Rs.49,000/- and thus, the conduct of the Inamdars shows that they have agreed not to prosecute the legal proceedings and they relinquish their right in the land and then they permitted respondent No.3 - Society to enjoy the land as they like and acted on the said agreement, they have withdrawn the suit and received the amount. Thus, the Inamdars have waived their right in the land."

29. It is thus clear that the Division Bench of the Karnataka High Court decided three issues in its judgment dated 15.9.1998 in Writ Appeal No.7574/1996: first, that the State Government had the power to sanction grant of the land in Survey Nos.45 and 47 in Jakkasandra village in favour of the Sangha by the order dated 15.6.1979 notwithstanding the pendency of the claim of the Inamdars to be registered as

occupants of the land before the Special Deputy Commissioner, Inam Abolition, and therefore the order dated 15.6.1979 of the State Government of Karnatka sanctioning the land in favour of the Sangha cannot held to be bad; second, in the event the claim of the Inamdars to be registered as occupants of the land was subsequently allowed by the Special Deputy Commissioner or by the Tribunal, the Inamdars were not entitled to restoration of the land from the Sanngha but were entitled for the price of the land; third, the Inamdars had waived their right of occupation of the land by the agreement dated 1.11.1980 and by withdrawing the suit O.S. No.687/1979 in which they challenged the order dated 15.6.1979 of the State Government of Karnataka, sanctioning the grant of land in favour of the Sangha and by receiving Rs.2,000/- per acre and Rs.49,000/- in addition to the price of Rs.10,000/- per acre totaling to Rs.3,40,750/-.

30. The judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 was sought to be challenged by the legal representatives of the Inamdars before this Court in SLP (C) No.2833/1999, but this Court did not grant special leave to the legal representatives of the Inamdars to appeal and instead disposed of the SLP with the following order:

> "It appears from the order of grant made in favour of the respondent-society that it was made condition upon the outcome of the dispute which was pending then before the Special Deputy Commissioner for Abolition of Inam. We are now told that the said proceedings have resulted in favour of the petitioners. If that is so, it would be open to the petitioners to approach the State Government for modification of the order granting land to the respondent-society. If such application is made, the State Government shall dispose of the same within the period of three months from the receipt of the application. The Special Lave Petition is disposed of accordingly."



Thereafter, an I.A. was filed by the Teachers' Colony Residents Association which was the fifth respondent in the SLP and this Court dismissed the I.A. by order dated 28.8.2000 with the following order:

> "We do not find anything adverse to the fifth respondent society in the order of this Court dated 9.4.1999 so as to recall the same. I.A. No.1 is therefore dismissed."

31. On interpreting the two orders dated 9.4.1999 and 28.8.2000 of this Court, we have no doubt that the decisions on the three issues in the judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 were not disturbed by this Court in the SLP and, therefore, the decisions on the three issues of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 became final and binding on the parties, namely, the legal representatives of the Inamdars, the State Government and the Sangha and its members.

32. In *Kunhayammed and Others v. State of Kerala and Another* (supra), this Court considered the question whether there was any merger of the order under challenge in the event this Court refuses special leave to appeal against the order and R.C. Lahoti, J., as he then was, speaking for a Bench of three Judges summed up the conclusions of the Court in para 44 of the judgment on this question thus:

> "(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.
>
> (v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the

order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

Hence, an order refusing special leave to appeal does not stand substituted in place of order under challenge and all that it means is that this Court was not inclined to exercise its discretion so as to allow the appeal being filed. The aforesaid law laid down by this Court however makes it clear that if the order refusing leave to appeal makes a statement of law, such statement of law is declaration of law by this Court within the meaning of Article 141 of the Constitution of India and if the order records some finding other than the declaration of law such finding would bind the parties thereto and also the Court, Tribunal or Authority in any proceeding subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country.

33. Applying the law laid down by this Court in *Kunhayammed and Others v. State of Kerala and Another* (supra) to the facts of the present case, the judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996, which was challenged in SLP (C) No.2833/1999 before this Court, does not stand substituted by the order dated 9.4.1999 of this Court in the SLP because



this Court has not granted special leave to appeal against such judgment dated 15.9.1998 in Writ Appeal No.7574/1996 of the Division Bench of the Karnataka High Court. Further, the order dated 9.4.1999 of this Court in SLP (C) No.2833/1999 does not contain any statement of law which would amount to declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution of India. The order dated 9.4.1999 of this Court in SLP (C) No.2833/1999, however, has taken note of the condition in the order of grant made in favour of the Sangha that the grant was subject to the outcome of the dispute which was pending before the Special Deputy Commissioner, Inam Abolition, and has further taken note of the fact that the proceedings have resulted in favour of the legal representatives of the Inamdars and thereafter left it open to legal representatives of the Inamdars to approach the State Government for modification of the order granting land to the Sangha and directed the State Government to dispose of such application made on behalf of the legal representatives of the Inamdars within a period of three months from the receipt of the application. In the aforesaid order dated 9.4.1999 in SLP (C) No.2833/1999, this Court has therefore also not recorded any finding which would be binding on the legal representatives of the Inamdars, the State Government, the Sangha and its members, but has only granted liberty to the legal representatives of the Inamdars to approach the State Government for modification of the order granting land in favour of the Sangha and has given further direction to the State Government to dispose of such application within the period of three months from the receipt of the application of the legal representatives of the Inamdars. Hence, the contention raised on behalf of the legal representatives of the Inamdars before us that the judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 got merged in the order dated 9.4.1999 in SLP (C) No.2833/1999 and the findings on the three issues in the order dated 15.9.1998 in Writ Appeal No.7574/1996 did not operate as res

judicata and were not binding on the legal representatives of the Inamdars, the State Government, the Teachers' Colony Association or the Sangha and its members, is misconceived.

34. In the common judgment impugned in the present appeals, however, the High Court has taken a view that the orders passed by the Karnataka High Court in the earlier proceedings in W.P. No.11412/1990 and W.A. No.7574/1996 do not operate as res judicata as the case of the Inamdars with reference to the provisions of the Inam Abolition Act and the law laid down by this Court on various aspects were not considered in the earlier writ petitions and writ appeal and the decisions rendered by the Division Bench of the Karnataka High Court in W.A. No.7574/1996 were per incurium. The High Court has failed to appreciate that the principle of per incurium has relevance to the doctrine of precedents but has no application to the doctrine of res judicata. To quote Rankin, C.J. of the Calcutta High Court in *Tarini Charan Bhattacharjee and Others v. Kedar Nath Haldar* [AIR 1928 Calcutta 777 at 781]:

> "The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a Court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it 'conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party."



35. We now come to the argument of Mr. Dave that the order dated 15.6.1979 of the State Government sanctioning grant of land in favour of Sangha for house sites was void ab initio because of the prohibitions in Sections 79-A, 79-B and 80 of the Land Reforms Act and that if the Court holds that the order dated 15.6.1979 was void ab initio on this ground, the earlier decision dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 would not operate as res judicata. This argument of Mr. Dave is based on the observations in *Mathura Prasad Bajoo Jaiswal and Others. v. Dossibai N.B. Jeejeebhoy* (supra) that "when the earlier decision declares valid a transaction which is prohibited by law" it does not operate as *res judicata*. We find from a reading of the order dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 that a contention was raised on behalf of the legal representatives of the Inamdars that there was no power to grant land for house sites under the Karnataka Land Grants Rules, 1969 but the Division Bench of the Karnataka High Court negatived the said contention and held that under Rule 20 of the Karnatka Land Grants Rules, 1969, the State Government had the power to grant land to the Sangha for house sites. We do not find from the judgment of the Division Bench of the Karnataka High Court in Writ Appeal No. 7574/1996 that any contention was raised on behalf of the legal representatives of the Inamdars that grant of land in Survey Nos.45 and 47 of Jakkasandra village could not be sanctioned in favour of the Sangha for house sites because of the restrictions in Sections 79-A, 79-B and 80 of the Land Reforms Act. If this ground of attack had not been taken by the legal representatives of the Inamdars while challenging the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha, this contention could not be raised by them before the High Court in a subsequent proceeding because of the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure which has been applied to writ petitions. In *Direct Recruit Class II Engineering Officers'*

*Association v. State of Maharashtra and Others* [(1990) 2 SCC 715] a Constitution Bench of this Court observed at Page 741:

> "The decision in *Forward Construction Co. v. Prabhat Mandal (Regd.), Andheri* [(1986) 1 SCC 100] further clarified the position by holding that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case."

36. Nonetheless, as the Division Bench of the Karnataka High Court had not decided this question in the judgment dated 15.9.1998 in Writ Appeal No.7574/1996 and the High Court has decided this question in the impugned common judgment dated 22.12.2006, we think it necessary to examine this question in these Civil Appeals against the impugned common judgment dated 22.12.2006. We find that Chapter V of the Land Reforms Act is titled "Restrictions on holding on transfer of agricultural lands" and the language of Sections 79-A, 79-B and 80 shows that these provisions apply to only "agricultural lands". We also find from the provisions of sub- sections (2) and (7) of Section 95 of the Karnataka Land Revenue Act, 1964 (for short 'the Land Revenue Act') that the land held for agricultural purpose can be permitted to be diverted for other purposes on payment of fine. In the order dated 15.6.1979 of the State Government sanctioning the grant of the land in favour of the Sangha, it is clearly stipulated that the Sangha shall pay such conversion fine to be levied as per the rules made under the Revenue Act. The Karnataka Land Grants Rules, 1969 made under Section 179 of the Land Revenue Act and in particular Rule 18 has also made elaborate provisions for grant of



building sites on payment of price. Justice G.P. Singh in Principles of Statutory Interpretation, 12th Edition at page 298 says:

> ".....a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in pari materia, i.e. statutes dealing with the same subject-matter or forming part of the same system."

Sections 79-A, 79-B and 80 of the Land Reforms Act, therefore, have to be read together with Section 95 of the Land Revenue Act as all these provisions deal the same subject matter, namely, agricultural lands. We therefore hold that the law permitted the grant of the agricultural land in favour of the Sangha for house sites on payment of conversion fine and the grant made by the State Government in favour of the Sangha by the order dated 15.6.1979 was not void ab initio on this count.

37. Mr. Dave, however, is right in his submission that res judicata will not operate as a bar for entertaining a fresh cause of action and in the present case the order dated 22.12.2003 passed by the Minister, Revenue, Government of Karnataka, gave rise to a fresh cause of action. But even where a fresh cause of action arises, issues between the parties which have been decided cannot be re-opened before the Court for fresh adjudication between the same parties. In *State of Haryana and others v. M.P. Mohla* [(2007) 1 SCC 457] (supra) cited by Mr. Dave, this Court has held:

> "22. ..... The dispute between the parties has to be decided in accordance with law. What, however, cannot be denied or disputed is that a dispute between the parties once adjudicated must reach its logical conclusion. If a specific question which was not raised and which had not been decided by the High Court the same would not debar a party to agitate the same at an appropriate stage,

subject, of course, to the applicability of principles of res judicata or constructive res judicata.

23. It is also trite that if a subsequent cause of action has arisen in the matter of implementation of a judgment a fresh writ petition may be filed, as a fresh cause of action has arisen."

38. The result of our aforesaid discussion is that the findings of the Division Bench of the Karnataka High Court in the judgment dated 15.9.1998 in Writ Appeal No.7574/1996 that the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha was valid and that the Inamdars were only entitled to the price payable for the land when their claims for registration under Sections 9 and 10 of the Inam Abolition Act were allowed and that the Inamdars have waived their right of occupation in the land by entering into the agreement dated 1.11.1980 and by accepting the price of Rs.10,000/- per acre deposited by the Sangha and the additional amount paid by the Sangha were binding not only on the legal representatives of the Inamdars and the Sangha but also on the State Government. While deciding the application of the legal representatives of the Inamdars for modification of the order dated 15.6.1979 sanctioning the grant of land in favour of the Sangha, therefore, the State Government could not ignore these findings of the Division Bench of the Karnataka High Court in the judgment dated 15.9.1998 in Writ Appeal No.7574/1996. In the order dated 9.4.1999 of this Court in SLP(C) No.2833/1999 there was no mandamus to the State Government to modify or cancel the order dated 15.6.1979 of the State Government sanctioning the grant of land in favour of the Sangha, but there was only a direction to the State Government to consider the application of the legal representatives of the Inamdars for modification of the order dated 15.6.1979. In the instant case, however, the Minister, Revenue, Government of Karnataka, while considering the application of the Inamdars, ignored the findings of the Division Bench of the Karnataka High Court in the judgment dated



15.9.1998 in Writ Appeal No.7574/1996 and took the view in his order dated 22.12.2003 that on the competent authority granting occupancy right to the Inamdars by the order dated 23.6.1982, the Inamdars had become the rightful owners of the land and action would have to be taken to cancel the grant made in favour of the Sangha.

39. In *Madan Mohan Pathak and Another v. Union of India and Others* (supra), the Calcutta High Court in Writ Petition No. 371 of 1976 had delivered the judgment dated 21.5.1976 issuing a writ of mandamus directing the Life Insurance Corporation to pay annual cash bonus to Class III and Class IV employees for the year April 1, 1975 to March 31, 1976 along with their salary for the month of April, 1976. Against the said judgment of learned Single Judge of the Calcutta High Court, Letters Patent Appeal was filed but by the time Letters Patent Appeal came up for hearing, the Life Insurance Corporation (Modification of Settlement) Act, 1976 came into force and there was no provision in this Act absolving the Life Insurance Corporation from its obligation to carry out the writ of mandamus issued by the learned Single Judge of the Calcutta High Court. For some reason or the other, the Letters Patent Appeal against the judgment of the learned Single Judge was withdrawn by the Life Insurance Corporation. P.N. Bhagwati, J., as he then was, delivering the judgment on behalf of himself, Krishna Iyer and Desai, JJ. held that since the Life Insurance Corporation did not press the Letters Patent Appeal, the judgment of the learned Single Judge of the Calcutta High Court granting the writ of\ mandamus became final and binding on the parties and in these circumstances, the Life Insurance Corporation could not claim to be absolved from the obligation imposed by the judgment to carry out the writ of mandamus by relying on the Life Insurance Corporation (Modification of Settlement) Act, 1976. Bhagwati, J. held:

"9.....If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the

remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the Life Insurance Corporation."

The judgment dated 15.9.1998 of the Division Bench of the Karnataka High Court in Writ Appeal No.7574/1996 had held that on the occupancy rights of the Inamdars being confirmed, the Inamdars would be entitled to only the price and that the Inamdars had waived their right to occupy the land by accepting the price and by accepting further additional amounts from the Sangha and this judgment of the Division Bench of the Karnataka High Court had not been disturbed by this Court in SLP(C) No.2833/1999 and the Minister, Revenue, Government of Karnataka, could not have taken a view that on the confirmation of the occupancy rights of the Inamdars, the grant of the land made in favour of the Sangha was liable to be cancelled.

40. Once we hold that the grant made in favour of the Sangha was not liable to be cancelled, the order of the Minister, Revenue, Government of Karnataka, directing that the vacant 182 sites have to be transferred to the Inamdars or compensation in lieu of the vacant 182 sites were to be paid by the Sangha to the Inamdars, has to be set aside. Further, the order of the Minister, Revenue, Government of Karnataka, that the vacant civic amenity sites to an extent of 2 acres 34 guntas must be handed over to the Inamdars free of cost and the land, which is used by the BDA for formation of the ring road, has to be acquired by the BDA and the compensation has to be paid for this land to the Inamdars as if the same was private property, has also to be set aside. This is because the civic amenity sites measuring 2 acres 34 guntas and the ring road were part of the land measuring 34.03 acres given on grant to the Sangha. Moreover, at the time of sanctioning the layout plan of the Sangha, the BDA had stipulated that the roads, civic amenity sites, parks and all connections such as underground



drainage, water supply lines, shall vest with the BDA free of cost. The civic amenity sites and the road, therefore, had become properties of the BDA and it was the BDA only which was empowered to deal with such properties subject to Section 38-A and other provisions of the Bangalore Development Authority Act, 1976. The order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, directing that the civic amenity sites be handed over to the Inamdars free of cost and directing that the BDA will acquire the land comprised in the ring road after paying compensation for the same, was thus without the authority of law.

41. For the aforesaid reasons, the directions in the order dated 22.12.2003 of the Minister, Revenue, Government of Karnataka, for cancellation of grant made in favour of the Sangha and for transfer of vacant 182 sites from the Sangha to the Inamdars or for payment of compensation in lieu thereof by the Sangha to the Inamdars and the directions in the order dated 22.12.2003 to the BDA to handover the vacant civic amenity sites to the Inamdars free of cost and to acquire the land forming the ring road and pay compensation for such acquisition, are set aside. The impugned common judgment dated 22.12.2006 of the Karnataka High Court is also set aside and the writ petitions filed before the Karnataka High Court are allowed. The Civil Appeals are disposed of accordingly. No costs.

K.K.T. Appeals disposed of.

MULLA & ANR.
*v.*
STATE OF U.P.
(Criminal Appeal No. 396 of 2008)

FEBRUARY 8, 2010

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

*Penal Code, 1860 – 302/149, 365 and 148 – Abduction and murder for ransom – Eye-witnesses to the incident – Three of them injured eye-witnesses – Prosecution case supported by medical evidence – Accused identified by two of the eye-witnesses in Test Identification Parade – Conviction and death sentence by courts below – On appeal, held: Prosecution case supported by version of eye-witnesses and medical evidence – Test Identification Parade properly conducted – Conviction justified – In view of the socio-economic background of the convicts, death sentence altered to life imprisonment – Life sentence to extend to their full life, subject to remission by Government – Sentence/Sentencing.*

*Evidence: Test identification parade – Purpose and object of holding – Evidentiary value of – Discussed.*

*Sentence/Sentencing – death sentence – Mitigating circumstance – Held: Socio-economic factors leading to crime is relevant in judicial decision making in sentencing – Such factors lead to another mitigating factor i.e. ability of the guilty to reform.*

**Appellant accused was prosecuted for having assaulted three persons and further for having abducted five persons and killing them for ransom. The prosecution case was that appellants accused alongwith two (one girl and a boy) came to the filed of the victims while they were**





**irrigating their fields. They demanded Rs. 10,000 from each of them. They assaulted three of the persons with the butt of the gun and thereafter abducted five persons and asked three persons to go to the village and bring the amount demanded, threatening that otherwise the five abducted persons would be killed. The three persons reached the village and thereafter lodged a complaint. On investigation for searching the abducted persons, their dead bodies were recovered. The appellants accused were convicted u/ss. 365, 148 and 302/149 IPC. They were sentenced to death. High Court confirmed the sentence and dismissed the appeals filed by the appellants. Hence the present appeal.**

**Disposing of the appeal, the Court**

**HELD: 1.1. It is true that either in the complaint or in the first information report, no one was specifically named for the commission of offence. Though a suggestion was made to prosecution witnesses that the accused persons are from the nearby villages, the same was stoutly denied and in such circumstance, miscreants being outsiders, it would not be possible to name those persons in the complaint itself without further verification. On the other hand, the prosecution through their witnesses particularly, PWs 1 to 4, established that it was the appellants, who along with few more persons committed the offence by killing five persons mercilessly for non-payment of ransom amount which they demanded for the release of five persons caught hold by them. In view of the same, though none was named in the FIR, subsequently, the name of the appellants came into light during investigation. [Para 8] [649-E-H; 650-A]**

**1.2. PW 1 had asserted that he had seen the faces of all the accused persons in the light of the torch. However, he admitted that he could not go and attend the**

**identification parade due to his illness. In cross-examination also, he asserted that he had seen the guns in the hands of the accused and three of the victims were assaulted by the accused persons by the butt of the gun. He informed that he had witnessed the incident from the distance of 10 mts. He also informed the court that one of the deceesed who came from the western side had lantern and torch and when he focused his torch on criminals they assaulted him and snatched away his torch and extinguished the lantern. [Para 9] [651-C-E]**

**1.3. PW 2 corroborated the evidence of PW 1. It is further seen from his evidence that he also sustained injuries by one of the miscreants and this is also clear from his assertion and statement as well as the evidence of PW 7. There is no reason to disbelieve the version of PW-2 that he did not see these persons on any other occasion except on the date of occurrence and at the time of identification parade. He being an injured eye-witness as well as identified the appellants in the identification parade, the trial Judge as well as the High Court rightly accepted his version. He deposed about his visit to District Jail, for test identification parade of miscreants. He informed the court that he had identified three miscreants. These persons had also been identified in the jail. He further explained that these accused had been seen for the first time by him at the time of incident and thereafter, he saw them in the test identification parade. He also reiterated that before the incident, these miscreants were neither known nor seen by him. In his cross-examination, he reiterated that in the test identification parade which was conducted in District Jail, he identified the three accused. [Paras 10 and 11] [653-C-D; G-H; 654-A; 652-F-H; 653-A]**

**1.4. PW 3 asserted that on the date and time of the incident, he witnessed the occurrence along with PW 2.**



**He explained to the court that when the miscreants detained him and others for about half an hour, he noticed the faces of the miscreants in the light of their torches. Like PW 2, he also explained that in view of their inability to pay the ransom as demanded by the miscreants, initially they killed one of the deceased and thereafter killed other four. PW 3 also asserted before the court that none of the accused was known to him earlier. He also explained that he had gone to jail for identification of the accused. Before the court, he identified, by putting his hand on the accused persons and said that these miscreants were involved in the incident and for the first time he had seen these persons at the time of occurrence and second time in jail at the time of test identification parade. In his cross-examination, his evidence about the incident, the involvement of the accused, threat to kill the persons in custody, recovery of dead bodies, identifying the accused in the test identification parade, could not be shattered in any way. He being an injured eye-witness, corroborated the evidence of PW 2 and identified the accused persons in the properly constituted test identification parade, his evidence was fully relied on by the prosecution and rightly accepted by the trial Court as well as by the High Court. [Paras 12 and 15] [654-B-E; 655-A-D]**

**1.5. It is not correct to say that PW-4, who claimed to be a victim of the accused person, is not competent to narrate the present incident and implicate the very same accused as in her earlier case she had deposed that the appellant-accused had nothing to do with the incident. Just prior to the incident the very same accused, that is, appellant-accused set fire to her house and took her to the forest. She was in the custody of miscreants for 10-12 days. It is true that at one stage she complained that they attempted to rape her. However, in the said case,**

**before the court she failed to mention their names and implicate them in the said crime. In the present case, when she was examined, she explained that due to threat and fear she made a statement in the earlier case disowning these accused. Considering her explanation, particularly, because of the threat and fear she was forced to make such statement and in view of the categorical statement about the present occurrence implicating the miscreants including the present appellants, explaining all the details about keeping three youngsters in their hands and five villagers demanding ransom for their release, identifying the five dead bodies at different places, there is no reason to disbelieve her version. [Paras 16 and 17] [655-E-F; 656-G-H; 657-A-C]**

**1.6. The trial Judge has accepted her conduct in making a statement about the earlier case and relied on her present statement with reference to abduction and killing of five persons. The statement of PW-4 also corroborates with the evidence of injured eye-witnesses PWs 2 and 3. Further she was in the clutches of these miscreants for a period of 10-12 days and because of her familiarity of their faces, in categorical terms, she informed the Court that it was appellant-accused 'M', who killed three persons and appellant-acused 'G', who killed two persons by slitting their neck. Her explanation about her own case and detailed narration in respect of the present case are acceptable and rightly relied on by the trial court and accepted by the High Court. [Para 18] [657-D-F]**

**1.7.Medical evidence also supports the case of prosecution. Medical Officer, who conducted autopsy on the five dead bodies was examined as PW 5. In all the reports, he mentioned cut in the nerves and muscles of neck and blood vessels apart from other injuries. He also opined that death was caused due to shock and**



**hemorrhage and approximately one day before the post mortem. Though the police could not produce the knife used for killing the five persons, one of the accused had admitted about possession of knife apart from unlicensed gun at the time of the occurrence. [Para 19] [657-G-H; 660-C-D]**

**1.8. It is not correct to say that in the absence of proper light at the time of occurrence it is highly improper to accept the version of prosecution witnesses particularly, PWs 2 and 3 identifying these appellants. Apart from the evidence of PWs 1 to 3, about the information that through their torch lights they were able to recognize the faces of miscreants, PW 4 who was taken away by the miscreants to the forest in respect of the first incident informed the name of the accused correctly. Inasmuch as her association with the accused was longer than others, she mentioned the name of the accused without any difficulty. In those circumstances, the trial Judge is perfectly right in holding that the prosecution witnesses were able to correctly identify these persons and rightly rejected the defence plea. [Paras 36 and 37] [668-B-G]**

**2.1. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in court. There is no provision in the Cr. P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. [Para 20] [660-E-G]**

*Matru* v. *State of U.P.* **(1971) 2 SCC 75;** *Santokh Singh* v. *Izhar Hussain,* **(1973) 2 SCC 406, relied on**

**2.2. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. The main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye-witnesses of the crime. [Para 22] [661-C-E]**

**2.3. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in Cr.P.C. and the Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. [Para 22] [661-E-G]**

**2.4. The identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is two-fold. *First* is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. *Second* is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. [Para 31] [665-G-H; 666-A]**

**2.5. The following principles regarding identification**



**parade emerge: (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses; (2) this condition can be revoked if proper explanation justifying the delay is provided; and, (3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses. In the present case, merely because there is delay, the outcome of the identification parade cannot be thrown out if the same was properly done after following the procedure. [Paras 32 and 33] [666-B-F]**

**2.6. When PWs 8 and 9 - I.O. and S.I were examined, nothing was suggested to them regarding delay in conducting the identification parade. PW-6, while examining before the court, explained in categorical terms that all the accused were kept in baparda when they were taken to court for remand. He also claimed that when persons connected with the incident came to the Police Station, they were kept in baparda. In view of the assertion of the official witness and in the absence of allegation against him, it is to be accepted that the accused were not seen by these witnesses more particularly PWs 2 and 3, who identified them in the identification parade. [Paras 33 and 34] [666-E-H; 667-A]**

**2.7. From the facts of the case, it is evident that the test identification parade was properly conducted and all required procedures were duly followed. The statement of witnesses PWs 2 and 3 clearly show that they identified the appellants as the accused who involved in killing five persons on the fateful night. In those circumstances, merely because there was some delay, evidence of PWs 2 and 3 who identified the appellants-accused coupled with the statement of official witnesses PW 6 and PW 11 who accompanied the Magistrate clearly**

**prove the fact that test identification parade was conducted in accordance with the established procedure. There is no reason to disbelieve their version, and court has correctly appreciated their evidence and the High Court has rightly affirmed it. [Para 35] [667-F-H; 668-A]**

*Subhash v. State of U.P.* **(1987) 3 SCC 331;** *State of Andhra Pradesh v. Dr. M.V. Ramana Reddy* **(1991) 4 SCC 536;** *Brij Mohan and Ors. v. State of Rajasthan*, **(1994) 1 SCC 413;** *Rajesh Govind Jagesha v. State of Maharashtra* **(1999 ) 8 SCC 428;** *Daya Singh v. State of Haryana*, **(2001) 3 SCC 468;** *Lal Singh v. State of U.P*. **(2003) 12 SCC 554;** *Anil Kumar v. State of Uttar Pradesh***, (2003) 3 SCC 569;** *Pramod Mandal v. State of Bihar* **2004 (13) SCC 150, referred to**

**3.1. The punishment must fit the crime. It is the duty of the court to impose proper punishment depending upon the decree of criminality and desirability to impose such punishment. As a measure of social necessity and also as a means of deterring other potential offenders, the sentence should be appropriate befitting the crime. [Para 42] [673-F-G]**

**3.2. It is open for the court to grant a death penalty in an extremely narrow set of cases, which is signified by the phrase 'rarest of the rare'. This rarest of the rare test relates to "special reasons" under Section 354(3). This route is open to the court only when there is no other punishment which may be alternatively given. This results in the death penalty being an exception in sentencing, especially in the case where some other punishment can suffice. [Para 44] [674-B-C]**

**3.3. The test for the determination of the 'rarest of the rare' category of crimes inviting the death sentence thus includes broad criterions i.e. (1) the gruesome nature of the crime, (2) the mitigating and aggravating**



**circumstances in the case. These must take into consideration the position of the criminal, and (3) whether any other punishment would be completely inadequate. This rule emerges from the dictum of this Court that life imprisonment is the rule and death penalty an exception. Therefore, the Court must satisfy itself that death penalty would be the only punishment which can be meted out to the convict. [Para 48] [676-E-G]**

*Bachhan Singh vs. State of Punjab* **(1980) 2 SCC 684;** *Machhi Singh and Ors. vs. State of Pubjab* **(1983) 3 SCC 470;** *Asharfi Lal and Ors. vs. State of Uttar Pradesh*, **(1987) 3 SCC 224;** *Ravji vs. State of Rajasthan***, (1996) 2 SCC 175;** *Ram Singh vs. Sonia and Ors.* **(2007) 3 SCC 1;** *Panchhi v. State of U.P.* **(1988) 7 SCC 177, referred to**

**3.4. The perusal of the case records of the present case shows that no one is depending on the appellant-accused and no family responsibility is on the shoulders of these accused persons. Coming to their background as to the criminality, the prosecution pressed into service the earlier incident relating to the offences of abduction, murder, mischief by firing led against these persons. The fact remained that ultimately both of them were acquitted from those offences. Admittedly, prosecution has not placed any other material about their criminal antecedents. [Paras 49 and 50] [677-G-H; 678-A]**

**3.5. The aggravating circumstances against the appellants show that it is a case of cold blooded murder of five persons including one woman of the middle age, the unfortunate victims did not provoke or resist. The murder of five innocent persons were committed for ransom which was executed despite the fact that the poor villagers were unable to pay the ransom as demanded, the accused fully aware of their inability and poverty of the victims. [Para 51] [678-B-C]**

**3.6. As regards mitigating circumstances, three factors which the court must take into account, 1) the length of the incarceration already undergone by the convicts; 2) the current age of the convicts; and finally, 3) circumstances of the convicts generally. In the present case, one of the convicts is around 65 years old. The appellants have been in prison for the last 14 years. [Paras 52 and 53] [678-D-F]**

*Bachhan Singh vs. State of Punjab* **(1980) 2 SCC 684;** *Swamy Shraddananda v. State of Karnataka* **(2008) 13 SCC 767, relied on**

**3.7. Socio-economic factors leading to crime is relevant in judicial decision-making in sentencing. It is not suggested that economic depravity justify moral depravity, but in the real world, such factors may lead a person to crime. Therefore, the Court believes that socio-economic factors might not dilute guilt, but they may amount to mitigating circumstances. Socio-economic factors leads the Court to another related mitigating factor, i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. [Para 54] [678-G-H; 679-A-B]**

*The 48th report of the Law Commission,* **referred to**

**3.8. In the present case, the convicts belong to an extremely poor background. With lack of knowledge on the background of the appellants, the Court may not be certain as to their past, but one thing which is clear to the Court is that they have committed these heinous crimes for want of money. Though the Court is shocked by their deeds, there is no reason why they cannot be reformed over a period of time. [Para 55] [679-C-D]**

*Dalbir Singh and Ors. v. State of Punjab* **(1979) 3 SCC 745;** *Subash Chander v. Krishan Lal* **(2001) 4 SCC 458, relied on**



**3.9. It is open to the sentencing Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The Court should be free to determine the length of imprisonment which will suffice the offence committed. Thus, despite the nature of the crime, the mitigating circumstances can allow the Court to substitute the death penalty with life sentence. The punishment of life sentence in this case must extend to their full life, subject to any remission by the Government for good reasons. [Paras 59, 60 and 61] [684-C-E]**

*Shri Bhagwan v. State of Rajasthan,* **(2001) 6 SCC 296;** *Jayawant Dattatray Suryarao v. State of Maharashtra,* **(2001) 10 SCC 109;** *Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh,* **2009 (14) SCALE 533, relied on**

**Case Law Reference:**

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|---|---|---|
| **(1973) 2 SCC 406** | **relied on** | **Para 21** |
| **(1971) 2 SCC 75** | **relied on** | **Para 21** |
| **(1987) 3 SCC 331** | **referred to** | **Para 23** |
| **(1991) 4 SCC 536** | **referred to** | **Para 24** |
| **(1994) 1 SCC 413** | **referred to** | **Para 25** |
| **(1999) 8 SCC 428** | **referred to** | **Para 26** |
| **(2001) 3 SCC 468** | **referred to** | **Para 27** |
| **(2003) 12 SCC 554** | **referred to** | **Para 28** |
| **(2003) 3 SCC 569** | **referred to** | **Para 29** |
| **(2004) (13) SCC 150** | **referred to** | **Para 30** |

| | | |
|---|---|---|
| **(1980) 2 SCC 684** | **referred to** | **Para 39** |
| **(1983) 3 SCC 470** | **referred to** | **Para 40** |
| **(1987) 3 SCC 224** | **referred to** | **Para 41** |
| **(1996) 2 SCC 175** | **referred to** | **Para 41** |
| **(2007) 3 SCC 1** | **referred to** | **Para 41** |
| **(1998) 7 SCC 177** | **referred to** | **Para 45** |
| **(2008) 13 SCC 767** | **relied on** | **Para 54** |
| **(1979) 3 SCC 745** | **relied on** | **Para 56** |
| **(2001) 4 SCC 458** | **relied on** | **Para 57** |
| **(2001) 6 SCC 296** | **relied on** | **Para 57** |
| **(2001) 10 SCC 109** | **relied on** | **Para 57** |
| **(2009) (14) SCALE 533** | **relied on** | **Para 58** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 396 of 2008.

From the Jugdment & Order dated 3.3.2006 of the High Court of Judicature at Allahabadin Capital Sentence No. 2 of 2005 and and Crl. A. No. 713 of 2005.

Ranjana Narayana (AC) for the Appellant.

Pramod Swaroop, S.K. Dwivedi, Sanjay Visen, Vandana Mishra, Manoj Kr. Dwivedi, Ashutosh Kr. Sharma, Guuna Venkateswara Rao for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. This appeal is filed on behalf of the appellants through the Jailor, District Jail, Sitapur, U.P. against the impugned judgment dated 03.03.2006 passed by the High Court of Judicature at Allahabad, Lucknow Bench,



Lucknow, in Criminal Reference No. 2 of 2005 and Criminal Appeal No. 713 of 2005 whereby the High Court allowed Criminal Reference No.2 of 2005 filed by the State confirming the death sentence awarded to the appellants herein and dismissed Criminal Appeal No. 713 of 2005 filed by the appellants herein.

2. The prosecution case is as under:

(a) On the fateful night of 21.12.1995 when Shiv Ratan, Nanhakey, Ram Kishore and Sushil were irrigating their fields in the northern side of the village from the tubewell of Sundari, widow of Jai Narain, at about 8.30 p.m., eight miscreants armed with guns reached the spot. A boy and two girls were also with them. All the miscreants caught hold of the four persons who were irrigating their fields and enquired about their properties and made a demand of Rs.10,000/- each and threatened that otherwise they would be killed. At the very moment, Harnam, Ganga Dai, Chhotakey s/o Gaya Ram and Hari Kumar Tripathi who were returning home after irrigating their fields were also stopped by the miscreants demanding Rs.10,000/- each from them. When all of them expressed their inability to pay the money, the miscreants assaulted Sushil, Shiv Ratan and Harnam by butt of the gun and took away Hari Kumar Tripathi, Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakkey and Ganga Dai towards western side of tubewell leaving Sushil, Shiv Ratan and Harnam directing them to bring money otherwise they would be killed. These three persons returned to the village and informed the villagers about the incident and by the time the villagers reached near the field, the miscreants had taken away all the five abducted persons along with them. Due to the night and being afraid of the miscreants, the villagers could not lodge a complaint immediately. On the very next day i.e. 22.12.1995 at 6.10 a.m., a complaint was lodged at P.S. Sandana, Dist. Sitapur and a case was registered and the investigation was commenced for

searching the abducted persons. At about 25 mts. away from the tubewell in the sugar cane field of Laltu, the dead body of Hari Kumar Tripathi was recovered and the dead bodies of Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakkey and Ganga Dai were found in the Arhar field at a distance of 1 km. from the tubewell. After recovery of the dead bodies, they were sent for post-mortem. After recording the statements, S.H.O. Ram Shankar Singh arrested Mulla and Guddu on 01.01.1996 and Tula on 08.01.1996 and recovered a countrymade gun, two cartridges and one knife.

(b) After completion of investigation, charge sheet was filed against Mulla, Guddu, Tula and Asha Ram. The accused persons were produced in the Court of Judicial Magistrate, First Class, Sitapur. Before committal of the case, the Judicial Magistrate vide his order dated 19.11.1996, separating the case of accused Asha Ram committed the case to the Additional Sessions Judge, Sitapur for trial vide his order dated 03.03.1997. During the trial, since accused Tula was absent, his case was separated. By order dated 30.4.2005, the trial Court convicted Mulla and Guddu under Section 365 IPC and sentenced them to undergo R.I. for 7 years and a fine of Rs.1000/- each and in default of payment of fine further simple imprisonment for one year. The appellants herein were also convicted under Section 148 IPC and sentenced to undergo R.I. for 3 years. They were further convicted under Section 302 read with Section 149 IPC and sentenced to death.

(c) Challenging the said judgment, Guddu filed Crl. A. No. 698 of 2005 and Mulla filed Crl. A. No. 701 of 2005 before the High Court from Jail and both of them jointly filed Crl.A. No.713 of 2005 through counsel. The High Court, vide order dated 03.03.2006, confirming the death sentence imposed on the appellants dismissed the appeals filed by both the appellants. Aggrieved by the said judgment, both the accused persons filed this appeal through the Jailor, Distt. Sitapur, U.P. On 14.7.2006, this Court issued notice and on 21.7.2006, stayed the execution



of death sentence pending further orders.

3. We heard Ms. Ranjana Narayan, learned *amicus curiae* for the appellants and Mr. Pramod Swaroop, learned senior counsel for the respondent-State.

4. After taking us through the relevant materials relied on by the prosecution, Ms Ranjana Narayan, learned *amicus curiae* raised the following contentions:

(a) No eye-witness to the alleged incident;

(b) Accused persons are not named in the FIR. In other words, FIR was lodged against unknown persons;

(c) delay in conducting the Test Identification Parade (TIP);

(d) Prosecution failed to establish motive for the incident;

(e) In any event, even if the Court accepts the prosecution case, imposition of death sentence is not warranted.

5. Mr. Pramod Swaroop, learned senior counsel for the State of U.P. while disputing all the above contentions pointed out that a) though the FIR was registered against unknown persons, by proper investigation and examining the persons who witnessed the occurrence, the prosecution proved its charge b) PWs 1, 2 and 3 were present at the place of occurrence and in the absence of any contradiction in their statements, the Courts below have rightly relied on and accepted their version c) PWs 2 and 3 identified Mulla and Guddu in the test identification parade which was conducted in accordance with the procedure d) the evidence of PW 4 is more probable and acceptable in view of the fact that she being a victim at the hands of the miscreants including the appellants, the Courts below have rightly relied on her statement e) all the

miscreants were armed with illegal guns in their hands and came to the spot along with a boy and two girls demanding ransom, f) inasmuch as the appellants- accused killed five persons including a woman, all between the age of 25-50 mercilessly, the award of capital punishment is justified and no interference called for by this Court.

6. We have carefully perused the entire records including depositions and documents and considered the rival contentions.

7. The prosecution mainly relied on the evidence of PW 1 - Rajesh Kumar Tripathi, PW 2 - Sushil, PW 3 –Harnam, independent eye witness - PW 4 - Kiran, PW 5 – Dr. A.K. Verma-Post Mortem Doctor, PW 7 - Dr. Sudarshan, who treated the injured witness, PW 8 – S.I. - Ram Kripal Bharati, PW 9 - Sub-inspector of Police, PW 11 Vijay Kumar Verma, an officer who accompanied and assisted the Magistrate in conducting the test identification parade and one Rajni Kant Mishra, the then Reader, as a court witness (CW 1). No one was examined on the side of the accused as defence witness.

8. It is true that either in the complaint or in the first information report, no one was specifically named for the commission of offence. In other words, the accused persons are not named in the FIR and it merely mentions 'unknown persons'. Though a suggestion was made to prosecution witnesses that the accused persons are from the nearby villages, the same was stoutly denied and in such circumstance, miscreants being outsiders, it would not be possible to name those persons in the complaint itself without further verification. On the other hand, the prosecution through their witnesses particularly, PWs 1 to 4, established that it was the appellants, who along with few more persons committed the offence by killing five persons mercilessly for non-payment of ransom amount which they demanded for the release of five persons caught hold by them. In view of the same, though none was



named in the FIR, subsequently, the name of the appellants came into light during investigation.

9. Rajesh Kumar Tripathi who made the complaint-Ex. Ka-1 was examined as PW 1. He was examined on 09.04.2001 and narrated that on the night of the incident, namely, on 21.12.1995 nearly at about 8.30 p.m. in the north of his land, Shiv Ratan, Ram Kishore @ Nanhakkey Naney, Nanhakkey and Sushil were watering their respective fields from the tubewell of Sundari, widow of Jai Narain. At that very moment, eight miscreants, armed with guns, reached there. They also had two girls and a boy with them. One by one, they caught hold of all the four persons and enquired them about their lands and threatened to kill them if they failed to bring Rs.10,000/- each. He further narrated that in the meantime, Harnam, Ganga Dai, Chhotakkey and Hari Kumar Tripathi, all from his village who were returning their home after watering their fields were also stopped by the miscreants. He also reached the spot. The miscreants were flashing their torches. The accused made all those persons to sit and asked to bring Rs.10,000/- each. When they replied that they are poor and wherefrom they would bring money to give them, all the accused persons assaulted Sushil, Shiv Ratan and Harnam by butt of the gun. The remaining five persons were taken away by accused persons towards west. All of them were told by the accused to come back immediately with money failing which these five persons would be killed. Sushil, Shiv Ratan and Harnam went to their village and informed the villagers about it. With the help of the villagers, they started searching the abducted persons who were taken away by the accused but could not found anyone. According to him, in the night itself they tried to inform at Sandana Police Station by telephone but they could not get the connection. Next day, early in the morning, he along with Sushil, Shiv Ratan and Harnam went to Police Station by bicycles. He prepared a complaint in his own handwriting under his signature. The said complaint has been marked as Ex. Ka-1. Thereafter, after sending the injured persons to hospital at Sandana for

treatment, he came back and with the help of villagers started searching for the kidnapped persons. In the western side of the tubewell dead body of Hari Kumar Tripathi was found lying in the sugarcane field of Laltu. At a distance of 1 km. in the west of Village Fatehpur, near a pond, they found the dead bodies of remaining four persons. These bodies were identified as Ram Kishore @ Chhotakkey Naney, Ganga Dai, Chhotakkey S/o Gaya Ram, Nanhakey. He along with the others noticed that the neck of all the four persons had been cut. PW 1 further deposed that after recovering the dead bodies, his statement was recorded and Daroga Ji (PW 8) I.O. prepared a sketch map of the place of occurrence. He asserted that he had seen the faces of all the accused persons in the light of the torch. However, he admitted that he could not go and attend the identification parade which was conducted in the District Jail, Sitapur, due to his illness. In cross-examination also, he asserted that he had seen the guns in the hands of the accused and Sushil Kumar, Shiv Ratan and Harnam were assaulted by the accused persons by the butt of the gun. He informed that he had witnessed the incident from the distance of 10 mts. He also informed the Court that Hari Kumar Tripathi, who came from the western side had lantern and torch and when he focused his torch on criminals they assaulted him and snatched away his torch and extinguished the lantern.

10. The other important witness heavily relied on by the prosecution is PW 2 Sushil Kumar. He was an injured eye witness. He narrated before the Court that nearly six years earlier i.e. on 21.12.1995, on the night of the incident, nearly about 8.30 p.m. he along with his brother Ram Kishore @ Chhotkaney, Shiv Ratan and Nanhakey were watering their fields from the tubewell. The said tubewell was owned by Sundari Devi, widow of Jai Narain. At that moment, eight miscreants reached there. They were armed with guns and torches. Two girls, one aged 10-13 years and the other 18-20 years and a young boy was also with them. All the miscreants came near the tubewell and caught hold four of them and asked



about their properties and wealth. They threatened that unless they bring Rs.10,000/- each, they would be killed. In the meantime, Harnam, his mother Ganga Dai, Chhotakey and Hari Kumar Tripathi came there from western side. They were also caught hold of by the miscreants and enquired about their properties. They started beating Harnam, Shiv Ratan and him with the butt of the gun and directed him along with the others to go to village and bring money. Thereafter, Hari Kumar Tripathi, Ram Kishore @ Chhotakey and his mother Ganga Dai and Nanhakey were taken away by them towards west. He also asserted that the miscreants were flashing their torches regularly. They had been recognized by PW 2 and others in the light of their torches. They were unknown to them. PW 2 along with others went to their village and informed the villagers about the demand of the miscreants. Thereafter, they started searching the accused and the persons who were taken away by the accused. PW 1 Rajesh had submitted a written complaint to the police. Since PW-2 had sustained injuries at the hands of the miscreants, he along with others went to Sandana hospital for treatment. Due to absence of doctor, treatment could not have been availed and he was given treatment only in Government Hospital on 27.12.1995. He further deposed that on return, he saw the dead body of Hari Kumar Tripathi in the sugar cane field of Laltu nearly 200-250 yards away from the tubewell. The other four dead bodies were lying in the boundary of Arhar fields about 1 km. away near the pond. These dead bodies were of Ram Kishore @ Chottakey Naney, Nanhakey, Chhotakey and Ganga Dai. He also deposed about his visit to District Jail, Sitapur for test identification parade of miscreants. He informed the Court that he had identified three miscreants, namely, Guddu, Mulla and Tulla, who were present in the Court. These persons had also been identified in the jail. He further explained that these accused had been seen for the first time by him at the time of incident and thereafter, he saw them in the test identification parade. He also reiterated that before the incident, these miscreants were neither known nor seen by him.

In his cross-examination, he reiterated that in the test identification parade which was conducted in District Jail, Sitapur, he identified the three accused. He explained that all three miscreants were not in one line and there were no specific marks of identification on the faces of accused persons. The face of all the accused were not similar. He also reiterated that when miscreants were beating him they were flashing torches. He also denied the claim that the accused Mulla is a labourer and residing in Mohmadpur half a kilo metre away from his village.

11. It is seen that PW 2 corroborated the evidence of PW 1. It is further seen from his evidence that he also sustained injuries by one of the miscreants and this is also clear from his assertion and statement as well as the evidence of PW 7 - Dr. Sudarshan. In his evidence, PW 7 has stated that he examined injured Sushil Kumar - PW 2 and noticed the following injuries:

> "Abrasion 1 cm x 0.5, which was present on the fore arm at the left side at 10 cm. below the wrist joint, the same was healed".

According to him, this injury was of simple nature, one week old and it was inflicted by any blunt object. His report was marked as Ex K-15. Dr. Sudarshan - PW 7 has also asserted that this injury could have been caused by the butt of a gun. It is also relevant to point out that apart from the fact that he had been injured at the hands of one of the accused persons which is evident from the statement of PW 7 who treated him. PW 2 also participated in the test identification parade which was held at District Jail, Sitapur. He also identified three miscreants, namely, Guddu, Mulla and Tulla. He further asserted that except on the date of occurrence of the incident, he had not seen them earlier and only on the date of test identification parade, he identified these persons at the jail. There is no reason to disbelieve his version that he did not see these persons on any other occasion except on the date of occurrence and at the time of identification parade. He being an injured eye witness as



well as identified the appellants in the identification parade, the trial Judge as well as the High Court rightly accepted his version.

12. The other reliable witness examined on the side of the prosecution is PW 3-Harnam. He asserted that on the date and time of the incident, he witnessed the occurrence along with PW 2. He also reiterated that those miscreants were carrying country-made guns and torches which they were flashing. He also sustained injuries. He was one of the four persons detained by the miscreants, enquired about their status, land details and demanded Rs.10,000/- each and when he informed the miscreants that he and others are poor people and difficult to comply with their demand, they started beating him. He also explained to the court that when the miscreants detained him and others for about half an hour, he noticed the faces of the miscreants in the light of their torches. Like PW 2, he also explained that in view of their inability to pay the ransom as demanded by the miscreants, initially they killed one Hari Kumar and thereafter killed other four-Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakey and Ganga Dai, by throwing their dead bodies 1 km. away from the spot near a pond.

13. Along with PW 2 and others, PW 3 also reached Sandana Police Station at about 6 a.m. PW 1 lodged a written complaint at the Police Station. He further explained that apart from himself, the other injured persons, namely, PW 2 and others were sent to Government Hospital, Sandana for medical examination. According to him, due to non-availability of doctor, they returned back to their village and searched the kidnapped persons and found one dead body near a tubewell and other four dead bodies one km. away from the tubewell near a pond.

14. About the injury of PW 3, PW 7 - Dr. Sudarshan stated that he conducted the medical examination of Harnam, PW 3, who was taken along with Sushil Kumar and Shiv Ratan. He prepared a medical report in his own hand writing with his signature which has been marked as Ex. K-16.

15. Like PW 2, PW 3 also asserted before the Court that none of the accused was known to him earlier. He also explained that he had gone to jail for identification of the accused. Before the Court, PW 3 identified, by putting his hand on the accused Guddu, Tulla and Mulla who were standing in the dock and said that these miscreants were involved in the incident and for the first time he had seen these persons at the time of occurrence and second time in jail at the time of test identification parade. Though he was cross-examined at length, his evidence about the incident, the involvement of the accused, threat to kill the persons in custody, recovery of dead bodies, identifying the accused in the test identification parade, could not be shattered in any way. He being an injured eye witness, corroborated the evidence of PW 2 and identified the accused persons in the properly constituted test identification parade, his evidence was fully relied on by the prosecution and rightly accepted by the trial Court as well as by the High Court.

16. The next witness relied on by the prosecution is PW 4 – Smt. Kiran. Learned amicus curiae by pointing out the conduct of PW 4 in respect of her statement in the earlier case in *State vs. Kailash Chandra & Ors.* submitted that the reliance on her evidence before the Trial court and accepted by the High Court cannot be sustained. She further pointed out that inasmuch as in the case of *State vs. Kailash Chandra & Ors*. though she claimed to be a victim, she deposed before the Court that the present accused Mulla and Guddu have nothing to do with the earlier incident. In such circumstances, according to the amicus curiae she is not competent to narrate the present incident and implicate the very same accused. On going through her entire evidence, we are unable to accept the stand taken by amicus for the following reasons: About the first incident, namely, setting fire to her house, she informed the court that six years earlier when she was at her matrimonial home at Surjapur, three criminals came there and set the roof of her house on fire. At the time, when she was in her house and male members had gone to extinguish the fire, the criminals forcibly took her



away with them. This incident took place at 1.00 a.m. in the midnight. They had taken her to the nearby forest. She further explained, that on the third day on which they had taken her away, after the sunset when it had become dark, eight miscreants armed with guns and torches reached near the tubewell of the village. She and other girl and a boy who were brought from somewhere were with them. There the criminals had caught eight persons and made them to sit at tubewell and they were asking them to bring Rs.10,000/- each then only they would be released. The accused persons had assaulted two to three persons by the butt of the gun and they were having torch lights. After keeping them for one hour, they released three persons and told them to bring Rs.10,000/- each and threatened that only then the remaining five persons would be released. After waiting for sometime since nobody came from the village the miscreants took away the said four men and one woman towards north. Nearly after crossing two or three agricultural fields they killed one person by slitting his throat by knife. Thereafter, about 1 km. in the southern side of the village near a pond they took the remaining four persons, that is, three men and one woman and killed them by cutting their throat and left the dead bodies near a pond. She informed that after leaving the dead bodies, they all went away. She, however, managed to escape from the custody of the said criminals after 10-12 days. Among the eight persons who committed the crime at the tube-well one was Asha Ram, Ram Sebak, Guddu, Mulla and Tulla whose names she came to know since she was with them for 10-12 days. She asserted that Mulla had killed three persons and Guddu had killed two persons. She pointed out that she can recognize the accused Guddu, Mulla and Tulla by face and by name and she also identified them when Mulla and Guddu were present in the Court.

17. It is relevant to point out that just prior to the incident the very same accused, that is, Mulla and Guddu set fire to her house and took her to the forest. She was in the custody of miscreants for 10-12 days. It is true that at one stage she

complained that they attempted to rape her. However, in the said case, before the Court she failed to mention their name and implicate them in the said crime. In the present case, when she was examined, she explained that due to threat and fear she made a statement in the earlier case disowning these accused. Considering her explanation, particularly, because of the threat and fear she was forced to make such statement and in view of the categorical statement about the present occurrence implicating the miscreants including the present appellants Mulla and Guddu, explaining all the details about keeping three youngsters in their hands and five villagers demanding ransom for their release, identifying the five dead bodies at different places, there is no reason to disbelieve her version.

18. As rightly pointed out, the trial Judge has accepted her conduct in making a statement about the earlier case and relied on her present statement with reference to abduction and killing of five persons. The statement of PW-4 also corroborates with the evidence of injured eye witnesses PWs 2 and 3. Further she was in the clutches of these miscreants for a period of 10-12 days and because of her familiarity of their faces, in categorical terms, she informed the Court that it was Mulla, who killed three persons and Guddu, who killed two persons by slitting their neck. Her explanation about her own case and detailed narration in respect of the present case are acceptable and rightly relied on by the Trial Court and accepted by the High Court.

19. Apart from the evidence of PWs 1-4 about killing of five persons, medical evidence also supports the case of prosecution. Dr. A.K.Verma, Medical Officer, District Hospital, Sitapur who conducted autopsy on the five dead bodies was examined as PW 5. He explained before the Court that on 22.12.1995 at about 8.00 p.m., he conducted post mortem on the dead body of Hari Kumar Tripathi, Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakey and Ganga Dai, who were all



residents of village Sandana, Police Station Sandana, District Sitapur. According to him, the dead bodies had been brought by the constables and identified by them. After post mortem, he prepared a report (Ex. K2-K6). The details are as follows:-

"The post mortem on the dead body of *Hari Kumar Tripathi* was conducted by Dr. A.K. Verma on 22.12.1995 at 8.30 p.m. and he noted the following ante mortem injuries on the person of the deceased:

1. Incised wound 14 x 2 cm. x tissue deep on front of neck (more towards right side) 4.5 cm. below chin trachea, all blood vessels of both side nerves and muscles divided.

2. Incised wound 3 x 0.5 cm. side just above eye brow.

3. Incised wound 3 x 0.5 cm. skin deep on the nose.

4. Incised wound 2 x 0.5 cm. x skin cartilage deep upper part of the Pinna of right ear.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of *Chhotkanney* was conducted by Dr. A.K.Verma on 22.12.1995 at 8.00 p.m. and he noted the following ante mortem injuries on the person of the deceased:

Incised wound 9 cm. x 1.5 cm. x tissue and bone deep. 1 cm. neck 6.5 cm. below 1 cm. chin. All self tissues uncludy muscle, blood vessels, trachea and oseophagus cut.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of *Chhotakkey* was

conducted by Dr. A.K.Verma on 22.12.1995 at 9.30 p.m. and he noted the following ante mortem injuries on the person of the deceased:

1. Incised wound 8.5 cm. x 2 cm. x bone deep on part of neck just below the adamis apple (Thyroid cartied) trachea, nerves, blood vessels of both sides divided along with other tissues oseophagus also cut.

2. Incised wound 2 cm. x 0.5 cm. x bone deep dorsum of left ring finger at its base.

3. Incised wound 1.5 cm. x. 0.5 cm. x muscle deep over finger web between ring finger and middle finger of right hand.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of *Nanhakey* was conducted by Dr. A.K. Verma on 22.12.1995 at 9.30 p.m. and he had noted the following ante mortem injury on the person of the deceased:

Incised wound 9 cm. x 2 cm. x bone deep just above adamis apple (Thyroid cartied) trachea, nerves, blood vessels of both sides divided along with other tissues oseophagus also cut.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of *Gangadai* was conducted by Dr. A.K. Verma on 22.12.1995 at 10 p.m. and he had noted the following ante mortem injury on the person of the deceased:

Incised wound 9.5 cm. x 2 cm. x bone and trachea



deep over fold neck just above the thyroid cartilage, trachea, blood vessels of both sides nerves and much and oseophagus all cut.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries."

In all the reports, he mentioned cut in the nerves and muscles of neck and blood vessels apart from other injuries. He also opined that death was caused due to shock and hemorrhage and approximately one day before the post mortem. Though the police could not produce the knife used for killing the five persons, one of the accused had admitted about possession of knife apart from unlicensed gun at the time of the occurrence. There is no reason to disbelieve the assertion of PWs 1 to 4 as well as the evidence of PW 7 who treated the injured witnesses PWs 2 and 3 and the medical opinion of PW 5 about the cause of death of five persons.

20. Now, let us consider the arguments of the learned *amicus curiae* on the delay in conducting the test identification parade. The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr. P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court.

21. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of

an accused by a witness is made for the first time in Court, it should not form the basis of conviction. As was observed by this Court in *Matru v. State of U.P.,* (1971) 2 SCC 75, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. (Vide *Santokh Singh v. Izhar Hussain,* (1973) 2 SCC 406).

22. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

23. In *Subhash v. State of U.P.* (1987) 3 SCC 331, the parade was held about three weeks after the arrest of the



accused. Therefore, there was some room for doubt if the delay was in order to enable the identifying witnesses to see him in jail premises or police lock-up and thus make a note of his features. Moreover, four months had elapsed between the date of occurrence and the date of holding of the test identification parade. The descriptive particulars of the appellant were not given when the report was lodged, but while deposing before the Sessions Judge, the witnesses said that the accused was a tall person with shallow complexion. The Court noted that if on account of these features the witnesses were able to identify the appellant Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time when his face was fresh in their memory. It is important to note that since the conviction of the accused was based only on the identification at the test identification parade, the Court gave him the benefit of doubt while upholding the conviction of the co-accused. This is also a case where the conviction of the appellant was based solely on the evidence of identification. There being a delay in holding the test identification parade and in the absence of corroborative evidence, this Court found it unsafe to uphold his conviction.

24. In *State of Andhra Pradesh v. Dr. M.V. Ramana Reddy* (1991) 4 SCC 536, the Court found a delay in holding the test parade for which there was no valid explanation. It held that in the absence of a valid explanation for the delay, the approach of the High Court could be said to be manifestly wrong calling for intervention.

25. In the case of *Brij Mohan & Ors. v. State of Rajasthan,* (1994) 1 SCC 413, the test identification parade was held after three months. The argument was that it was not possible for the witnesses to remember, after a lapse of such time, the facial expressions of the accused. It was held that generally with lapse of time memory of witnesses would get dimmer and therefore the earlier the test identification parade is held it inspires more faith. It was held that no time limit could be fixed for holding a

test identification parade. It was held that sometimes the crime itself is such that it would create a deep impression on the minds of the witnesses who had an occasion to see the culprits. It was held that this impression would include the facial impression of the culprits. It was held that such a deep impression would not be erased within a period of three months.

26. In *Rajesh Govind Jagesha v. State of Maharashtra* (1999) 8 SCC 428, the accused was apprehended on 20th January, 1993, while the identification parade was held on 13th February, 1993. It was also not disputed that at the time of identification parade the appellant was not having a beard and long hair as mentioned at the time of lodging of the first information report. It was also not disputed that no person with a beard and long hair was included in the parade. The witnesses were alleged to have identified the accused at the first sight despite the fact that he had removed the long hair and beard. This Court held that the Magistrate should have associated 1-2 persons having resemblance with the persons described in the FIR and why it was not done was a mystery shrouded with doubts and not cleared by the prosecution. In these circumstances, the Court observed that the possibility of the witnesses having seen the accused between the date of arrest and the test identification parade cannot be ruled out. This case also rests on its own facts, and mere delay in holding the test identification parade was not the sole reason for rejecting the identification.

27. In the case of *Daya Singh v. State of Haryana*, (2001) 3 SCC 468, the test identification parade was held after a period of almost eight years inasmuch as the accused could not be arrested for a period of 7-1/2 years and after the arrest the test identification parade was held after a period of six months. It was pointed out that the purpose of test identification parade is to have the corroboration to the evidence of the eye witnesses in the form of earlier identification. It was held that



the substantive evidence is the evidence given by the witness in the Court and if that evidence is found to be reliable then the absence of corroboration by the test identification is not material. It was further held that the fact that the injured witnesses had lost their son and daughter-in-law showed that there were reasons for an enduring impression of the identity on the mind and memory of the witnesses.

28. This Court in *Lal Singh v. State of U.P.,* (2003) 12 SCC 554, while discussing all the cases germane to the question of identification parades and the effect of delay in conducting them held that:

> "It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety."

29. In the case of *Anil Kumar v. State of Uttar Pradesh,* (2003) 3 SCC 569, this Court observed as under:

> "It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal .A mere lapse of some days is not enough to erase the facial expressions of assailants from

the memory of father and mother who have seen them killing their son..."

30. In another case of *Pramod Mandal v. State of Bihar,* 2004 (13) SCC 150, placing reliance on the case of *Anil Kumar* (supra), this Court observed that it is neither possible nor prudent to lay down any invariable rule as to the period within which a Test Identification Parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the Test Identification Parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification.

31. The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two-fold. *First* is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. *Second* is to satisfy the investigating authorities that the suspect is the real



person whom the witnesses had seen in connection with the said occurrence.

32. Therefore, the following principles regarding identification parade emerge: (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses; (2) this condition can be revoked if proper explanation justifying the delay is provided; and, (3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses.

33. In the light of the above principles, let us consider whether the test identification parade conducted on 24.02.1996 at District Jail, Sitapur is valid. It is contended by the learned *amicus Curiae* that the appellants were arrested on 01.01.1996 and they were placed for identification only on 24.02.1996. It is further pointed out that the accused were put up for identification after 63 days of the occurrence and 55 days after their arrest. It is also pointed out that in the meantime, these persons were taken to court and present before the test identification parade, innumerable persons noticed them and in the absence of evidence that they were kept baparda at a time when they were taken to court, the report has no value at all. It is true that though the appellants were arrested on 01.01.1996 they were put up for identification on 24.02.1996. However, merely because there is delay, the outcome of the identification parade cannot be thrown out if the same was properly done after following the procedure. In fact, when PWs 8 and 9 - I.O. and S.I were examined, nothing was suggested to them regarding delay in conducting the identification parade.

34. PW 6, Suresh Kumar, while examining before the court explained in categorical terms that all the accused were kept in baparda when they were taken to court for remand. He also claimed that when persons connected with the incident came to the Police Station, they were kept in baparda. In view of the assertion of the official witness and in the absence of allegation

against him, it is to be accepted that the accused were not seen by these witnesses more particularly PWs 2 and 3, who identified them in the identification parade.

35. Admittedly, the Magistrate before whom the identification parade was conducted at the District Jail, Sitapur is no more and was not available for examination. On the other hand, One Vijay Kumar Verma, who accompanied the Magistrate for test identification parade was examined as PW 11. He proved the identification memo as secondary evidence due to non-availability of the Magistrate in whose presence test identification parade was conducted. PW 11 has stated that witnesses PW 2 and PW 3 had correctly identified these accused persons. It is further seen that the accused persons' thumb impressions and signatures were obtained before starting of identification parade as well as after completing the process. It is further seen that in the report, the Magistrate had put his signature. PW 11 who is competent to speak about the proceedings of the learned Magistrate and who recorded the test identification parade has also explained the presence of PW 2 and PW 3, the procedure followed and identification by them correctly identifying the accused Mulla and Guddu. After completing the process, identification memo was signed by the Magistrate and he also put his signature. Identification memo Ex. K-58 has been proved by PW 11. From the materials, we hold that the test identification parade was properly conducted and all required procedures were duly followed. The statement of witnesses PWs 2 and 3 clearly show that they identified the appellants as the accused who involved in killing five persons on the night of 21.12.1995. In those circumstances, merely because there was some delay, evidence of PWs 2 and 3 who identified the appellants- accused coupled with the statement of official witnesses PW 6 and PW 11 who accompanied the Magistrate clearly prove the fact that test identification parade was conducted in accordance with the established procedure. There is no reason to disbelieve their version and we hold that



the trial Court has correctly appreciated their evidence and the High Court has rightly affirmed it.

36. Learned *amicus curiae* put-forth another feeble argument that in the absence of proper light at the time of occurrence it is highly improper to accept the version of prosecution witnesses particularly, PWs 2 and 3 identifying these appellants. PW 1, in his cross examination, has stated that Harikumar Tripathi, who came from the western side had lantern and torch and when he focused his torch on criminals, they assaulted him and snatched away his torch and extinguished the lantern. PW 2 has asserted that "the miscreants were flashing their torches regularly. They have been recognized properly by us in the light of their torches. They were not known to us. They were unknown……" Again he deposed "when miscreants were beating me, they were flashing torches……" PW 3 has also asserted by saying "the miscreants detained us at about half an hour at this spot and I had seen the faces of miscreants in the light of their torches….." In cross-examination, he also reiterated "at first time, I had seen these persons at the time of occurrence and second time in jail when I went for identification".

37. Apart from the evidence of PWs 1 to 3, about the information that through their torch lights they were able to recognize the faces of miscreants, PW 4 who was taken away by the miscreants to the forest in respect of the first incident informed the name of the accused correctly. Inasmuch as her association with the accused was longer than others, she mentioned the name of the accused without any difficulty. In those circumstances, the learned trial Judge is perfectly right in holding that the prosecution witnesses were able to correctly identify these persons and rightly rejected the defence plea.

38. Finally, we have to consider whether the death sentence awarded by the trial Judge affirmed by the High Court is justifiable and acceptable. After finding that the prosecution has established beyond reasonable doubt in respect of offences

under Sections 148, 364A, 365 and 302 IPC, the learned Trial Judge, by giving adequate reasons, awarded death sentence to both the appellants which was confirmed by the High Court. Now, we have to find out whether death sentence is warranted in the facts and circumstances duly established by the prosecution.

39) When the constitutional validity of death penalty for murder provided in Section 302 of the Indian Penal Code and sentencing procedure embodied in sub-section 3 of Section 354 of the Code of Criminal Procedure, 1873, was questioned, the Constitution Bench of this Court in *Bachhan Singh vs. State of Punjab* (1980) 2 SCC 684, after thorough discussion, rejected the challenge to the constitutionality of the said provisions and ruled that "life imprisonment is the rule and death sentence is an exception".

40. The above said decision of the Constitution Bench was considered by a three-Judge bench in *Machhi Singh & Others vs. State of Punjab* (1983) 3 SCC 470. The discussion and the ultimate conclusion as well as instances/guidelines are relevant:-

"Death Sentence

**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 this 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 enforced 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 if it suits their ends. Every member of the community owes a doubt 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:

I. *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.

II. *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-a-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.

III. *Anti-social or socially abhorrent nature of the crime*

**35.** (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. *Magnitude of crime*

**36.** When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

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-a-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.

**38.** In this background the guidelines indicated in Bachan Singh case[1] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case[1]:

of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

**39.** In order to apply these guidelines inter alia the following questions may be asked and answered:

(*a*) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

**40.** If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

41. Following the guidelines and principles enunciated in *Bachhan Singh's case & Machhi Singh's* case, (supra), this Court in subsequent decisions applied those principles and either confirmed the death sentence or altered the same as life sentence vide *Asharfi Lal & Others vs. State of Uttar Pradesh,* (1987) 3 SCC 224, *Ravji vs. State of Rajasthan,* (1996) 2 SCC 175 and *Ram Singh vs. Sonia & Others,* (2007) 3 SCC 1.

42. It is settled legal position that the punishment must fit the crime. It is the duty of the Court to impose proper punishment depending upon the decree of criminality and desirability to impose such punishment. As a measure of social necessity and also as a means of deterring other potential offenders, the sentence should be appropriate befitting the crime.

43. This Court in *Bachhan Singh's* case (supra) has held that:

"A real and abiding concern for the dignity of human life



postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

44. Therefore, it is open for the court to grant a death penalty in an extremely narrow set of cases, which is signified by the phrase 'rarest of the rare'. This rarest of the rare test relates to "special reasons" under Section 354(3). Importantly, as the Court held, this route is open to the Court only when there is no other punishment which may be alternatively given. This results in the death penalty being an exception in sentencing, especially in the case where some other punishment can suffice. It was in this context that the Court had noted:

"The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal"

45. In *Panchhi v. State of U.P.,* (1998) 7 SCC 177, this Court also elucidates on "when the alternative option is foreclosed" benchmark in the following terms:

"16. When the Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in *Bachan Singh v. State of Punjab* this Court took particular care to say that death sentence shall not normally be awarded for the offence of murder and that it must be confined to the rarest of rare cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid freaks wherein the lesser sentence would be, by any account, wholly inadequate. In Machhi Singh v. State of Punjab a three-Judge Bench of this Court while following the ratio in Bachan Singh case laid down certain guidelines among which the following is relevant in the present case: (SCC p.489, para 38)"

Here, this court quoted Guideline no. 4 in para 38 of *Machhi Singh* (supra) which we have extracted earlier.

46. In the same case, this court held that the brutality of the murders must be seen along with all the mitigating factors in order to come to a conclusion:

> "20. We have extracted the above reasons of the two courts only to point out that it is the savagery or brutal manner in which the killers perpetrated the acts on the victims including one little child which had persuaded the two courts to choose death sentence for the four persons. No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in Bachan Singh case. In a way, every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."

47. In *Bachan Singh (supra)* again, this Court discussed mitigating circumstances as follows:

> "206. Dr Chitale has suggested these mitigating factors:
>
> "Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:
>
> (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.



> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
>
> (5) That in the facts and circumstances of the case the accused believed that he morally justified in committing the offence. (6) That the accused acted under the duress or domination of another person.
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.
>
> We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

48. Therefore, in the determination of the death penalty, para. 38 of *Machhi Singh's* case (supra) must be paid due attention to it. The test for the determination of the 'rarest of the rare' category of crimes inviting the death sentence thus includes broad criterions i.e. (1) the gruesome nature of the crime, (2) the mitigating and aggravating circumstances in the case. These must take into consideration the position of the criminal, and (3) whether any other punishment would be completely inadequate. This rule emerges from the dictum of this Court that life imprisonment is the rule and death penalty an exception. Therefore, the Court must satisfy itself that death penalty would be the only punishment which can be meted out to the convict.

49. In the light of the above principles, let us examine the reasoning of the Trial Judge and its confirmation by the High Court in awarding death sentence. Before the Trial Court, High

Court and even before us the learned amicus curiae appearing on behalf of the accused Mulla and Guddu argued that the offences alleged to have committed by these persons cannot come in the category for which they may be punished with death sentence. She also pointed out that neither they have any criminal history nor the prosecution could show that the accused Mulla and Guddu were involved in dacoity/gang or taken part in any criminal activities prior to the occurrence of the present case. Learned amicus curiae further pointed out that even the one incident pressed into service by the prosecution ended in acquittal. On the other hand, the learned senior counsel appearing for the State by pointing various instances how the five persons were killed mercilessly by these accused, pleaded that no sympathy or leniency should be afforded to these persons and prayed for confirmation of the death sentence as awarded by the Trial Court and confirmed by the High Court. We have already quoted the Constitution Bench decision in *Bachhan Singh* (supra) and three-Judge Bench decision in *Machhi Singh* (supra) to the effect that in the case of murder, "life imprisonment is a rule and imposition of death sentence is an exceptional one" and the same should come within the purview of "rarest of rare category". We have already noted that the accused Mulla is of the age 50 years and Guddu is of the age 30 years at the time of committing the offence in question. No material was placed or available about the family background of these two accused and whether these persons are married or not and about the family circumstance etc. Learned amicus curiae fairly stated that no family member ever approached during the entire proceedings enquiring these appellants. The perusal of the case records also shows that no one is depending on them and no family responsibility is on the shoulders of these accused persons.

50. Now, coming to their background as to the criminality, the prosecution pressed into service the earlier incident relating to the offences of abduction, murder, mischief by firing led against these persons. The fact remained that ultimately both



of them were acquitted from those offences. Admittedly, prosecution has not placed any other material about their criminal antecedents.

51. No doubt, the aggravating circumstances against the appellants show that it is a case of cold blooded murdering of five persons including one woman of the middle age, the unfortunate victims did not provoke or resist. The murder of five innocent persons were committed for ransom which was executed despite the fact that the poor villagers were unable to pay the ransom as demanded, the accused knowing fully aware of their inability and poverty of the victims.

52. As we have noted above, along with the aggravating circumstances, it falls on us to point to the mitigating circumstances in the case. In this case, we observe three factors which we must take into account, 1) the length of the incarceration already undergone by the convicts; 2) the current age of the convicts; and finally, 3) circumstances of the convicts generally.

53. As we have noted above, old age has emerged as a mitigating factor since *Bachhan Singh* (supra). This court in *Swamy Shraddananda v. State of Karnataka* (2008) 13 SCC 767 substituted death sentence to life imprisonment since the convicts were 64 years old and had been in custody for 16 years. Even in the present case, one of the convicts is around 65 years old. The charges had been framed in 1999 and they have been in custody since 1996. They have been convicted by the Sessions Court in 2005. Clearly, the appellants have been in prison for the last 14 years.

54. Another factor which unfortunately has been left out in much judicial decision-making in sentencing is the socio-economic factors leading to crime. We at no stage suggest that economic depravity justify moral depravity, but we certainly recognize that in the real world, such factors may lead a person to crime. The 48th report of the Law Commission also reflected

this concern. Therefore, we believe, socio-economic factors might not dilute guilt, but they may amount to mitigating circumstances. Socio-economic factors lead us to another related mitigating factor, i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. This court on many previous occasions has held that this ability to reform amount to a mitigating factor in cases of death penalty.

55. In the present case, the convicts belong to an extremely poor background. With lack of knowledge on the background of the appellants, we may not be certain as to their past, but one thing which is clear to us is that they have committed these heinous crimes for want of money. Though we are shocked by their deeds, we find no reason why they cannot be reformed over a period of time.

56. This Court in *Dalbir Singh and others v. State of Punjab* (1979) 3 SCC 745 had considered the question of the length of incarceration when death penalty is reduced to life imprisonment. It was held that:

> "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case. Taking the cue from the English legislation on abolition,we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at larger. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."



57. This Court in *Subash Chander v. Krishan Lal* (2001) 4 SCC 458 considered the length of life imprisonment, while going over the precedents germane to the question and observed as follows:

> "20. Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment of imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years. The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoners sentenced to life imprisonment is bound in law to serve the life term in prison. In *Gopal Vinayak Godse v. State of Maharashtra & Others* 1961 Cri L J 736a , the convict petitioner contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in *Pandit Kishori Lal v. King Emperor* 1944 (1) 72 LR IndAp this Court held:
>
> "If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to s. 57 of the Indian Penal Code, 20 year's imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p.10:
>
> "Assuming that the sentence is to be regarded as one of

twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission."

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

21. In *State of Madhya Pradesh v. Ratan Singh & Ors.* 1976 Cri L J 1192 this Court held that a sentence of imprisonment for life does not automatically expire at the end of the 20 years, including the remissions. "The sentence for imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government choses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure", observed the court. To the same effect are the judgments in *Sohan Lal v. Asha Ram & Others* AIR 1981 SC 174a , *Hagirath v. Delhi Administration* 1985 Cri L J 1179 and the latest judgment in *Zahid Hussein & Ors. v. State of West Bengal & Anr.* 2001 Cri L J 1692 ."



Finally, this Court held that life imprisonment would mean imprisonment for the rest of the life of the convict, unless the State Government remits the sentence to 20 years. This position has been accepted by this Court on various occasions [See *Shri Bhagwan v. State of Rajasthan,* (2001) 6 SCC 296; *Jayawant Dattatray Suryarao v. State of Maharashtra,* (2001) 10 SCC 109].

58. This question came up again recently before this Court in *Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh,* 2009 (14) SCALE 533, where this Court considered the variance in precedents and ruled as follows:

"15. What ultimately emerges from all the aforesaid decisions is that life imprisonment is not to be interpreted as being imprisonment for the whole of a convict's natural life within the scope of Section 45 of the aforesaid Code. The decision in *Swamy Shraddananda's* case (supra) was taken in the special facts of that case where on account of a very brutal murder, the appellant had been sentenced to death by the Trial Court and the reference had been accepted by the High Court. However, while agreeing with the conviction and confirming the same, the Hon'ble Judges were of the view that however heinous the crime may have been, it did not come within the. definition of "rarest of rare cases" so as to merit a death sentence. Nevertheless,' having regard to the nature of the offence, Their Lordships were of the view that in the facts of the case the claim of the petitioner for premature release after a minimum incarceration for a period of 14 years, as envisaged under Section 433A Cr.P.C., could not be acceded to, since the sentence of death had been stepped down to that of life imprisonment, which was a lesser punishment.

16. On a conjoint reading of Sections 45 and 47 of the Indian Penal Code and Sections 432, 433 and 433A Cr.P.C., it is now well established that a convict awarded life sentence has to undergo imprisonment for at least 14

years. While Sections 432 and 433 empowers the appropriate Government to suspend, remit or commute sentences, including a sentence of death and life imprisonment, a fetter has been imposed by the legislature on such powers by the introduction of Section 433A into the Code of Criminal Procedure by the Amending Act of 1978, which came into effect on and from 18th December, 1978. By virtue of the *non-obstante* clause used in Section 433A, the minimum term of imprisonment in respect of an offence where death is one of the punishments provided by laws or where a death sentence has been commuted to life sentence, has been prescribed as 14 years. In the various decisions rendered after the decision in Godse's case (supra), "imprisonment for life" has been repeatedly held to mean imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the power vested in the Governor under Article 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the concerned authorities to determine the actual length of imprisonment having regard to the gravity and intensity of the offence. Section 433A Cr.P.C., which is relevant for the purpose of this case, reads as follows:

*433A. Restriction on powers of remission or commutation in certain cases.-* Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by laws or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.



17. In the present case, the facts are such that the petitioner is fortunate to have escaped the death penalty. We do not think that this is a fit case where the petitioner should be released on completion of 14 years imprisonment. The petitioner's case for premature release may be taken up by the concerned authorities after he completes 20 years imprisonment, including remissions earned."

59. We are in complete agreement with the above dictum of this Court. It is open to the sentencing Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The Court should be free to determine the length of imprisonment which will suffice the offence committed.

60. Thus we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.

61. Here we like to note that the punishment of life sentence in this case must extend to their full life, subject to any remission by the Government for good reasons.

62. For the foregoing reasons and taking into account all the aggravating and mitigating circumstances, we confirm the conviction, however, commute the death sentence into that of life imprisonment. The appeal is disposed of accordingly.

K.K.T. Appeal disposed of.

KUSUM SHARMA & OTHERS
*v.*
BATRA HOSPITAL & MEDICAL RESEARCH CENTRE & OTHERS
(Civil Appeal No.1385 of 2001)

FEBRUARY 10, 2010

**[DALVEER BHANDARI AND HARJIT SINGH BEDI, JJ.]**

*Consumer Protection Act, 1986:*

*Deficiency in Service – Claim for compensation – Death of patient in hospital – Allegation of medical negligence in conducting surgery and post surgical care – HELD: The doctor who performed the operation had reasonable degree of skill and knowledge – National Commission has rightly held him not guilty of negligence – Merely because the doctor chooses one course of action in preference to the other, he would not be liable if the course of action chosen by him was acceptable to the medical profession – Tort – Negligence – Difference between 'negligence and 'criminal negligence'.*

*Criminal Law:*

*Criminal negligence –Medical negligence – Purpose behind holding a professional liable for his act or omission – HELD: Is to make life safer and to eliminate the possibility of recurrence of such negligence in future – At the same time, courts have to be extremely careful to ensure that professionals are not unnecessarily harassed otherwise they will not be able to carry out their professional duties without fear – It is for the complainant to clearly make out a case of negligence before a medical practitioner is proceeded against criminally – A medical practitioner would be liable only where his conduct fell below that of standards of a reasonably competent practitioner in his field - A mere deviation from*





*normal professional practice is not necessarily evidence of negligence – Guidelines laid down – Penal Code, 1860 – ss.88, 92 and 370.*

**The husband of appellant No. 1 was admitted in respondent no. 1 hospital on 18.3.1990. A surgical operation for removal of an abdominal tumor, which was found to be malignant, was carried out on 2.4.1990 by respondent no. 3. As the flow of fluid did not stop, a second surgery was carried out on 23.5.1990. The patient was discharged on 23.6.1990 with an advice to follow up and for change of the dressing. Some post operative complications were stated to have arisen and respondent visited a few other hospitals including the AIIMS. On 9.10.1990 the patient was again taken to respondent no. 1-hospital where he died on 11.10.1990 on account of 'pyogenic meningitis'. Thereupon the appellants filed a complaint u/s 21 of the Consumer Protection Act, 1986 before the National Consumer Disputes Redressal Commission claiming compensation for alleged deficiency in service and medical negligence on the part of the respondents in the treatment of the deceased. The National Commission did not find any merit in the allegations and dismissed the complaint. Aggrieved, the claimants filed the appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1. In the instant case, the doctor, respondent no.3, who performed the operation had reasonable degree of skill and knowledge. The National Commission, which considered the medical literature and evidence of eminent doctors of AIIMS, rightly held respondent no. 3 not guilty of negligence. [Para 57] [711-C]**

*Spring Meadows Hospital & Another v. Harjot Ahluwalia through K.S. Ahluwalia & Another* **1998 ( 2 ) SCR 428 =**

**(1998) 4 SCC 39 and** *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole & Anr.* **1969 SCR 206 = AIR 1969 SC 128 ;** *State of Haryana v. Smt. Santra* **2000 ( 3 ) SCR 195 = (2000) 5 SCC 182 ; and** *Poonam Verma* v. *Ashwin Patel & Ors*. **1996 ( 2 ) Suppl. SCR 671 = (1996) 4 SCC 332 – referred to.**

*R.* v. *Lawrence*, **[1981] 1 All ER 974 (HL);** *R. v. Caldwell* **1981(1) All ER 961 (HL);** *Bolam* v. *Friern Hospital Management Committee* **(1957) I WLR 582 : (1957) 2 All ER 118 ;** *Roe and Woolley* v. *Minister of Health* **(1954) 2 QB 66;** *Whitehouse* v. *Jordon & Another* **(1981) 1 All ER 267 ;***Chin Keow* v. *Government of Malaysia & Anr.* **(1967) WLR 813;** *Hucks v. Cole & Anr.* **(1968) 118 New LJ 469;** *Hunter* v. *Hanley* **1955 SLT 213– referred to.**

*Black's Law Dictionary; Halsbury's Laws of England* **(Fourth Edition, Vol.30, Para 35), referred to.**

**1.2. A clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. As has been held by this Court, while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the** *gross and culpable neglect or failure* **to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. [Para 66 and 68] [713-D-F; 714-C-E]**

*Syad Akbar v. State of Karnataka* **1980 ( 1 ) SCR 95 = (1980) 1 SCC 30 ;** *Bhalchandra alias Bapu & Another v.*



*State of Maharashtra* **1968 SCR 766 = AIR 1968 SC 1319; and** *Jacob Mathew* v. *State of Punjab & Another* **2005 (2) Suppl. SCR 307 = (2005) 6 SCC 1, referred to.**

*Andrews* v. *Director of Public Prosecutions* **[1937] A.C. 576, referred to.**

*Charlesworth & Percy on Negligence* **(10th Edn., 2001) Para 1.13, referred to.**

**1.3. This Court has held that it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that the respondent charged with negligence acted in accordance with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted: Firstly, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used. A mere deviation from normal professional practice is not necessarily evidence of negligence. [Para 75 and 76] [718-E-G]**

**2.1. A doctor faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally.The professional should be held liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of**

**negligence in future. But, at the same time courts have to be extremely careful to ensure that professionals are not unnecessarily harassed otherwise they will not be able to carry out their professional duties without fear. [Para 78 and 80] [719-E-H; 720-A]**

**2.2. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. A professional deserves total protection. The Indian Penal Code, 1860 has taken care to ensure that people who act in good faith should not be punished. Sections 88, 92 and 370 IPC give adequate protection to the professional and particularly medical professionals. [Para 81 and 91] [720-B-C; 725-B]**

*Kurban Hussein Mohammedali Rangawalla* v. *State of Maharashtra* **(1965) 2 SCR 622;** *Indian Medical Association v. V.P. Shantha & Others* **1995 ( 5 ) Suppl. SCR 110 = (1995) 6 SCC 651;** *Achutrao Haribhau Khodwa & Others v. State of Maharashtra & Others* **1996 ( 2 ) SCR 881 = (1996) 2 SCC 634;** *C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam* **2009 (7 ) SCR 272 = (2009) 7 SCC 130, refered to.**

*John Oni Akerele v. The King* **AIR 1943 PC 72;** *Emperor v. Omkar Rampratap* **(1902) 4 Bom LR 679, referred to.**

**3. On scrutiny of the leading cases, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-**



**I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.**

**II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.**

**III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.**

**IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.**

**V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.**

**VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving**

**lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.**

**VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.**

**VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.**

**IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.**

**X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/ hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.**

**XI. The medical professionals are entitled to get**



**protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals. [Para 94] [725-G-H; 726-A-H; 727-A-G]**

**4.1. It is not that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind. [Para 95] [728-A-B]**

**4.2. In the facts and circumstances of the case, the appellants have failed to make out any case of medical negligence against the respondents. The National Commission was justified in dismissing the complaint of the appellants. No interference is called for. [Para 96 and 97] [728-C-D]**

**Case Law Reference:**

| | | |
|---|---|---|
| 1998 (2) SCR 428 | referred to | para 47 |
| 1969 SCR 206 | referred to | para 47 |
| (1957) I WLR 582 | referred to | para 49 |
| (1957) 2 All ER 118= (1954) 2 QB 66 | referred to | para 51 |
| (1981) 1 All ER 267 | referred to | para 53 |
| (1967) WLR 813 | referred to | para 54 |
| 2000 (3) SCR 195 | referred to | para 55 |
| 1996 (2) Suppl. SCR 671 | referred to | para 56 |
| [1981] 1 All ER 974 (HL) | referred to | para 64 |

| | | |
|---|---|---|
| **1981(1) All ER 961 (HL)** | **referred to** | **para 64** |
| **[1937] A.C. 576** | **referred to** | **para 66** |
| **1980 (1) SCR 95** | **referred to** | **para 67** |
| **1968 SCR 766** | **referred to** | **para 68** |
| **2005 (2 ) Suppl. SCR 307** | **referred to** | **para 69** |
| **(1968) 118 New LJ 469** | **referred to** | **para 73** |
| **1955 SLT 213** | **referred to** | **para 74** |
| **AIR 1943 PC 72** | **referred to** | **para 82** |
| **(1965) 2 SCR 622** | **referred to** | **para 84** |
| **(1902) 4 Bom LR 679** | **referred to** | **para 84** |
| **1995 (5) Suppl. SCR 110** | **referred to** | **para 86** |
| **1996 (2) SCR 881** | **referred to** | **para 88** |
| **2009 (7) SCR 272** | **referred to** | **para 92** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1385 of 2001.

From the Judgment & Order dated 30.8.2000 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 116 of 1991.

Gp. Capt, Karan Singh Bhati, Aishwarya Bhati, Himanshu Singh and Rekha Giri for the Appellants.

Manvendra Verma, Sudhir Vats, Sanveer Mehalwal (for Kamakshi S. Mehlwal), Parmanand Gaur (N.P.) Sudhir Kumar Gupta, (N.P.), Somnath Mukherjee, (N.P.) and Ankit Gupta (for Maninder Singh) for the Respondents.

The Judgment of the Court was delivered by



**DALVEER BHANDARI, J.** 1. This appeal is directed against the judgment and order dated 30th August, 2000 passed by the National Consumer Disputes Redressal Commission, New Delhi (for short, `National Commission') in Original Petition No.116 of 1991.

2. The appellants filed a complaint under section 21 of the Consumer Protection Act, 1986 claiming compensation of Rs.45 lakhs attributing deficiency in services and medical negligence in the treatment of the deceased Shri R.K. Sharma (who was the husband of appellant no.1, Kusum Sharma and the father of appellant nos. 2 and 3).

3. Brief facts which are necessary to dispose of this appeal are as under:-

4. Late Shri R.K. Sharma was a Senior Operations Manager in the Indian Oil Corporation (Marketing Division). In June 1989, he developed blood pressure. He was very obese. He complained of swelling and breathlessness while climbing stairs. He visited Mool Chand Hospital on 10.12.1989 but no diagnosis could be made. The Indian Oil Corporation referred him to Batra Hospital on 14.3.1990 where he was examined by Dr. R.K. Mani, respondent no.2 and Dr. S. Arora who advised him to get admitted for Anarsarca (Swelling).

5. On 18.3.1990, Shri Sharma was admitted in Batra Hospital. On 20.3.1990, an ultrasound of abdomen was done and the next day, i.e., on 21.3.1990, a C.T. scan of abdomen was done and it was found that there was a smooth surface mass in the left adrenal measuring 4.5 x 5 cm and that the right adrenal was normal. Surgery became imperative for removing the left adrenal. The deceased, Shri Sharma and appellant no.1 were informed by Dr. Mani, respondent no.2 that it was well encapsulated benign tumor of the left adrenal ˇof less than 5 cm in size which could be taken out by an operation. It was decided to carry out the surgical operation for the removal of

abdominal tumor. On 2.4.1990, the doctor obtained consent from the appellants for the operation of removal of abdominal tumor. On test, the tumor was found to be malignant. The treatment for malignancy by way of administering Mitotane could not be given as it was known to have side effects.

6. The surgery was carried out on 2.4.1990 by Dr. Kapil Kumar, respondent no.3. During the surgery, the body of the pancreas was damaged which was treated and a drain was fixed to drain out the fluids. According to the appellants, considerable pain, inconvenience and anxiety were caused to the deceased and the appellants as the flow of fluids did not stop. After another expert consultation with Dr. T.K. Bose, respondent no.4 a second surgery was carried out on 23.5.1990 in Batra Hospital by Dr. Bose assisted by Dr. Kapil Kumar.

7. Shri Sharma was fitted with two bags to drain out the fluids and in due course, wounds were supposed to heal inside and the fluid was to stop. The deceased was discharged on 23.6.1990 carrying two bags on his body, with an advice to follow up and for change of the dressing. The deceased next visited Batra Hospital only on 31.8.1990 and that too to obtain a Medical Certificate from Dr. Mani, respondent no.2.

8. On 9.10.1990, Shri Sharma vomited at home and arrangements for shifting him to the Batra Hospital were made and the Hospital's ambulance sent by Dr. Mani. Shri Sharma died in the hospital on 11.10.1990 on account of `pyogenic meningitis'.

9. It is pertinent to mention that after the discharge from Batra Hospital on 23.6.1990, the deceased wrote a letter on 26.6.1990 to his employer narrating the agony and the pain he underwent at the hands of the doctors in Batra Hospital.

10. The deceased, on the suggestion of Dr. Bose, respondent no.4 visited Modi Hospital on 10.7.1990 where Dr.



Bose was a Consulting Surgeon for change of dressing after 17 days. Respondent nos. 2 and 3, namely, Dr. Mani and Dr. Kapil Kumar visited the residence of the deceased on 14.7.1990 and found him in a bad condition and asked him to go to AIIMS ˇwhere he was admitted on 22.7.1990 and treatment was given for pancreatic fistula and chronic fistula. He was discharged on 26.7.1990 with an advice to follow up in the O.P.D. The deceased again went to Mool Chand Hospital on 17.8.1990 with pancreatic and feacal fistula which was dressed. The deceased was discharged from Mool Chand Hospital on 31.8.1990. The deceased went to Jodhpur on 29.9.1990 and on 30.9.1990 he had to be admitted in the Mahatma Gandhi Hospital at Jodhpur where he was diagnosed with having post-operative complications of Adrenoloctomy and Glutteal abscess. The deceased was discharged from there on 3.10.1990 with an advice to get further treatment at AIIMS and when the deceased again went to AIIMS on 8.10.1990, Dr. Kuchupillai, a senior doctor at AIIMS wrote on a slip `to be discussed in the Endo-Surgical Conference on 8.10.1990'.

11. The appellants after the death of Shri Sharma filed a complaint under section 21 of the Consumer Protection Act, 1986 before the National Commission claiming compensation attributing deficiency in services and medical negligence in the treatment of the deceased Shri Sharma.

12. The appellants attributed death of Shri Sharma because of negligence of the doctors and the hospital. The appellants alleged that the informed consent was completely lacking in this case. The appellants also alleged that the only tests done before operation to establish the nature of tumor were ultrasound and C.T. scan which clearly showed a well capsulated tumor of the size 4.5 x 5 cm. in the left adrenal and the right adrenal was normal.

13. The appellants alleged that the deceased Shri Sharma had no access whatsoever to any of the hospitals records before filing the complaint.

14. The appellants also alleged that there was nothing on record to conclusively establish malignancy of the tumor before the operation was undertaken. The appellants also had the grievance that they were not told about the possible complications of the operation. They were told that it was a small and specific surgery, whereas, the operation lasted for six hours. The appellants alleged that pancreatic abscess was evident as a result of pancreatic injury during surgery. The appellants further alleged that there was nothing on record to show that Dr. Kapil Kumar, respondent no. 3 possessed any kind of experience and skill required to undertake such a complicated operation.

15. The appellants also had the grievance that they were not informed in time of the damage caused to the body of pancreas and the removal of the spleen.

16. According to the appellants, the `anterior' approach adopted at the time of first surgery was not the correct approach. Surgery should have been done by adopting `posterior' approach for removal of left adrenal tumor. Dr. Kapil Kumar, respondent no. 3 after the first operation on 2.4.1990 told the appellants that the operation was successful and the tumor was completely removed which was in one piece, well defined and no spreading was there. After the surgery, blood was coming out in a tube which was inserted on the left side of the abdomen. On specific query made by thedeceased and appellant no.1, respondent nos. 2 and 3 told them that the pancreas was perfectly normal but during operation on 2.4.1990, it was slightly damaged but repaired instantly, hence there was no cause of any anxiety. When the fact of damage to pancreas came to the notice of the deceased, he asked for the details which were not given. The appellants alleged that the tumor taken out from the body was not malignant.

17. The complaint of the appellants was thoroughly examined and dealt with by the National Commission. The National Commission had decided the entire case of the



appellants in the light of the law which has been crystallized by a number of cases decided by this Court. Some of them have been extensively dealt with by the Commission.

18. The allegations in the complaint were strongly rebutted by Dr. Kapil Kumar, respondent no. 3. Dr. Kapil stated in his affidavit that the anterior approach was preferred over the posterior approach in the suspected case of cancer, which was the case of Shri Sharma. The former approach enables the surgeon to look at liver, the aortae area, the general spread and the opposite adrenal gland. The risk involved was explained to the patient and the appellants and they had agreed to the surgery after due consultation with the family doctor.

19. With the help of medical texts in support of adopting `anterior' approach, respondent no. 3 mentioned as under:

> "(i) "The `anterior' approach for adrenalectomy is mandatory whenever optimum exposure is required or when exploration of the entire abdomen is necessary. Therefore, this approach is used in patients with adrenal tumours >4 cm in diameter, or in patients with possibly malignant tumours of any size, such as pheochromocytoma or adrenocortical carcinoma.....
>
> Resection of the left adrenal gland requires mobilization of the spleen and left colon. The lateral peritoneal attachments of the left colon are freed, initially. Then the spleen is scooped out from the left upper guardant medially and the avascular attachments between the spleen and diaphragm are divided. The spleen, stomach, pancreatic tail and left colon are retracted medially en bloc to the superior mesenteric vessels. The left adrenal gland is exposed splendidly in this manner". - Peritoneum, Retroperitoneum and Mesentery - Section IV.
>
> (ii) "Adrenal operations. Surgery should be initial treatment for all patients with Cushing syndrome secondary

to adrenal adenoma or carcinoma. Preoperative radiologic lateralization of the tumor allows resection via a unilateral flank incision. Adrenalectomy is curative. Postoperative steroid replacement therapy is necessary until the suppressed gland recovers (3-6 months).

Adrenal carcinoma should be approached via a midline incision to allow radical resection, since surgery is only hope for cure". - Principles of Surgery, 18th Edition Page 560.

(iii) "Adrenocortical malignancies are rare, often at advanced stage when first discovered and should be approached using an anterior approach to allow adequate exposure of the tumor and surrounding soft tissue and organs". - Technical Aspects of Adrenalectomy - By Clive S. Grant and Jon A. Van Heerden - Chapter Thirty Five."

20. The medical texts quoted above speak of both the approaches for adrenaloctomy. Nowhere the appellant no.1 has been able to support her contention that posterior approach was the only possible and proper approach and respondent no. 3 was negligent in adopting the anterior approach.

21. Apart from the medical literature, Dr. N. K. Shukla, Additional Professor at AIIMS and a well-know surgeon stated in unequivocal terms in response to a specific question from the appellant no.1 that for malignant tumors, by and large, we prefer anterior approach.

22. Dr. Nandi, Professor and Head of Department of Gastro-Intestinal Surgery at AIIMS also supported `anterior' approach and confirmed and reconfirmed adoption of `anterior' approach in view of inherent advantages of the approach.

˘23. In view of the medical literature and the evidence of eminent doctors of AIIMS, the National Commission did not find any merit in the allegations levelled.



24. According to the appellants, Dr. Bose, respondent no. 4, who performed the second surgery on 23.5.1990 did not follow the advice of Dr. Nandi, Professor and the Head of Department of Gastro-Intestinal Surgery at AIIMS. Dr. Nandi had advised placing of feeding tube at a designated place, but this was not done.

25. Dr. Bose, Respondent no. 4 stated in his affidavit that there are three well known alternative methods of food supply of nutrition minimizing any leakage of enzymes from the pancreas. Any of the alternative methods could be adopted only after opening the stomach and this is precisely what respondent no. 4 did, i.e. cleared the area of abscess, dead and other infective tissues and inserted a second tube for drainage of fluid in the affected area and in the pancreatic duct. Respondent no. 4 also inserted a second tube connecting the exterior of the abdomen with the affected part of the ˘pancreas and the abdomen for drainage and clearance in support of the first tube inserted for drainage. According to respondent no. 4, this was the best course which could be done keeping in view the inside status of the stomach of the deceased and that was done.

26. The National Commission did not find any merit in this complaint of the appellants.

27. Another complaint made by the appellants was with regard to `Gluteal abscess' which was attributed to `pyogenic meningitis' resulting in the death of Shri Sharma which was first observed in the Medical College Hospital at Jodhpur, where the deceased had gone in connection with performing certain rites in connection with the death of his mother-in-law. The Gluteal abscess was drained by a simple incision. He was discharged from there on 3.10.1990 with an advice to go to AIIMS, New Delhi and meet Dr. Kuchupillai, the Endoconologist. According to the doctor, there was not even a whisper of any incision or draining of gluteal abscess. The Essentiality Certificate makes it clear that no incision was

made to drain out gluteal abscess.

28. The appellants aggrieved by the judgment and order of the National Commission filed the present appeal before this court.

29. This court issued notice and in pursuance to the notice issued by this court, a counter affidavit on behalf of respondent no.1 has been filed by Dr. Ranbir Kumar Gupta. It is mentioned in the affidavit that although the respondents fully sympathized with the appellants' unfortunate loss, the respondents are constrained to submit that the appellants had presented a malicious, fabricated and distorted account to create a false impression that the respondents were guilty ofnegligence in treating late Shri R.K. Sharma.

30. The respondents also submitted that the appellants have ignored the fact that the medicine is not an exact science involving precision and every surgical operation involves uncalculated risks and merely because a complication had ensued, it does not mean that the hospital or the doctor was guilty of negligence. A medical practitioner is not expected to achieve success in every case that he treats. The duty of the Doctor like that of other professional men is to exercise reasonable skill and care. The test is the standard of the ordinary skilled man. It is further submitted in the counter affidavit that the hospital and the doctors attended late Shri Sharma with utmost care, caution and skill and he was treated with total devotion and dedication. Shri Sharma'sdeath was attributable to the serious disease with which hewas suffering from. It is also mentioned that the conduct of the deceased himself was negligent when he was dischargedon 23.6.1990. The doctors specifically advised him "Regular Medical Follow Up" which the deceased failed to attend. In fact, subsequently, it was respondent no.4 who called upon the deceased and persuaded him to visit the Modi Hospital for a change of dressing. The Fitness Certificate issued to the deceased also bore the endorsement "he would need prolonged and regular



follow up". However, the deceased did not make any effort and was totally negligent.

31. According to the affidavit, the deceased was admitted on 18.3.1990 in Batra Hospital. Dr. R.K. Mani recommended certain investigations such as abdominal Utrasound, Echo-cardiogram Blood Tests etc. On 20.3.1990, Dr. Mani ordered a C.T. Scan of the abdomen for a suspected lump in the abdomen. The C.T. abdomen revealed a large left adrenal mass. Accordingly, the following note was recorded by Dr. R.K. Mani in the case sheet on 21.3.1990:-

"CT abdomen reveals a large left adrenal mass. Evidently there is a secreting adrenal tumour. Patient needs full work up re hormonal status and CT Head Scan." The same day Dr. R.K. Mani referred the case to Dr. C.M. Batra, Endocrinologist and sought Dr. Batra's opinion on the diagnosis made by him that Anasrarca was attributable to the Adrenal tumour. Dr. Mani also referred Shri R.K. Sharma to a Dermatologist. That after reviewing the case Dr. C.M. Batra agreed with Dr. Mani that Anarsarca was due to the Adrenal Tumour. Dr. Batra was also of the opinion that the Adrenal Tumour could be due to either Adrenal or Adrenal Carcinoma (i.e. cancer). Dr. Batra recommended a C.T. Thorax Bone and Skeletol survey.

The Dermatologist Dr. Kandhari reported that Shri R.K. Sharma had a fungal infection. After the reports of all the tests and the report of the hormonal assays had been received, respondent no.2 came to a confirmed diagnosis that Shri R.K. Sharma had a secreting adrenal tumour. The patient was informed that surgery for removal of an adrenal tumour was planned. Appellant no.1 was also informed that the tumour was suspected to be malignant. Mrs. Kusum Sharma told respondent no.2 that one of her relations was a doctor working in Jodhpur Medical College and that she would like to consult him. The said relation of Smt. Kusum Sharma came down to Delhi, examined Shri R.K. Sharma

and went through all the reports. Thereafter, Smt. Kusum Sharma gave consent for the surgery. Dr. Kapil Kumar, who specializes in surgical oncology, i.e., cancer surgery was asked to operate upon Shri R.K. Sharma. The risk involved in the operation was explained to the petitioner, her husband (now deceased) and their relative and they agreed after due consultation with their family doctor."

32. Shri Sharma was operated on 2.4.1990 by Dr. Kapil Kumar, respondent no.3 and the adrenal tumour was removed. During surgery it became necessary to remove the spleen of Shri R.K. Sharma. The operation was successful. However, the tail of the pancreas was traumatized during retraction as Shri R.K. Sharma was extremely obese. On examination, the injury to the pancreas was found to be superficial and non-ductal. The damage to the pancreas was repaired immediately with interrupted non-absorbable sutures and drains were placed. The injury to the pancreas was known during surgery and the same was repaired immediately. It was clearly recorded in the operation transcript that the body of the pancreas was damaged on its posterior surface. The said fact was recorded in the discharge summary.

33. It is submitted that after the surgery Shri R.K. Sharma was subjected to ultrasound imaging and sonogram. On 26.4.1990 respondent no.2 ordered a CT Scan as he suspected the existence of a pancreatic abscess. The CT Scan report was suggestive of paripancreatic inflammation and pancreatic abscess. Thus the CT Scan merely confirmed the suspicion of appellant no.1, the wife of Shri R.K. Sharma who was well aware of the injury to the pancreas and the possibility of there being a pancreatic abscess and she had long discussion with respondent nos.2 and 3 regarding the prognosis. It is denied that the patient and the appellants were assured that fluid discharge would stop within 2 or 3 days time or that it was normal complication after any surgery.

34. It is submitted that the tumour mass was sent for biopsy



the same day i.e. 2.4.1990. The histopathology report was received the next day and it recorded a positive finding of the tumour being malignant. Since cases of adrenal cancer have a very poor prognosis, six slides were sent to Sir Ganga Ram Hospital for confirmation. The histopathology report from Sir Ganga Ram Hospital also indicated cancer of the adrenal gland.

35. It is admitted that due to the insistence of the patient and the appellants to seek expert advice of the All India Institute of Medical Science the patient was referred to Sir Ganga Ram Hospital for E.R.C.P. Test. After the CT Scan report dated 26.4.1990 confirmed the existence of pancreatic abscess, on 28.4.1990, respondent nos.2 and 3 sought the advice of Dr. T.K. Bose, respondent no.4. An E.R.C.P. test and Sonogram were recommended by respondent no.4 and it was again respondent no.4 who suggested that the opinion of Prof. Nandi of All India Institute of Medical Sciences be sought. E.R.C.P. and Sonogram are sophisticated tests and the patient can hardly be expected to be aware of such procedures. It is submitted that the E.R.C.P. test confirmed the initial diagnosis made by respondent nos. 2 and 3 that there being a leakage from the pancreatic duct and showed the exact site of leakage. Determination of exact site of leakage is one of the principal functions of the E.R.C.P. test.

36. In the counter-affidavit it is specifically denied that the deceased was dissatisfied with the treatment. In the affidavit, it is mentioned that Dr. T.K. Bose and Dr. Kapil Kumar adopted the procedure, which in their opinion was in the best interest of the patient, Shri Sharma.

37. During the second operation on 23.5.1990 it was found that there was matting together of proximal jejunal loops (intestinal loops) in the left infra-colic compartment subjacent to root of transverse mescolon and it was technically hazardous to do feeding jejunostomy. That is why a deviation was made. Dr. T.K. Bose and Dr. Kapil Kumar were not obliged to follow every detail of Dr. Nandi's recommendation as appropriate

decisions were to be made in accordance with the findings at surgery. It would be pertinent to point out that Dr. Nandi's note was at best a theoretical analysis whereas Dr. Bose was the man on the spot. Matting of jejunal loops was not known to Dr. Nandi and came to be known only on the operation table.

38. It is submitted that the bleeding (hematemsia) was due to stress ulceration and not due to damage to the stomach by a Nasodudoenal tube. Such bleeding is quite common after major surgery. It is denied that fundus of the stomach was damaged during surgery or during placement of the Nasodudoenal tube as alleged by the appellants. In fact, the site of surgery was nowhere near the fundus of the stomach. It is denied that any procedure adopted by Dr. Bose and Dr. ˇKapil Kumar in surgery endangered the life of the patient. Shri R.K. Sharma was discharged as his surgical wounds hadhealed and his overall condition was satisfactory.

39. It is submitted that after his discharge from Batra Hospital on 23.6.1990, Shri R.K. Sharma did not maintain any contact with the answering respondents till 9.10.1990 barring one visit to respondent no.2 on 31.8.1990 for the purpose of obtaining fitness certificate. The answering respondent cannot be held responsible for any mishap, which might have taken place when the deceased Shri R.K. Sharma was being treated elsewhere.

40. It is further submitted that no request was received by respondent no.1 from AIIMS for supply of the case sheets or the tumour mass. Had such a request been received the case sheets would have been sent to AIIMS forthwith. The tumour mass would also have been sent subject to availability, as generally the mass is not preserved beyond a period of 4 weeks. As a standard practice, case sheets are never given to patients as they contain sensitive information which can affect their psyche.

41. It is submitted that no malafides can be attributed to



the answering respondents for declining the request of Shri R.K. Sharma for handing over the entire mass of tumour. Had the mass been available, it would have definitely been given. As per standard practice, specimens are discarded after one month and, therefore, the tumour mass was not available and as such could not be given to Shri R.K. Sharma. All over the world the standard practice is to preserve slides and to use them for review.

42. The Histopathology report from Mool Chand Hospital recorded the presence of Mitosis, which are indicative of malignancy. The Histopathology reports from Batra Hospital and Sir Ganga Ram Hospital clearly indicated the presence of malignancy, whereas the report from Mool Chand Hospital did not specifically indicate whether the tumour was malignant or benign. Rather it was stated in the report that a follow up was required.

43. It is submitted that pyrogenic meningitis was most probably the consequence of gluteal abscess for which the patient had not received any proper treatment in the proceeding weeks. It was only when the patient was in a critical condition that he was brought to Batra Hospital. However, at that stage the disease of the patient was too far advanced.

44. It is denied that pyrogenic Meningitis "is swelling in the brain due to the spoiled surgery and the unhealed wounds inside caused by the repeated insertions of tubes introducing infections." It is denied that surgery was spoiled at Batra Hospital. Further when the deceased Shri R.K. Sharma was discharged, all his wounds had healed. Pyrogenic Meningitis is not swelling of the brain but inflammation of the covering of the brain. It could not have been the consequence of the surgery or the pancreatic abscess.

45. In the discharge summary prepared initially it was recorded specifically that the adrenal mass was malignant and

that the patient should be started on Mitotane at the earliest after the period of recovery from the operation. However, the appellants had requested respondent no.2 to delete all references about cancer from the discharge slip as her husband was likely to read the same. She apprehended that in such an event her husband would become mentally disturbed. Having regard to the apprehension expressed by the appellant no.1, Smt. Kusum Sharma, respondent no.2 prepared a fresh discharge summary which did not contain any reference to cancer. The diagnosis of cancer was not an afterthought. The diagnosis of cancer was a considered one after two histopathological reports were received. It is however denied that the patient was told that he was suffering from cancer.

46. It is also denied that Dr. Kapil Kumar lacks experience. On the contrary, Dr. Kapil Kumar has impressive credentials and he had undertaken training in the well known Tata Cancer Hospital at Mumbai and he had adequate experience in handling such operations.

47. The learned counsel appearing for the appellants placed reliance on *Spring Meadows Hospital & Another v. Harjot Ahluwalia through K.S. Ahluwalia & Another* (1998) 4 SCC 39 and *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole & Anr.* AIR 1969 SC 128. According to respondent no.1, these cases have no application to the present case. The facts in these cases are entirely different and the law of negligence has to be applied according to the facts of the case.

48. According to Halsbury's Laws of England Ed.4 Vol.26 pages 17-18, the definition of Negligence is as under:-

> "22. Negligence : Duties owed to patient. A person who holds himself out as ready to give medical (a) advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is



> consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case: a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment (b) A breach of any of these duties will support an action for negligence by the patient (c)."

49. In a celebrated and oftenly cited judgment in *Bolam v. Friern Hospital Management Committee* (1957) I WLR 582 : (1957) 2 All ER 118 (Queen's Bench Division - Lord Justice McNair observed.

> "(i) a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view.
>
> The direction that, where there are two different schools of medical practice, both having recognition among practitioners, it is not negligent for aˇ practitioner to follow one in preference to the other accords also with American law; See 70 Corpus Juris Secundum (1951) 952, 953, para 44. Moreover, it seems that by American law a failure to warn the patient of dangers of treatment is not, of itself, negligence ibid. 971, para 48).
>
> Lord Justice McNair also observed : Before I turn that, I must explain what in law we mean by "negligence". In the ordinary case which does not involve any special skill, negligence in law means this : some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case, it is generally said, that you judge that by the action of the man in the street. He is the ordinary man.

> In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Claphm omnibus, becausehe has not got this man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if her exercises the ordinary skill of an ordinary competent man exercising that particular art."

50. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking risks. Every advancement in technique is also attended by risks.

51. In *Roe and Woolley v. Minister of Health* (1954) 2 QB 66, Lord Justice Denning said : `It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way."

52. It was also observed in the same case that "We must not look at the 1947 accident with 1954 spectacles:". "But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of



proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.

53. In *Whitehouse v. Jordon & Another* (1981) 1 All ER 267 House of Lords per Lord Edmund-Davies, Lord Fraser and Lord Russell:

> "The test whether a surgeon has been negligent is whether he has failed to measure up in any respect, whether in clinical judgment or otherwise, to the standard of the ordinary skilled surgeon exercising and professing to have the special skill of a surgeon (dictum of McNair Jo. In *Bolam v. Friern Hospital Management Committee* (1957) 2 All ER 118 at 121).

54. In *Chin Keow v. Government of Malaysia & Anr.* (1967) WLR 813: the Privy Council applied these words of *McNair J in Bolam v. Friern Hospital Management Committee:*

> ".....where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill."

55. This court in the case of *State of Haryana v. Smt. Santra* (2000) 5 SCC 182 in the matter of negligence relied upon the case of *Bolam v. Friern Hospital Management Committee* (supra) and on *Whitehouse v. Jordan & Another* (supra).

56. In *Poonam Verma v. Ashwin Patel & Ors.* (1996) 4 SCC 332 where the question of medical negligence was considered in the context of treatment of a patient, it was

observed asunder:-

> "40. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence per se."

57. In the instant case, Dr. Kapil Kumar, respondent no.3 who performed the operation had reasonable degree of skill and knowledge. According to the findings of the National Commission, he cannot be held guilty of negligence by any stretch of imagination.

58. Negligence per-se is defined in Black's Law Dictionary as under:-

> *Negligence per-se:* - Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."

59. In *Bolam v. Friern Hospital Management Committee* (supra), Lord McNair said : ".....I myself would prefer to put it this way : A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men in that particular art". In the instant case, expert opinion is in favour of the procedure adopted by Opposite Party No.3 at the time of Surgery on 2.4.90.



60. The test is the standard of ordinary skilled man exercising and professing to have that special skill.

61. In *Roe and Woolley* (supra) Lord Denning said:

> "We should be doing a dis-service to the community at large if we were to impose liability on Hospitals and Doctors for everything that happens to go wrong".

62. Other rulings and judgments also hold and support this view. It is on these judgments that the Supreme Court has relied to determine negligence or otherwise.

63. Judgment in the case of *State of Haryana* (supra) in the context of `Negligence per se', is not applicable in the instant case, as herein, there was no violation of public duty enjoined by law. The term 'negligence' is used for the purpose of fastening the defendant with liability under the Civil Law and, at times, under the Criminal Law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law.

64. In *R. v. Lawrence,* [1981] 1 All ER 974 (HL), Lord Diplock spoke for a Bench of five judges and the other Law Lords agreed with him. He reiterated his opinion in R. v. Caldwell 1981(1) All ER 961 (HL) and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warded against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to

prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it."

65. We are here concerned with the criminal negligence. We have to find out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences.

66. Lord Atkin in his speech in *Andrews v. Director of Public Prosecutions,* [1937] A.C. 576, stated, "Simple lack of care -- such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case -- "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (Charlesworth & Percy on Negligence (10th Edn., 2001) Para 1.13).

67. The aforementioned statement of law in *Andrews's* case (supra) has been noted for approval by this court in *Syad Akbar v. State of Karnataka* (1980) 1 SCC 30. This court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. The court opined that there is a marked difference as to the effect of evidence, viz. the proof, in civil and criminal proceedings. In civil proceedings,



a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

68. A three-Judge Bench of this court in *Bhalchandra alias Bapu & Another v. State of Maharashtra* AIR 1968 SC 1319 has held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in ˇparticular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

69. This court in a landmark judgment in J*acob Mathew v. State of Punjab & Another* (2005) 6 SCC 1 while dealing with the case of negligence by professionals also gave illustration of legal profession. The court observed as under:-

> "18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him

that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and˘ while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.,* [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charles worth & Percy, ibid, Para 8.03)"

70. In *Jacob Mathew's* case, this court heavily relied on the case of *Bolam* (supra). The court referred to the opinion of McNair, J. defining negligence as under:-



"19.Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill . . . A man need not possess the highest expert skill; it is well established law that it is sufficient if he˘ exercises the ordinary skill of an ordinary competent man exercising that particular art."

71. In *Eckersley v. Binnie, Bingham,* L.J. summarized the Bolam test in the following words :-

"From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet." (Charles worth & Percy, ibid, Para 8.04)

72. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35):-

"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

73. In *Hucks v. Cole & Anr.* (1968) 118 New LJ 469, Lord Denning speaking for the court observed as under:-

"a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field."

74. In another leading case *Maynard v. West Midlands Regional Health Authority* the words of Lord President (Clyde) in *Hunter v. Hanley* 1955 SLT 213 were referred to and quoted as under:-

"In the realm of diagnosis and treatment there is ample



scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men...The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care...".

The court per Lord Scarman added as under:-

"A doctor who professes to exercise a special skill must exercise the ordinary skill of his specialty. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."

75. The ratio of *Bolam's* case is that it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that the respondent charged with negligence acted in accordance with the general and approved practice is enough ˇto clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

76. A mere deviation from normal professional practice is not necessarily evidence of negligence.

77. In *Jacob Mathew's* case (supra) this court observed that higher the acuteness in emergency and higher the

complication, more are the chances of error of judgment. The court further observed as under:-

> "25.....At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure."

78. A doctor faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. This court in *Jacob Mathew's* case very aptly observed that a surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

79. Doctors in complicated cases have to take chance even if the rate of survival is low.

80. The professional should be held liable for his act or omission, if negligent, is to make life safer and to eliminate the



possibility of recurrence of negligence in future. But, at the same time courts have to be extremely careful to ensure that unnecessarily professionals are not harassed and they will not be able to carry out their professional duties without fear.

81. It is a matter of common knowledge that after happening of some unfortunate event, there is a marked tendency to look for a human factor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. A professional deserves total protection. The Indian Penal Code has taken care to ensure that people who act in good faith should not be punished. Sections 88, 92 and 370 of the Indian Penal Code give adequate protection to the professional and particularly medical professionals.

82. The Privy Council in *John Oni Akerele v. The King* AIR 1943 PC 72 dealt with a case where a doctor was accused of manslaughter, reckless and negligent act and he was convicted. His conviction was set aside by the House of Lords and it was held thus:-

> (i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.;
>
> (ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.... There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.
>
> (iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence

intelligible, except by means of illustrations drawn from actual judicial opinion....The most favourable view of the conduct of an accused medical man has to be taken, *for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck."*

(emphasis supplied)

83. In the said case, their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships ˇalso refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

84. This court in *Kurban Hussein Mohammedali Rangawalla v. State of Maharashtra* (1965) 2 SCR 622, while dealing with Section 304A of IPC, the following statement of law by *Sir Lawrence Jenkins in Emperor v. Omkar Rampratap* (1902) 4 Bom LR 679, was cited with approval:-

"To impose criminal liability under Section 304A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."

85. In *Dr. Laxman Balkrishna Joshi* (supra), the court observed that the practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law



requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor without taking the elementary caution of giving anaesthetic to the patient. The doctor was held guilty of negligence and liability for damages in civil law. We hasten to add that criminal negligence or liability under criminal law was not an issue before the Court - as it did not arise and hence was not considered.

86. In a significant judgment in *Indian Medical Association v. V.P. Shantha & Others* (1995) 6 SCC 651, a three-Judge Bench of this Court held that service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of `service' as defined in Section 2(1)(o) of the Consumer Protection Act, 1986. Deficiency in service has to be judged by applying the test of reasonable skill and care which is applicable in action for damages for negligence.

87. In the said case, the court also observed as under:-

"22. In the matter of professional liability professions differ from occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable

care in giving advice or performing services. (see: Jackson and Powell on Professional Negligence, 3rd Edn. paras 1-04,1-05 and 1-56).

88. In *Achutrao Haribhau Khodwa & Others v. State of Maharashtra & Others* (1996) 2 SCC 634, this Court noticed that in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

89. In *Spring Meadows Hospital & Another* (supra), the court observed that an error of judgment is not necessarily negligence. In *Whitehouse* (supra) the court observed as under:-

"The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

90. In *Jacob Mathew's* case (supra), conclusions summed up by the court were very apt and some portions of which are reproduced hereunder:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily



regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

(3) The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the

professional proceeded against on indictment of negligence.

91. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

92. In a relatively recent case in *C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam* (2009) 7 SCC 130 this court had an occasion to deal with the case of medical negligence in a case in which the respondent was hit by a motor-cycle while going on his by-cycle sustained a hairline fracture of the neck of the right femur.

93. Pre-operative evaluation was made and the appellant Dr. Sreekumar, on considering the various options available, decided to perform a hemiarthroplasty instead of going in for the internal fixation procedure. The respondent consented for the choice of surgery after the various options have been explained to him. The surgery was performed the next day. The respondent filed a complaint against the appellant for medical negligence for not opting internal fixation procedure. This court held that the appellant's decision for choosing hemiarthroplasty with respect to a patient of 42 years of agewas not so palpably erroneous or unacceptable as to dub it as a case of professional negligence.

94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-



I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her

suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

95. In our considered view, the aforementioned principles



must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

96. When we apply well settled principles enumerated in the preceding paragraphs in dealing with cases of medical negligence, the conclusion becomes irresistible that the appellants have failed to make out any case of medical negligence against the respondents.

97. The National Commission was justified in dismissing the complaint of the appellants. No interference is called for. The appeal being devoid of any merit is dismissed. In view of the peculiar facts and circumstances of this case the parties are directed to bear their own costs.

R.P. Appeal dismissed.

SATYAVIR SINGH
*v.*
STATE OF U.P.
(Criminal Appeal No. 295 of 2010)

FEBRUARY 11, 2010

**[ALTAMAS KABIR AND SWATANTER KUMAR, JJ.]**

*Penal Code, 1860 – s.307 – Accused, armed with licensed gun of his brother, allegedly fired bullet shots at informant's brother and injured him – Trial Court convicted accused u/s 307, IPC and u/s 27 of Arms Act – First Appellate Court held that the firing was accidental and acquitted accused of both the offences – High Court reversed the judgment of acquittal by convicting accused u/s.307, IPC – Justification of – Held: Justified – The First Appellate Court founded its judgment of acquittal on surmises and suspicion, which were not supported by evidence on record – Statement of eye witnesses, medical evidence and investigation conducted by Investigating Officer clearly show that prosecution proved its case beyond reasonable doubt – The act of firing gun shots at the victim shows that accused had knowledge that by such an act he may even cause death of the victim, though it is a matter of co-incidence that the gun shots did not injure the victim at any of his vital organs – Arms Act, 1959 – s.27.*

*Appeal – Appeal against acquittal – Scope for interference – Discussed.*

**According to the prosecution, the appellant-accused, armed with the licensed gun of his brother, fired bullet shots at PW3 and injured him as he was enraged with the fact that the farmers in the village had started irrigating their fields from the tubewell of PW1-informant instead of appellant's father. The occurrence was allegedly**





**witnessed by PW1, PW-4 and two other witnesses. PW1 is brother of PW3.**

**The trial court convicted the appellant u/s. 307 IPC and u/s 27 of Arms Act, 1959. The first Appellate Court held that the firing was accidental and acquitted the appellant of both the said offences. The High Court partly allowed the appeal of the State by convicting him u/s. 307 IPC.**

**In appeal to this Court, it was contended that a) that the High Court erred in law in setting aside the judgment of acquittal recorded by the First Appellate Court, which was reasoned one and based on a proper appreciation of evidence and thus the High Court ought not to have upset the judgment of acquittal; (b) that no motive was proved and in absence of a specific motive, the High Court erred in holding the appellant guilty of offence under Section 307 IPC; (c) that the expert evidence being at variance and the medical evidence not supporting the injuries allegedly found on the person of the victim, the benefit of doubt should have been given to the accused as the prosecution had failed to prove its case beyond reasonable doubt and (d) that the High Court should have appreciated that it was an accidental firing and the prosecution had not put forth any explanation on record as to how the weapon (double barrel gun) was broken.**

**Dismissing the appeal, the Court**

**HELD:1. The judgment of acquittal can be interfered by the appellate court. However, it is neither permissible nor possible to enunciate any straightjacket formula which can universally be applied to all the cases. The court will have to exercise its discretion keeping in view the facts and circumstances of a given case. [Para 15] [748-B-D]**

*Ganesh Bhavan Patel & Anr. vs. State of Maharashra,* **1978 (4) SCC 371;** *Sheo Swarup v. King Emperor* **AIR 1934 PC 227;** *Mathai Mathews v. State of Maharashtra* **(1970) 3 SCC 772;** *Khedu Mohton & Ors. v. State of Bihar* **1970 (2) SCC 450;** *Kunwar Bahadur Singh v. Shiv Baran Singh & Ors.* **2001 9 SCC 149;** *Arulvelu & Anr. v. State represented by the Public Prosecutor & Anr.* **2009 (10) SCC 2006 and** *Ghurey Lal v. State of U.P.* **2008 (10) SCC 450, referred to.**

**2.1. In the present case, the trial court discussed ocular as well as documentary evidence produced by the prosecution. The version stated by the eye witnesses, the medical evidence as well as the veracity of the statement made under Section 313 CrPC formed the basis of the judgment of conviction passed by the trial court. The court examined in its right perspective one of the most important feature of the case that why the accused was carrying gun of his brother and discarded the narration and the explanation for keeping the gun with him. [Para 16] [748-E-G]**

**2.2. The First Appellate Court, however, held that it was an accidental firing and the prosecution failed to prove its case. The benefit was given to the accused primarily on certain surmises and conjectures and doubting the presence of the witnesses particularly PW4 whose presence had been admitted by the accused himself in the report lodged by him and even in his explanation before the Court. [Para 18] [749-B-C]**

**2.3. Definite doubts or lacunae in the case of the prosecution may result in benefit of doubt being given to the accused and consequential acquittal. However, such doubts and lacunae must be clearly distinguished from doubts or lacunae based upon certain assumptions. In such cases what appears to be loop-hole in the case of the prosecution at the first glance, on appropriate**



**examination and appreciation of evidence, may fall in the other class. The First Appellate Court founded its judgment of acquittal more on surmises and suspicion and the views of the Court were not supported by evidence on record. The First Appellate Court proceeded on the basis of certain presumptions which in the opinion of the Court could be the correct approach. But such approach may be guided by the doctrine of perversity. If findings are neither supported by evidence nor such approach could be adopted by the person of common prudence or behaviour, then the court may interfere in a judgment of acquittal. The First Appellate Court is a court of both fact and law and as such has jurisdiction to entirely re-appreciate the evidence. Thus, while setting aside the order of conviction it has to equally ensure that no injustice is done and on certain assumptions of facts, guilty may not go scot free. A person otherwise proved to be guilty by the prosecution by leading cogent and reliable evidence, normally would not be given the benefit of doubt on the basis of certain assumptions or presumptions of facts. The Court may have to notice and rely upon behaviour of the person of a common prudence only where the direct evidence have been produced. The assumptions raised by the First Appellate Court are not supported on record. The High Court did not err in setting aside the order of acquittal and affirming the judgment of conviction rendered by trial court. [Paras 19 and 20] [749-D-H; 750-A-H]**

**2.4. The High Court noticed that the fields of farmers in the village were irrigated from the tubewell of appellant's father which was installed in that village. It was because of construction of the road for the Power House that the farmers of the village started irrigating from the tubewell of PW1. This was not bearable to the appellant. Thus, this may not be exactly a motive but was a reason**

**enough for the accused to take an offensive step against the injured. [Para 22] [751-B-C]**

**2.5. The first information report was lodged by PW1 without any delay and PW3 had been challenged by the accused saying that how he was irrigating the fields of the villagers from his tubewell. Armed with a licensed gun of his brother, he opened fire on PW3 and shot two bullets. The occurrence was seen by PW-1, who was present there as well as PW-4 and some others. The accused was arrested and the gun was also deposited. [Para 23] [751-D-E]**

**3.1. PW3 was medically examined and according to Dr. (PW-5), three injuries were found on the person of the injured, who was then subjected to X-ray by PW8. The medical evidence clearly reflected that the injuries could be caused by gun shots. However, there was little difference of opinion between two doctors but both the doctors were not the ballistic experts so as to provide any expert opinion which could safely be relied upon by the Court while deciding the case. [Para 25] [751-E-H; 752-A-B]**

**3.2. The difference of opinion between experts necessarily may not persuade the Court to adopt one approach or the other particularly when none of the experts are persons competent to express opinion on that subject. The difference of opinion between two doctors which, in the facts and circumstances of the present case, does not have any material bearing on the case of the prosecution is not such a formidable submission which has to be accepted by the Court to grant necessarily the benefit of doubt to the accused. [Paras 24 and 26] [751-E-G; 752-B-C]**

*Malay Kumar Ganguly v. Dr. Sukumar Mukherjee & Ors.* **(2009) 9 SCC 22 – referred to.**



**4. It was stated by PW-5 that the injuries on PW3 could be caused by gun shots. The trial court and the High Court expressed in unambiguous language the view that it was possible that no gun powder was traced around the wounds of the injuries as he was wearing clothes. This finding cannot be said to be erroneous. PW-8 clearly stated that the pellets of the fire shots were found in the wounds and were duly seen in the X-Ray of the injured. In fact the major part of the occurence is not even disputed by the accused in his statement under Section 313 CrPC and in any case the report lodged by him clearly shows that the incident occurred and the injured besides, other two witneses, PW-1 and PW-2 were present at the spot. In fact according to the accused it was an accidental fire which occurred as a result of snatching of the gun by the injured and other persons accompanying him at that time. While, according to the prosecution he had fired two shots which injured the victim and thereafter the gun was snatched. PW-5 examined the injuries of the injured and stated that injuries would have been caused 2-3 hours earlier and that when the injured was brought to the hospital he was bleeding and such injuries could be sustained by gun shots. This statement of the doctor had fully supported the case of the prosecution and chain of events as stated therein. [Para 28] [752-E-H; 752-A-C]**

**5. The contention that as no explanation was rendered by the prosecution as to how the gun had broken, this would straightaway cause serious dent in the case of the prosecution and entitles the accused for an acquittal, has no merit. It was for the accused to prove his defence as the prosecution is liable to prove the case as stated in the first information report and the report filed by it under Section 173 CrPC. The eye witnesses had actually seen the victim being injured by the shots fired**

**by the accused. In fact the accused was apprehended at the spot with the gun. The gun in question was admittedly a double barrel gun and the same was used by the accused while firing two shots. The gun with the spent cartridges were taken into custody. The accused himself had lodged the report under Section 394 IPC against the eye-witnesses. The report lodged by the accused, itself shows as to how the gun was broken. But the breaking incident took place after the two shots had been fired by the accused upon the injured. There appears to be no justifiable reason as to why the eye witnesses PW-1 and PW-4, who even according to the accused were present at the place of occurrence, should be disbelieved. It could be safely construed from the evidence on record that the accused may not have any strong motive to kill the victim, however, the loss of revenue on account of the fact that water for irrigation was being provided by the father of the injured, was reason enough for the accused to show his anger or it was not acceptable to him, as stated by the witnesses, thus he fired two shots which resulted in causing injuries to PW3. The gun and the utilized bullets were given at the police station itself. This evidence clearly shows that prosecution has not failed in proving its case in accordance with law. [Paras 29, 30] [753-D-H; 754-A-C]**

**6. The statement of the eye witnesses, medical evidence and the investigation conducted by the Investigating Officer clearly show that the prosecution has been able to prove its case beyond reasonable doubt. The act of firing gun shots at the injured obviously shows that the accused had the knowledge that by such an act he may even cause the death of the injured and actually caused hurt to victim. It is a matter of co-incidence that the gun shots did not injure PW3 at any of his vital organs. [Para 31] [754-D-F]**



**7. The appellant while referring to certain discrepancies appearing in the statements of the witnesses including the doctors, contended that it was a case of acquittal and there was no intention on the part of the accused to kill the injured otherwise he would have fired the gun shots at the vital parts of the body of the injured, particularly when according to the prosecution, it is stated that the firing took place from a close distance. This contention has no merit inasmuch the tattooing and charring shall always depend upon the constituents of the propellant charge and it is in that context only wounds are classified by their external appearance as close contact. [Para 32] [754-F-H; 755-A]**

*Bano Prasad & Ors. v. State of Bihar* **2006 (12) SCALE 354, referred to.**

**8. Some discrepancies *per se* would not prove fatal to the case of the prosecution particularly when there is no reason before the Court to doubt the statement of PW-1. There has been no delay in registration of the case and in fact even a counter case was registered which did not result in favourable culmination for the accused. Also the statement of the accused recorded under Section 313 CrPC to some extent falls in line with the case of the prosecution. [Para 33] [755-B-D]**

**9. The High Court did not exceed its jurisdiction in law and with reference to the evidence on record while reversing the judgment of acquittal to one that of conviction. [Para 34] [755-D-F]**

**Case Law Reference:**

| | | |
|---|---|---|
| **1978 (4) SCC 371** | **referred to** | **Para 3** |
| **AIR 1934 PC 227** | **referred to** | **Para 11** |
| **(1970) 3 SCC 772** | **referred to** | **Para 12** |

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| **1970 (2) SCC 450** | **referred to** | **Para 12** |
| **2001 9 SCC 149** | **referred to** | **Para 12** |
| **2009 (10) SCC 2006** | **referred to** | **Para 13** |
| **2008 (10) SCC 450** | **referred to** | **Para 13** |
| **(2009) 9 SCC 22** | **referred to** | **Para 27** |
| **2006 (12) SCALE 354** | **referred to** | **Para 32** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 295 of 2010.

From the Judgment & Order dated 20.10.2008 of the High Court of Judicature at Allahabad in Govt. Appeal No. 390 of 1981.

N.S. Gahlout, R.K. Singh and Sanjeev Malhotra for the Appellant.

Ratnakar Dash, Rajeev K. Dubey, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

**SWATANTER KUMAR, J.** 1. Leave granted.

2. Satyavir Singh, appellant-accused was tried for an offence under Section 307 of the Indian Penal Code, 1860 (hereinafter referred to as the 'Code') and Section 25/27 Arms Act, 1959 (for short the 'Act') in the Court of Assistant Sessions Judge, Bulandshahr, and was found guilty for both the offences. After hearing the accused on the question of sentence, the Court awarded him three years R.I. under Section 307 of the Code and one year R.I. under Section 27 of the Act. Both the sentences were ordered to run concurrently. Upon appeal by the accused, the learned 1st Additional Sessions Judge at Bulandshahr set aside the judgment and sentence and while partly allowing the appeal by its judgment dated 06.11.1980



acquitted him of both the charges for which he was convicted by the learned Assistant Sessions Judge, Bulandshahr and only convicted him for offence u/s 25(1)(a) of the Act and sentenced him to imprisonment till the rising of the Court. With the leave of the High Court, the State preferred an appeal against the judgment of acquittal. The High Court of Judicature at Allahabad vide its judgment dated 20.10.2008 set aside the order of acquittal and while allowing the appeal partly, it convicted the appellant under Section 307 of the Code and declined to interfere with the sentence awarded by the First Appellate Court in relation to an offence under Section 25 of the Act.

2. It will be useful to refer to the findings and conclusions recorded by the High Court of the State.

> "On the basis of evidence on record, the charge under Section 307 IPC is proved beyond all reasonable and probable doubt.
>
> The impugned judgment and order passed in Criminal Appeal No. 99 of 1979, *'Satyavir Singh vs. State of U.P.'* is thus found to be unsustainable as far as acquittal of accused-respondent under Section 307 IPC is concerned.
>
> We do no find any illegality or irregularity in the impugned judgment and order dated 6.11.1980 regarding acquittal of accused-respondent under Section 27 Arms Act and his conviction under Section 25(1)(a) Arms Act.
>
> The criminal revision filed by Bhanu Prakash Sharma is thus partly allowed. We are not inclined to enhance the sentence awarded under Section 307 IPC passed by learned Assistant Sessions Judge, Bulandshahr in S.T. No. 328 of 1976, *State vs. Satyavir Singh.* No prayer for the enhancement of the sentence under Section 307 IPC has been made in the criminal revision by Bhanu Prakash Sharma. The occurrence is dated 9.2.1975. We are also not inclined to enhance the sentence awarded to accused-

respondent under Section 25(1)(a) Arms Act.

Keeping in view the date of occurrence of this case, we are not inclined to enhance the sentence as awarded by learned Assistant Sessions Judge, Bulandshahr in S.T.No. 328 of 1976 in government appeal as well.

We thus confirm the sentence of three years R.I. Awarded under Section 307 IPC by learned Assistant Sessions Judge, Bulandshahr vide judgment and order dated 21.5.1979 passed in S.T. No. 328 of 1976, *State vs. Satyavir Singh.*

Government Appeal is thus partly allowed. The judgment and order dated 6.11.1980 passed by 1st Additional Sessions Judge, Bulandshahr is partly set aside to the extent referred above. The accused-respondent Satyavir Singh having been found guilty under Section 307 IPC is sentenced to three years R.I.

We decline to interfere with the order of acquittal passed under Section 27 Arms Act and instead convicting the accused-respondent under Section 25(1)(a) Arms Act and sentencing him to imprisonment till the rising of the Court.

The judgment and order passed today is certified to the Court of 1st Additional Sessions Judge, Bulandshahr and such court shall thereupon make such orders as are conformable to the judgment and order of this Court and if necessary the record shall be amended in accordance therewith."

3. Legality and correctness of the judgment and order of sentence passed by the High Court is questioned by the appellant-accused in the present appeal under Article 136 of the Constitution of India inter alia but primarily on the following grounds :



(a) The High Court has erred in law in setting aside the judgment of acquittal recorded by the First Appellate Court, which was reasoned one and based on a proper appreciation of evidence. Thus the High Court ought not to have upset the judgment of acquittal. Therefore, the High Court has acted beyond the limitations on such exercise of power and heavy reliance is placed on the case of *Ganesh Bhavan Patel & Anr. vs. State of Maharashra :* 1978 (4)SCC 371.

(b) No motive was proved and in absence of a specific motive, the High Court has erred in holding that the appellant is guilty of offence under Section 307 of the Code.

(c) The expert evidence being at variance and the medical evidence not supporting the injuries allegedly found on the person of the victim, the benefit of doubt should have been given to the accused as the prosecution had failed to prove its case beyond reasonable doubt.

(d) The Court should have appreciated that it was an accidental firing and the prosecution had not put forth any explanation on record as to how the weapon (double barrel gun) was broken.

4. In order to appreciate the merit or otherwise of the submissions made before us reference to the case of prosecution would be necessary :

**5. Facts**

Bhanu Prakash Sharma, (PW-1) was taking tea at Hamid Khan's Hotel at about 2.30 P.M. His brother Dharam Prakash (PW-3) arrived at the crossing towards Narora Bus Stand. Dharam Prakash aged about 18 years was a student of Khurja Polytechnic. Satyavir Singh, accused is the resident of village Niwari. Vijay Singh is his elder brother and owned a double

barrel gun under a valid licence. It is the case of the prosecution that the fields of farmers in village Niwari were irrigated by tubewell of Prem Shankar Thakur. A road was constructed for the power house due to which some farmers of village Niwari started irrigating their fields from the tube well of Bhanu Prakash Sharma (PW-1), resident of village Jairampur Bangar. This caused some displeasure to Prem Shankar Thakur, father of Satyavir Singh, the accused. At about 2.30 P.M. on 09.02.1975 said Bhanu Pratap sharma was taking tea in the Hotel of Hamid Khan at Chauraha of the village. Dharam Prakash came from the side of Narora Bus Stand. The accused on seeing Dharam Prakash, who ultimately examined as PW-3, challenged him by saying that how he was irrigating the fields of villagers from his tube-well. The accused, as already noticed, was armed with a licenced gun of his brother. The accused thereupon fired two bullets from that gun on Dharam Prakash. Dharam Prakash was medically examined on that very day by Dr. Suresh Chandra Singh (PW-5) and the following injuries were noticed on his person:

> 'INJ: (1) Lacerated wound 1 c.m. X 1 c.m. X thickness of the left upper arm, on the left upper arm front aspect in upper part. There are four abrasions each 1/4c.m. X 1/4c.m. on its lower and outer aspect. Suspected underneath Adv. X-ray. The margines of the wound are inverted.
>
> (2) Lacerated wound 1.5c.m. X 1.5c.m. X thickness of the left upper .. on the back aspect of the left upper arm 2c.m. Above the elbow... Suspected underneath. Adv. X-ray. The margines of the wound are inverted.
>
> (3) Lacerated wound 7.5 c.m. X 3.5 c.m.on the left forearm upper half-inner aspect. It is bone deep. Suspected fracture underneath. Adv. X-ray.'

6. The occurrence was witnessed by Bhanu Prakash Sharma informant, Rama Shanker (PW-4); Brij Bhushan and others. Bhanu Prakash Sharma reported the matter to the



police, the first information report was registered being Exh.Ka-1 at about 16.05 hours and the case under Section 307 of the Code and under Section 25 of the Act was registered against the accused. The accused was arrested. The accused was also medically examined on that very day and on his person the following injuries were noticed:

> "INJ: (1) Swelling 5c.m. X 5 c.m on the right side of front of face and nose. There is clotted blood in both nostrils. Red in colour Adv. X-ray.
>
> (2) Swelling 2c.m. X 1/2c.m. on the left cheek lower jaw. Adv. X-ray in colour.
>
> (3)Abrasion 1/5 c.m. X 1/5 c.m. on the front of the right knee joint. Oozing stopped.'

7. Accused also lodged a report with Police Station, Dibai, District Bulandshahr on 09.02.1975 at about 5.00 P.M. stating that Pandit Raghunandan Prasad resident of village Jairampur Bangar had a tube-well in the village. Later on the appellant-accused installed a tube-well in his own village Niwari and started giving water for irrigation at lesser price. This affected the income of Pandit Raghunandan Prasad. On 09.02.1975 when he was carrying the gun of his brother Vijay Pal Singh to Narora and reached at the shop of Hamid Khan situated in Village Jairampur Bangar, Bhanu Prakash, Dharam Prakash, Rama Shankar and other unknown person met him and started snatching his gun. The fire accident happened due to snatching and caused injuries to Dharam Prakash. The accused was beaten and his gun was snatched. This came to be registered as Criminal Case No. 27A/75; whereas on the complaint of PW-1, Criminal case 87/75 under Section 307 of the Code and Section 25 of the Act respectively was registered.

8. As the various contentions raised on behalf of the appellant are interconnected and common evidence would have to be examined to record a finding, it will be appropriate for us

to have a common discussion on these arguments.

9. As is evident from the record before us, the learned trial court vide its judgment dated 21.05.1979 had convicted the accused of both the offences under Section 307 of the Code as well as 27 of the Act, which judgment of the trial court was set aside and the accused was acquitted of both these offences and was convicted for the offence under Section 25 (1) (a) of the Act while awarding him the punishment of imprisonment till rising of the court. This judgment of acquittal which was set aside by the High Court practically restored the judgment of the trial court and partly allowed the appeal of the State and convicted the accused of an offence under Section 307 of the Code and maintained the conviction under Section 25 (1) (a) of the Act.

10. The reliance placed by the learned counsel upon the judgment of this Court in the case of *Ganesh Bhavan Patel's* case (supra), is to buttress his submission that a judgment of acquittal should not be interfered by the High Court, as on facts and overall view of the evidence recorded by the First Appellate Court, the findings were reasonable and, therefore, no interference was called for. It is true that in this case the court observed that where two reasonable conclusions can be drawn on evidence on record, the High Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the court below. To put it simply, if the order acquitting the accused is reasonable and plausible and cannot be entirely or effectively dislodged or demolished, the High Court should not disturb the order of acquittal. The principles with regard to exercise of judicial discretion by the High Court while hearing an appeal against a judgment of acquittal have been well settled and are hardly open to any expansion.

11. Right from the case of *Sheo Swarup v. King Emperor* : AIR 1934 PC 227, the principles governing exercise of discretion were well stated by the court with a specific note that there was no occasion for placing limitations upon the power



unless it was so expressly stated in the code itself. It will be useful to reproduce the dictum of the court at this stage :

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should, 'be placed, upon that power, unless , it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this however is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

The above stated principles have been reiterated with approval and wider dimensions by this Court from time to time.

12. In the case of *Mathai Mathews v. State of Maharashtra* : 1970 (3) SCC 772, the court while reiterating the said principle stated that it is now well settled that order of an appellate court to review evidence in appeals against acquittal is as extensive as its power in appeals against convictions. It is also well settled that before an appellate court can set aside the order of acquittal, it must carefully consider the reasons given by the trial court in support of its order and must give a reasoning to reject those reasons. In brief, the appellate court should not disturb the order of acquittal except on very cogent grounds

and on examination of the entire material. Before the appellate court, where the judgment of acquittal is recorded, two important aspects emerge from such judgment. Firstly, there is presumption of innocence of the accused person in our criminal jurisprudence and secondly, the concerned court has recorded the finding in favour of the accused and disbelieved the prosecution and has founded as a matter of fact that the prosecution has failed to prove its case beyond reasonable doubt, thus giving benefit to the accused. Both these presumptions – jurisprudential and in regard to the factual matrix – must be kept in mind and unless the conclusions reached by the court were palpably erroneous or contrary to law or it is likely to result in injustice, the High Court may be reluctant in interfering with the judgment of acquittal. Reference in this regard can also be made to the case of *Khedu Mohton & Ors. v. State of Bihar :* 1970 (2) SCC 450.

In the case of *Kunwar Bahadur Singh v. Shiv Baran Singh & Ors. :* 2001 9 SCC 149, this Court introduced the caution of exercise of such discretion by the court and observed that interference while hearing an appeal against judgment of acquittal, the court should not hesitate to examine the matter on merits merely because there is a judgment of acquittal in favour of the accused. Undue benefit need not be given particularly if acquittal is based on surmises and conjectures and not substantiated by law and evidence on record. Usefully, reference can be made to the relevant findings recorded by the court in para 24 of the judgment :

> "In the former case declining to go into the merits may be justifiable but in the latter case it is impermissible. There can be no doubt that jurisprudentially an accused is presumed to be innocent till he is found to be guilty by a competent court. In giving its verdict the Court will give benefit of doubt arising on consideration of evidence brought on record by the prosecution or on account of absence of material evidence which ought to have been adduced but is not brought on record, to the accused persons and acquit him of the offence charged against. But a doubt arising on the basis of surmises and conjectures should never be allowed to influence the verdict of the Court as in such cases giving benefit of doubt to the accused but will be counter productive and destructive of system of delivery of justice in criminal cases having repercussions on existence of every civilised and peaceful society. The Courts will have to be cautious and prudent to secure the ends of justice."



13. In a very recent judgment a Bench of this Court in the case of *Arulvelu & Anr. v. State represented by the Public Prosecutor & Anr. :* 2009 (10) SCC 2006, while referring with approval the judgment of another equal (Division) Bench in the case of *Ghurey Lal v. State of U. P. :* 2008 (10) SCC 450 and relying upon various judgments of the court stated the following principles :

> "**34** In *Ghurey Lal v. State of Uttar Pradesh* [(2008) 10 SCC 450] a two Judge Bench of this Court of which one of us (Bhandari, J.) was a member had an occasion to deal with most of the cases referred in this judgment. This Court provided guidelines for the Appellate Court in dealing with the cases in which the trial courts have acquitted the accused. The following principles emerge from the cases above:
>
> 1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.
>
> 2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the

trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

**36**. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either 'perverse' or wholly unsustainable in law."

14. In addition to the above re-statement of principles, the court also referred to what findings could be termed as 'perverse' so as to call for interference by the higher court hearing the appeal against judgment of acquittal. 'perverse' was stated to be a behaviour which most of the people would take wrong, unacceptable, unreasonable and a 'perverse' verdict may probably be defined as one that is not only against the weight of the evidence but is altogether against the evidence. Besides, a finding being 'perverse', it could also suffer from the infirmity of distorted conclusions and glaring mistakes. In addition thereto there can be cases where for substantial and compelling reasons, good and sufficient grounds, very strong



circumstances and to avoid the ends of justice being defeated, the higher courts have to interfere with the judgment of acquittal recorded by the lower court.

15. From the above enunciated principles it is clear that judgment of acquittal can be interfered by the appellate court. However, exercise of judicial discretion would be guided by these principles. It is neither permissible nor possible to enunciate any straightjacket formula which can universally be applied to all the cases. The court will have to exercise its discretion keeping in view the facts and circumstances of a given case. The court within the stated parameters will well be within its jurisdiction to interfere with the judgment of acquittal. Thus, we will have to examine the matter from the point of view whether in the facts of the present case and evidence on record, High Court was justified in reversing the judgment of acquittal and convicting the accused of an offence under Section 307 of the Code.

16. The trial court in its lengthy judgment have discussed occular as well as documentary evidence produced by the prosecution. The version stated by the eye witnesses, the medical evidence as well as the veracity of the statement made under Section 313 Code of Criminal Procedure (for short the 'Cr.P.C.') formed the basis of the judgment of conviction passed by the learned trial court. The court examined in its right perspective one of the most important feature of the case that why the accused was carrying gun of his brother and discarded the narration and the explanation for keeping the gun with him. According to the accused his brother Vijay Pal (DW-1) demanded his gun at Narora. According to report Exh. Kh-2, Vijay Pal stated to bring his licensed gun to Narora as he would come late in the evening and the Court was not satisfied with the explanation and held that prosecution has been able to bring home the guilt of the accused.

17. The Court while noticing the statement made by the eye-witnesses PW-1 and PW-3 noticed as under :

"Accused Satyavir himself admits the presence of Ramashankar. Therefore, despite three persons could not explain satisfactory reason of their presence, their presence cannot be denied. "

18. These findings were set aside by the learned First Appellate Court which stated that it was an accidental firing and the prosecution has failed to prove its case. The benefit was given to the accused primarily on certain surmises and conjectures and doubting the presence of the witnesses particulaly Ram Shankar whose presence had been admitted by the accused himself in the report lodged by him and even in his explanation before the Court.

19. Definite doubts or lacunae in the case of the prosecution may result in benefit of doubt being given to the accused and consequential acquittal. However, such doubts and lacunae must be clearly distinguished from doubts or lacunae based upon certain assumptions. In such cases what appears to be loop-hole in the case of the prosecution at the first glance, on appropriate examination and appreciation of evidence, may fall in the other class. The following observations of the learned First Appellate Court clearly demonstrates that Court has founded its judgment of acquittal more on surmises and suspicion and the views of the Court which were not supported by evidence on record. Illustratively, the following observations can usefully be noticed:

"(a) It is evident that left arm is not a vital part. If the appellant was fired from a close range within 4 feet, he could have easily aimed at the chest of the victim, which could have killed him at the spot.

(b) But when the motive alleged is the very genesis or commencement of the prosecution story, it would not be possible to discard the defect relating to motive or genesis in the prosecution story.



(c) The third important feature of the case is simultaneous presence of Bhanu Prakash, Dharam Prakash and Ram Shanker at the crossing.

(d) Then the only possible inference is that they were together at the crossing or at the tea stall for some other reason and as soon as they saw appellant Satyavir Singh, a youngman alongwith a gun, they were tempted to snatch the gun. According to medical evidence the very seat of the injuries discloses that the shots would have been fired during snatching. "

20. The above observations demonstrate that the learned First Appellate Court has proceeded on the basis of certain presumptions which in the opinion of the Court could be the correct approach. But such approach may be guided by the doctrine of perversity. If findings are neither supported by evidence nor such approach could be adopted by the person of common prudence or behaviour, then the court may interfere in a judgment of acquittal. The First Appellate Court is a court of both fact and law and as such has jurisdiction to entirely re-appreciate the evidence. Thus, while setting aside the order of conviction it has to equally ensure that no injustice is done and on certain assumptions of facts, guilty may not go scot free. A person otherwise is proved to be guilty by the prosecution by leading cogent and reliable evidence, normally would not be given the benefit of doubt on the basis of certain assumptions or presumptions of facts. The Court may have to notice and rely upon behaviour of the person of a common prudence only where the direct evidence have been produced. As we shall shortly proceed to discussion that the assumptions raised by the First Appellate Court are not supported on record. We find that the High Court has not fallen in error of law in setting aside the order of acquittal and affirming the judgment of conviction rendered by learned trial court.

21. Now we may proceed to examine the appreciation of evidence on record by the First Appellate Court acquitting the accused as well as that of the High Court reversing the judgment of acquittal.

22. The High Court noticed that the fields of farmers in village Niwari were irrigated from the tubewell of Prahalad Singh Thakur which was installed in that village. It was because of construction of the road for the Power House that the farmers of village Niwari started irrigating from the tubewell of Bhanu Prakash Sharma resident of Village Jairampur Bangar. This was not bearable to the accused who is the son of Prahlad Singh Thakur. Thus, this may not be exactly a motive but was a reason enough for the accused to take an offensive step against the injured.

23. The first information report was lodged by Bhanu Prakash Sharma without any delay and as already noticed Dharam Prakash (PW-3) had been challenged by the accused saying that how he was irrigating the fields of the villagers of his village from his tubewell. Armed with a licensed gun of his brother, he opened fire on Dharam Prakash and shot two bullets. The occurrence was seen by Bhanu Prakash Sharma (PW-1), who was present there as well as Rama Shankar (PW-4) and some others. The accused was arrested and the gun was also deposited. Ext.Ka-1 report to the police station was lodged by Bhanu Prakash Sharma (PW-1).

24. Dharam Prakash was medically examined on 9th February, 1975 at about 4.35 p.m. and according to Dr. Suresh Chandra Singh (PW-5), three injuries were found on the person of the injured who was then subjected to X-Ray by Dr. A.K. Agarwal (PW-8), who was posted as Radiologist in District Hospital, Bulandshahr. It has been proved on record by Dr. Jitendra Singh Sharma (PW-7) that Dharam Prakash remained in the hopsital from 9th Febraury, 1975 to 20th March, 1975.

25. The medical evidence clearly reflected that the injuries



could be caused by gun shots. However, there was little difference of opinion between two doctors but both these doctors are not the ballistic experts so as to provide any expert opinion which could safely be relied upon by the Court while deciding the case.

26. The difference of opinion between experts necessarily may not persuade the Court to adopt one approach or the other particularly when none of the experts are persons competent to express opinion on that subject. The difference of opinion between two doctors which, in the facts and circusmtances of the present case, does not have any material bearing on the case of the prosecution is not such a formidable submission which has to be accepted by the Court to grant necessarily the benefit of doubt to the accused.

27. In the case of *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee & Ors. :* (2009) 9 SCC 22, this Court has, while noticing the difference of opinion between the doctors on the basis of the evidence on record and the literature produced, preferred one view over the other without commenting on any expert opinion expressed by either of them.

28.It was stated by Dr. Suresh Chandra Singh (PW-5) that such injuries could be caused by gun shots. The trial court and the High Court expressed in unambiguous language the view that it was possible that no gun powder was traced around the wounds of the injuries as he was wearing clothes. This finding cannot be said to be erroneous. Dr. A.K. Agarwal (PW-8) clearly stated that the pellets of the fire shots were found in the wounds and were duly seen in the X-Ray of the injured. Thus such view taken by the courts cannot be faulted. In fact the major part of the occurence is not even disputed by the accused in his statement under Section 313 of Cr.P.C. and in any case the report lodged by him bearing No. 27A/75 clearly shows that the incident occurred and the injured besides, other two witneses, PW-1 and PW-2 were present at the spot. In fact

according to the accused it was an accidental fire which occurred as a result of snatching of the gun by the injured and other persons accompanying him at that time. While, according to the prosecution he had fired two shots which injured the victim and thereafter the gun was snatched. Dr. Suresh Chandra Singh (PW-5) examined the injuries of the injured and stated that injuries would have been caused 2-3 hours earlier and that when the injured was brought to the hosptial he was bleeding and such injuries could be sustained by gun shots. This statement of the doctor had fully supported the case of the prosecution and chain of events as stated therein.

29. With considerable emphasis, learned counsel for the appellant aruged that as no explanation was rendered by the prosecution as to how the gun had broken, this would straightaway cause serious dent in the case of the prosecution and entitles the accused for an acquittal.

30. We find no merit in the aforesaid contention. It was for the accused to prove his defence as the prosecution is liable to prove the case as stated in the first information report and the report filed by it under Section 173 of Cr.P.C. The eye witnesses had actually seen the victim being injured by the shots fired by the accused. In fact the accused was apprehended at the spot with the gun. The gun in question was admittedly a double barrel gun and the same was used by the accused while firing two shots. The gun with the spent cartridges were taken into custody vide Ext Ka-3. The accused himself had lodged the report bearing No. 27A/75 under Section 394 of the Indian Penal Code against the eye-witnesses including Bhanu Prakash Sharma, Dharam Prakash, Rama Shankar and one unknown person. The report lodged by the accused, itself shows as to how the gun was broken. But the breaking incident took place after the two shots had been fired by the accused upon the injured. There appears to be no justifiable reason as to why the eye witnesses PW-1 and PW-4, who even according to the accused were present at the place of occurrence, should



be disbelieved. It could be safely construed from the evidence on record that the accused may not have any strong motive to kill the victim, however, the loss of revenue on account of the fact that water for irrigation was being provided by the father of the injured, was reason enough for the accused to show his anger or it was not acceptable to him, as stated by the witnesses, thus he fired two shots which resulted in causing injuries to Dharam Prakash. Both the reports were lodged by the informant as well as the accused at 2.30 p.m. on 9th February, 1975. The gun and the utilized bullets were given at the police station itself. This evidence clearly shows that prosecution has not failed in proving its case in accordance with law.

31. As already noticed, part of the occurence stands admitted and it is only the limited aspect of the case as to whether the firing was accidental or the accused had intentionally fired on the injured. Statement of the eye witnesses, medical evidence and the investigation conducted by the Investigating Officer clearly show that the prosecution has been able to prove its case beyond reasonable doubt. The act of firing gun shots at the injured obviously shows that the accused had the knowledge that by such an act he may even cause the death of the injured and actually caused hurt to victim. It is a matter of co-incidence that the gun shots did not injure Dharam Prakash at any of his vital organs.

32. Learned counsel appearing for the appellant while referring to certain discrepancies appearing in the statements of the witnesses including the doctors, vehemently contended that it was a case of acquittal and there was no intention on the part of the accused to kill the injured otherwise he would have fired the gun shots at the vital parts of the body of the injured, particulary when according to the prosecution, it is stated that the firing took place from a close distance. If that was so, such injuries would not have been caused. This contention also does not impress us inasmuch the tattooing and

charring shall always depend upon the constituents of the propellant charge and it is in that context only wounds are classified by their external appearance as close contact. Reference can be made to *Bano Prasad & Ors. v. State of Bihar :* 2006 (12) SCALE 354.

33. Some discrepancies per se would not prove fatal to the case of the prosecution particularly when there is no reason before the Court to doubt the statement of the eye witnesses, PW-1. There has been no delay in registration of the case and in fact even a counter case was registered which did not result in favourable culmination for the accused. It may also be noticed that the learned trial court as well as the High Court has referred to the statement of the accused recorded under Section 313 of Cr.P.C. which to some extent falls in line with the case of the prosecution.

34. The cumulative effect of the above discussion is that we do not see any reason to interfere with the judgment of the High Court. The High Court has not exceeded its jurisdiction in law and with reference to the evidence on record while reversing the judgment of acquittal to one that of conviction. So far as the conviction of the accused under Section 25(1) of the Act is concerned, no arguments were addressed. In any case we see no reason to interfere with the said finding of the courts below.

35. In the result, the appeal fails and is dismissed.

B.B.B. Appeal dismissed.



HARI RAM & ANR.
*v.*
STATE OF HARYANA & ORS.
(Civil Appeal No. 5440 of 2000)

FEBRUARY 11, 2010

**[D.K. JAIN AND R.M. LODHA, JJ.]**

*Land Acquisition Act, 1894 – ss. 48, 4 and 6 – Notification and declaration for acquisition of large tract of land for public purpose – Representation for release from acquisition – State Government releasing land of similarly situated landowners from acquisition but rejected appellants' representation who were similarly placed – Challenge to – Held: Where State Government exercises its power u/s. 48 for withdrawal from acquisition in respect of a particular land, similarly situated landowners have right of similar treatment by State Government – Government is duty bound to act with substantial fairness and consistency in considering the representations of such landowners – It cannot pick and choose some landowners and release their land from acquisition and deny the same benefit to others – On facts, State Government did not consider representation of appellants by applying the same standards which were applied to other land owners – No uniform policy with regard to release of land from acquisition existed – Thus, action of State Government is violative of Article 14 and discriminatory – State directed to issue appropriate orders in respect of appellants' lands as done in the matters of other landowners – Constitution of India, 1950 – Article 14.*

**The notification was issued u/s. 4 of the Land Acquisition Act, 1894 proposing to acquire large tract of land. The land owners filed objections. The concerned Land Acquisition Officer released lands of some of the landowners and issued declaration u/s. 6 of the Act in**

**respect of the remaining lands. Various landowners filed writ petitions challenging the notifications u/ss. 4 and 6 of the Act; and also prayed for release of their lands. During pendency thereof, a Joint Inspection Committee submitted its report. In view of the recommendations, the High Court ordered release of land in favour of 22 landowners and dismissed the writ petitions of the other petitioners including the appellants. The remaining landlords applied u/s. 48 of the Act for release of their land from acquisition. The State Government released the land of several landowners from acquisition except the appellants. Aggrieved, appellants filed appeals before this Court. During pendency, this Court directed the State Government to consider the representation of the appellants for release of their land from acquisition. The appellants made representations and the same were rejected on basis of the policy dated October 26, 2007.**

**The question for consideration in these appeals was whether the action of the State Government in rejecting the appellants' representations for withdrawal from acquisition of their land is an *ultra vires* act and discriminatory.**

**Allowing the appeals, the Court**

**HELD: 1. It is true that any action or order contrary to law does not confer any right upon any person for similar treatment. It is equally true that a landowner whose land has been acquired for public purpose by following the prescribed procedure cannot claim as a matter of right for release of his/her land from acquisition but where the State Government exercises its power under section 48 of the Act for withdrawal from acquisition in respect of a particular land, the landowners who are similarly situated have right of similar treatment by the State Government. Equality of citizens' rights is**



**one of the fundamental pillars on which edifice of rule of law rests. All actions of the State have to be fair and for legitimate reasons. The Government has obligation of acting with substantial fairness and consistency in considering the representations of the landowners for withdrawal from acquisition whose lands have been acquired under the same acquisition proceedings. The State Government cannot pick and choose some landowners and release their land from acquisition and deny the same benefit to other landowners by creating artificial distinction. Passing different orders in exercise of its power under section 48 of the Act in respect of persons similarly situated relating to same acquisition proceedings and for same public purpose is definitely violative of Article 14 of the Constitution and must be held to be discriminatory. [Para 24] [782-F-H; 783-A-C]**

**2.1. Lands of more than 40 landowners out of the same acquisition proceedings have been released by the State Government u/s. 48 of the Act. Some of the release orders have been passed in respect of landowners who had not challenged the acquisition proceedings and some of them had challenged the acquisition proceedings before the High Court and whose cases were not recommended by Joint Inspection Committee for withdrawal from acquisition and whose writ petitions were dismissed. Some of these landowners had only vacant plots of land and there was no construction at all. In most of these cases, the award has been passed and, thereafter, the State Government has withdrawn from acquisition. It is not the case of the respondents that withdrawal from acquisition in favour of such landowners has been in violation of any statutory provision or contrary to law or was wrong action on their part or it was done due to some mistake or a result of fraud or corrupt motive. There is nothing to even remotely**

**suggest that the persons whose lands have been released have derived the benefit illegally. [Para 24] [781-G-H; 782-A-D]**

**2.2. It is an admitted case of the respondents that prior to October 26, 2007, the State of Haryana had no uniform policy governing the release of land from acquisition under section 48 of the Act. Although respondents submitted that matter relating to release of land from acquisition was governed from time to time by various guidelines/parameters set out in intra-office communications governing individual acquisition, no such guidelines/parameters have been placed on record except a letter dated June 26, 1991 pertaining to review progress of the various schemes of HUDA. The only guideline discernible from the said letter is that survey of existing construction should be done before notification is issued under section 4 of the Act; that existing factory should not be acquired and it should be released from the proceedings of section 4 notification and that constructed area of 'A' and 'B' grade should be left out of acquisition. The policy articulated in the letter thus, hardly helps the respondents. Neither the said policy nor any other policy has been followed by the State Government while releasing land of various landowners whose lands have been acquired in the same acquisition proceedings. As a matter of fact, the only policy that seems to have been followed is: you show me the face and I'll show you the rule. Insofar as policy of 2007 is concerned, apparently that has not been applied to any of the landowners whose land was acquired along with the appellants' land under the same acquisition proceedings and released later on. When this Court directed to the State Government by order dated August 19, 2008 to consider release of the land of the appellants from acquisition, obviously the State Government was required to consider the representations of the appellants**



**by applying the same standards as were applied to other landowners whose lands were acquired for the same purpose and under the same acquisition proceedings and released later on. However, the representations made by the appellants were rejected by relying upon the policy dated October 26, 2007 which on its face is erroneous and unsustainable in law. [Paras 19 and 20] [733-D-F; 774-E-H; 775-A-D]**

**2.3. As regards the guidelines provided in the letter dated June 26, 1991, classification on the basis of nature of construction cannot be validly made and such policy is not based on intelligible differentia and a rational basis. What appears from the available material is that for release of the lands under the subject acquisition, no policy has been adhered to. This leads to an irresistible conclusion that no firm policy with regard to release of land from acquisition existed. [Para 24] [782-D-F]**

*Sube Singh and Ors. v. State of Haryana and Ors*. **(2001) 7 SCC 541, Relied on.**

**2.4. By order dated August 19, 2008, this Court gave an opportunity to the State Government to consider the representations of the appellants for release of their land and pass appropriate order but the State Government considered their representations in light of the policy dated October 26, 2007 ignoring and overlooking the fact that for none of the landowners whose lands have been released from acquisition, the policy dated October 26, 2007 was applied. The State Government has sought to set up make believe grounds to justify its action that development planning has been kept into consideration and that the appellants have been offered developed plots of double the area of construction while the fact of the matter is that in some cases where the plots were vacant and had no construction, the entire plot has been released from acquisition and also the cases where one**

**room or two rooms construction was existing, the whole of plot has been released. [Para 24] [783-D-G]**

**2.5. While releasing land of more than 40 landowners having plots of size from 150 sq. yards to 1500 sq. yards, if development plan did not get materially disturbed in the opinion of the State Government, the same opinion must hold good for the appellants' lands as well. It is unfair on the part of the State Government in not considering representations of the appellants by applying the same standards which were applied to other landowners while withdrawing from acquisition of their land under the same acquisition proceedings. If this Court does not correct the wrong action of the State Government, it may leave citizens with the belief that what counts for the citizens is right contacts with right persons in the State Government and that judicial proceedings are not efficacious. The action of State Government in treating the present appellants differently although they are situated similar to the landowners whose lands have been released can not be countenanced and has to be declared bad in law. [Para 24] [783-G-H; 784-A-C]**

**2.6. The order of the State Government dated September 29, 2008 is set aside. The respondent no.1-State of Haryana is directed to issue appropriate order/s concerning the appellants' lands on the same terms and in the same manner as has been done in the matters of SD, RK, MR and others. The portion of the lands which in the layout plan forms part of roads or common sites or public utility area should not be considered for release. [Para 25] [784-C-E]**

*Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and Ors.* **(1997) 1 SCC 35;** *Jalandhar Improvement Trust v. Sampuran Singh* **(1999) 3 SCC 494;** *Union of India and Anr. v. International Trading Co. and Anr.*



**(2003) 5 SCC 437;** *Ved Prakash and Ors. v. Ministry of Industry, Lucknow and Anr.* **(2003) 9 SCC 542;** *Anand Buttons Ltd. v. State of Haryana and Ors.* **(2005) 9 SCC 164;** *Vishal Properties (P) Limited v. State of Uttar Pradesh and* Ors. **(2007) 11 SCC 172; *J*agdish Chand and Anr. v. State of Haryana and Anr. (2005) 10 SCC 162, referred to.**

**Case Law Reference:**

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|---|---|---|
| **(1997) 1 SCC 35** | **Referred to.** | **Paras 7, 11** |
| **(1999) 3 SCC 494** | **Referred to.** | **Paras 7, 12** |
| **(2003) 5 SCC 437** | **Referred to.** | **Paras 7, 13** |
| **(2003) 9 SCC 542** | **Referred to.** | **Paras 7, 14** |
| **(2005) 9 SCC 164** | **Referred to.** | **Paras 7, 15** |
| **(2007) 11 SCC 172** | **Referred to.** | **Paras 7, 16** |
| **(2005) 10 SCC 162** | **Referred to.** | **Paras 7, 18** |
| **(2001) 7 SCC 545** | **Relied on.** | **Paras 20** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5540 of 2000.

From the Judgment & Order dated 13.8.1998 of the High Court of Punjab & Haryana at Chandigarh in Writ Petition No. 15002 of 1995.

WITH

C.A. No. 5441, 5442, 5443, 5444, 5545, 5446, 5449 of 2000.

Harinder Mohan Singh, Kaushal Yadav, Durgesh Yadav, Pradeep Yadav, S.B. Khan, R.K.Kapoor, Shweta Kapoor, Harish C. Pani R. Pathan, Anis Ahmed Khan, Aseem Mehrotra, Abhijat P. Medh, U.S. Prasad (NP), Govind Goel, Nitin Singh, Ambuj Agarwal, Kamal Mohan Gupta for the appearing parties.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. This group of eight appeals involves identical controversy and, hence, all these appeals were heard together and are being disposed of by a common judgment. As a matter of fact, five appeals (5440/2000, 5442/2000, 5443/2000, 5444/2000 and 5445/2000) have been disposed of vide common judgment dated August 13, 1998 by the Division Bench of the Punjab and Haryana High Court. The other three appeals (5449/2000 5441/2000 and 5446/2000) have been disposed of by the High Court vide separate judgments dated March 26, 1998, May 18, 1998 and August 13, 1998 respectively.

2. The facts have been set out in the impugned judgments and, therefore, we do not deem it necessary to repeat the same. Suffice, however, to say that large tract of land admeasuring 184.56 acres situate at Narnaul was proposed to be acquired for Urban Mini Estate by the Haryana Urban Development Authority (HUDA) and, for the said public purpose, notification under Section 4 of the Land Acquisition Act, 1894 (for short, 'Act') was issued on October 30, 1992. Many owners whose lands were sought to be acquired filed objections under Section 5-A of the Act before the concerned Land Acquisition Officer. Pursuant to these objections, land admeasuring 11.55 acres was excluded and declaration under Section 6 of the Act was made in respect of 173.01 acres on October 28, 1993. Seventy eight landowners filed 32 writ petitions in the High Court of Punjab and Haryana challenging the notifications under Sections 4 and 6 of the Act on diverse grounds. Inter alia, in these writ petitions, the writ petitioners also prayed for release of their respective lands. At this stage, it may also be noticed that although declaration under Section 6 was made in respect of 173.01 acres but award was passed for land admeasuring 172.57 acres only as the State Government is said to have decided to release land of 13 landowners admeasuring 0.44 acres for which ultimately release order was passed on



February 28, 1997.

3. Reverting back to the writ petitions, it transpires that during their pendency, Chief Administrator, HUDA-cum-Director, Urban Estates stated before the Division Bench on January 8, 1998 that HUDA was prepared to appoint a committee to inspect the site and make recommendations whether the land of the writ petitioners could be released or not. Accordingly, a Joint Inspection Committee was constituted comprising of Superintending Engineer, HUDA, Gurgaon; Land Acquisition Officer, Gurgaon and District Town and Country Planner, Narnaul under the Chairmanship of Administrator, HUDA, Gurgaon. The Committee carried out spot inspection of the land owned by the petitioners and submitted its report before the Division Bench on February 13, 1998. Insofar as the present appellants are concerned, the Joint Inspection Committee did not recommend release of their land from acquisition. The High Court took into consideration the report submitted by the Joint Inspection Committee and keeping in view the recommendations made by it ordered release of land in favour of 22 owners and dismissed the writ petition of other petitioners including the present appellants.

4. It is pertinent to mention here that at least four petitioners whose writ petitions were dismissed by the High Court on the ground that Joint Inspection Committee had not recommended release of their land, later on applied under Section 48 of the Act and by separate orders the Government released their land from acquisition. It also appears that some of the owners although did not challenge the acquisition in the court but represented to the Government for release of their land from acquisition and their lands were also released.

5. During the pendency of these appeals, this Court vide order dated August 19, 2008, keeping in view the earlier orders passed by this Court and the affidavit in-reply dated June 27, 2008 (filed in Court on July 8, 2008) by Financial Commissioner

and Principal Secretary to Government of Haryana, Town and Country Planning and Urban Estate Department, Chandigarh and the available material granted liberty to the appellants to make representation(s) to the State Government for release of their land from acquisition and the State Government was directed to consider such representation(s) and pass appropriate order/s within time granted therein.

6. In pursuance of the order dated August 19, 2008, the appellants made representations before the State Government. The lands owned by them admeasure between 300 sq. yards to 1600 sq. yards. However, the representations made by the appellants came to be rejected on September 29, 2008 on the basis of the policy dated October 26, 2007.

7. We heard learned counsel for the parties at quite some length on various dates. The principal grievance raised by the appellants is that they have been discriminated by the State Government in not releasing their land although land of similar situated persons in identical facts and circumstances has been released. On the other hand, Mr. Govind Goel, learned counsel for the respondents justified the action of the State Government and submitted that by an elaborate and speaking order, the State Government has rejected the appellants' prayer of release of their land from acquisition and there is no infirmity in the said order. Mr. Govind Goel, learned counsel contended that plea regarding discrimination is fallacious as release of land of few owners after the impugned judgment cannot provide permissible basis for advancing the plea of discrimination, especially in the absence of any legal right for release. In this regard, he relied upon decisions of this Court in the case of *Secretary, Jaipur Development Authority, Jaipur* v. *Daulat Mal Jain & Others*[1], *Jalandhar Improvement Trust* v. *Sampuran Singh*[2], *Union of India and Another* v. *International Trading*

1. (1997) 1 SCC 35.
2. (1999) 3 SCC 494.



*Co. and Another*[3], *Ved Prakash and Others* v. *Ministry of Industry, Lucknow and Another*[4], *Anand Buttons Ltd.* v. *State of Haryana and Others*[5], *and Vishal Properties (P) Limited* v. *State of Uttar Pradesh and Others*[6]. He also referred to decisions of this Court in *Sube Singh and Others* v. *State of Haryana and Others*[7] and *Jagdish Chand & Anr. v. State of Haryana and Anr*[8].

8. Mr. Govind Goel, learned counsel for the respondents also submitted that development planning and the parameters of release of constructed area along with proportionate area were kept in view while considering the representations made by the appellants. He would submit that instead of disturbing the entire layout plan and leaving the released area on the spot, the appellants have been offered a fully developed plot in the same sector of a size of land to which they became entitled on the basis of the constructed area in their land.

9. The only question that falls for our consideration in this group of appeals is whether the action of the State Government in rejecting the appellants' representations for withdrawal from acquisition of their land is an ultra vires act and discriminatory?

10. Section 48 of the Act empowers the Government to withdraw from the acquisition of the land provided possession has not been taken. The said power is given to the Government by a statutory provision and is not restricted by any condition except that such power must be exercised before possession is taken. The statutory provision contained in Section 48 does not provide for any particular procedure for withdrawal from acquisition.

3. (2003) 5 SCC 437.
4. (2003) 9 SCC 542.
5. (2005) 3 SCC 164.
6. (2007) 11 SCC 172.
7. (2001) 7 SCC 545.
8. (2005) 10 SCC 162.

11. Before we consider the question further, a look at the decisions cited by the learned counsel for the respondents at this stage would be appropriate. In the case of *Secretary, Jaipur Development Authority, Jaipur*[1], the question that arose before this Court was whether High Court was right in directing allotment of the lands to the respondents therein since allotment made to others had become final and denial thereof to the respondents would amount to violation of equality clause enshrined in Article 14 of the Constitution. Dealing with the said question, this Court observed :

> "13. ……The intention behind the government actions and purposes is to further the public welfare and the national interest. Public good is synonymous with protection of the interests of the citizens as a territorial unit or nation as a whole. It also aims to further the public policies. The limitations of the policies are kept along with the public interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain or for illegal gratification.
>
> **14.** The so-called public policy cannot be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties. Misuse implies doing of something improper."

12. In *Jalandhar Improvement Trust*[2], *this* Court was concerned with the claim of the respondents being "local displaced persons" to a plot each in lieu of the lands acquired by the Trust. The plea of the respondents was that Trust had made similar preferential allotments as "local displaced persons" in favour of other persons. While considering the said claim of the respondents, this Court held, "if it was not within the scope of the rules then even those allotments in favour of other persons will not create a right in the respondents to claim equality with them; maybe, if the allotments were made wrongly in favour of those persons, the same may become liable for



cancellation, if permissible in law, but that will not create an enforceable right on the respondents to claim similar wrongful allotments in their favour".

13. While dealing with the scope of judicial review in the matter of policy decision of Government, this Court in *International Trading Co.*[3] held :

> **"14.** It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.
>
> **15.** While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

**16.** Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary."

14. In *Ved Prakash and Others*[4], this Court directed the concerned authority to consider representations of the owners for release of their land from acquisition under Section 48 of the Act. This is how the Court considered the matter:

**"17.** It is no doubt true that conclusion on Point 1 raised in para 11 of the judgment in the case of *Om Prakash* was recorded against the State but ultimately effective and operative order is to be seen in paras 31 and 32 of the said judgment. The ultimate direction was to consider the representations of the appellants for releasing the lands from acquisition under Section 48(1) of the Act on being satisfied of the five aspects mentioned in para 31 of the judgment. It is also made clear in the said paragraph that this Court did not express any opinion on the question whether the appellants' lands had such *abadi* on the date of Section 4 notification which would attract the State policy of not acquiring such lands and whether such policy had continued thereafter at the stage of Section 6 notification of 7-1-1992 and whether such policy was still current and operative at the time when the appellants' representations came up for consideration of appropriate authorities of the State Government. It is further stated that it will be for the State authorities to take the informed decision in this connection. In the same paragraph, it is stated that:

> "We may not be understood to have stated anything on this aspect, nor are we suggesting that the State must release these lands from acquisition if the State authorities are not satisfied about the merits of the representations."



This Court went on to say in para 32 that the entire matter is left at large for the consideration of the State authorities on the appellants' representations. It is further stated that if the representations were made within the given time, then the appropriate authority of the State Government shall consider their representations regarding the feasibility of releasing of such lands from acquisition under Section 48(1) of the Act on the ground that there were "*abadis*" on these lands at the relevant time and are governed by any existing State policy for releasing such lands from acquisition.

**18.** Thus, it is clear that it was open to the State authorities to consider regarding the feasibility of releasing such lands from acquisition under Section 48(1) of the Act after taking into consideration the observations made and directions given in paras 31 and 32 as aforementioned. We have already noticed above that the competent authority of the State gave hearing to the appellants, considered the evidence and material placed on record and examined the contentions raised on behalf of the parties in compliance with the directions given and observations made in paras 31 and 32 of the judgment of this Court. The State authority came to the conclusion for the reasons already stated above that having regard to various aspects including development scheme, it was found not feasible to release the lands of the appellants under Section 48(1) of the Act. The High Court did not find any good ground to disagree with the findings of fact recorded by the State authority and also found that the State authorities duly considered the directions given and observations made by this Court as contained in paras 31 and 32 of the judgment."

15. In *Anand Buttons Ltd.5*, the contention advanced by the appellants before this Court was that the decision of the

State Government in not granting exemption from acquisition to their lands was arbitrary, discriminatory and violative of Article 14 of the Constitution. Dealing with the said contention, this Court observed :

> "**13.** It is trite law that not only land but also structures on land can be acquired under the Act. As to whether in a given set of circumstances certain land should be exempted from acquisition only for the reason that some construction had been carried out, is a matter of policy, and not of law. If after considering all the circumstances, the State Government has taken the view that exemption of the lands of the appellants would render askew the development scheme of the industrial estate, it is not possible for the High Court or this Court to interfere with the satisfaction of the authorities concerned. We see no ground on which the appellants could have maintained that their lands should be exempted from acquisition. Even if three of the parties had been wrongly exempted from acquisition, that gives no right to the appellants to seek similar relief."

16. In the case of *Vishal Properties (P) Limited*[6], this Court reiterated the legal position that : (i) Article 14 is not meant to perpetuate an illegality. It provides for positive equality and not negative equality; (ii) Courts cannot issue a direction that the same mistake be perpetuated on the ground of discrimination or hardship; (iii) Any action/order contrary to law does not confer any right upon any person for similar treatment and; (iv) An order made in favour of a person in violation of the prescribed procedure cannot form a legal premise for any other person to claim parity with the said illegal or irregular order. A judicial forum cannot be used to perpetuate the illegalities.

17. In *Sube Singh*[7], while dealing with the contention that the decision of the State Government in not accepting the prayer of the petitioners for exclusion of their property from



acquisition is arbitrary and discriminatory inasmuch as in the case of owners of other lands lying within the area notified who had sought exclusion of their property on the ground of existing structures, the prayer was accepted and the lands were excluded from acquisition and the response of the State Government that as per Policy, the State Government has excluded from acquisition, 'A' Class constructions and since the constructions on the petitioners' land were either 'B' Class or 'C' Class, their land could not have been excluded, this Court held that such policy was not based on intelligible differentia and a rational basis germane to the purpose. It was held :

> "**10.** ……It remains to be seen whether the purported classification of existing structures into 'A', 'B' and 'C' Classes is a reasonable classification having an intelligible differentia and a rational basis germane to the purpose. If the State Government fails to support its action on the touchstone of the above principle, then this decision has to be held as arbitrary and discriminatory. It is relevant to note here that the acquisition of the lands is for the purpose of planned development of the area which includes both residential and commercial purposes. That being the purpose of acquisition, it is difficult to accept the case of the State Government that certain types of structures which according to its own classification are of 'A' Class can be allowed to remain while other structures situated in close vicinity and being used for same purposes (residential or commercial) should be demolished. At the cost of repetition, it may be stated here that no material was placed before us to show the basis of classification of the existing structures on the lands proposed to be acquired. This assumes importance in view of the specific contention raised on behalf of the appellants that they have pucca structures with RC roofing, mosaic flooring etc. No attempt was also made from the side of the State Government to place any architectural plan of different types of structures proposed to be constructed on the land notified for

acquisition in support of its contention that the structures which exist on the lands of the appellants could not be amalgamated into the plan.

**11.** On the facts and circumstances of the case revealed from the records, we are persuaded to accept the contention raised on behalf of the appellants that the rejection of the request of the appellants for exclusion of their land having structures on them was not based on a fair and reasonable consideration of the matter. We are of the view that such action of the Government is arbitrary and discriminatory……"

18. In the case of *Jagdish Chand*[8], this Court issued the directions as were given in the case of *Sube Singh7* but clarified that these directions are given on the particular facts of the case and are not intended for any general application.

19. It is an admitted case of the respondents that prior to October 26, 2007, the State of Haryana had no uniform policy governing the release of land from acquisition under Section 48 of the Act. Although learned counsel for the respondents submitted that matter relating to release of land from acquisition was governed from time to time by various guidelines/ parameters set out in intra-office communications governing individual acquisition, no such guidelines/parameters have been placed on record except a letter dated June 26, 1991 sent by the Chief Administrator, HUDA to the Additional Director, Urban Estate, Haryana, Manimajra and the Chief Controller of Finance, HUDA, Manimajra pertaining to review progress of the various schemes of HUDA which reads thus :

"1. That a land bank should be created in the current financial year. Chief Controller of Finance, HUDA should discuss the matter with Additional Director, Urban Estate for financial planning, so that land bank could be treated.

2. That during the current year 2000 acres more land can



be acquired provided additional amount is advanced for the purpose.

3. That financial fore-cast should be prepared every month for land lying notified under section 6 of the Land Acquisition Act, should acquired. (sic)

4. That existing factories should not be acquired and should be released from the proceedings of the section 4 notification. Constructed area of 'A' and 'B' grade should be left out of acquisition.

5. That survey of existing construction be done before the notification under section 4 of the Land Acquisition Act.

6. That the area which is liable to be left out and of acquired (sic) should be left out at the time of decision on the report under section 5-A of the Land Acquisition Act. No notification earlier issued under Land Acquisition Act should lapse.

7. That reference under section 18 of the Land Acquisition Act should not be delayed. Pendency of reference has financial implication."

20. The only guideline discernible from the aforesaid letter dated June 26, 1991 is that survey of existing construction should be done before notification is issued under Section 4 of the Land Acquisition Act; that existing factory should not be acquired and it should be released from the proceedings of Section 4 notification and that constructed area of 'A' and 'B' grade should be left out of acquisition. In *Sube Singh7,* this Court has already held that classification on the basis of nature of construction cannot be validly made and such policy is not based on intelligible differentia and a rational basis germane to the purpose. The policy articulated in the letter dated June 26, 1991, thus, hardly helps the respondents. Rather it is seen that neither the aforesaid policy nor any other policy has been

followed by the State Government while releasing land of various landowners whose lands have been acquired in the same acquisition proceedings. As a matter of fact, the only policy that seems to have been followed is : you show me the face and I'll show you the rule. Insofar as policy of 2007 is concerned, apparently that has not been applied to any of the landowners whose land was acquired along with the appellants' land under the same acquisition proceedings and released later on. We are pained to observe that when this Court directed to the State Government vide order dated August 19, 2008 to consider release of the land of the appellants from acquisition, obviously the State Government was required to consider the representations of the appellants by applying the same standards as were applied to other landowners whose lands were acquired for the same purpose and under the same acquisition proceedings and released later on. However, the representations made by the appellants were rejected by relying upon the policy dated October 26, 2007 which on its face is erroneous and unsustainable in law.

21. Now, we advert to the few instances of landowners who filed writ petitions before the High Court challenging the same notifications under Sections 4 and 6 of the Act and in whose matters Joint Inspection Committee did not recommend release of their lands from acquisition and the High Court dismissed their writ petitions, yet later on their lands were released from acquisition by the State Government on the representations made by them in exercise of its power under Section 48 of the Act.

*Land of Smt. Ram Kala :*

She is owner of land admeasuring 600 sq. yards. There is no construction in the said plot. She challenged the acquisition notifications vide CWP No. 18087 of 1995. The writ petition was dismissed by the High Court by common judgment dated August 13, 1998 as the Joint



Inspection Committee had not recommended release of her land. She then applied for release of her land from acquisition under Section 48 of the Act. Vide order dated November 6, 2001, her land was released. The said order reads thus :

"From:
Director,
Urban Estate Department, Haryana, Panchkla.
To
Administrator, HUDA
Gurgaon.
Memo No.S-1-2001/8226
Dated

Subject:- Release of land in Sector 1 Narnaul (Smt. Ram Kala w/o Hari Singh).

On the above subject, in reference to your letter bearing Memo No.1650 dated 23.01.01.

2. In this regard, you are informed that the Government has agreed for release the land of Smt. Ram Kala w/o Shri Han Singh, Rio Narnaul, bearing Khasra No.872/ 1278, 1055/3, area 600 sq. yards, falling in Sector 1, Narnaul for residential purpose on the usual conditions. The condition of recovery of development charges proportionately would be applicable on the party.

3. In pursuance of letter bearing memo No.2280-72 dated 04.08.86 and letter memo No.23640-63 dated '18.9.2000 and by keeping in view the instructions, first of all the amount of development charges is to be recovered from the party and thereafter to send the sanctioned agreement to the Head Office for finalizing the agreement.

4. Party would be required to comply with conditions of release as per the agreement to be executed.

Thus, you are requested to send the agreement after getting it executed from the party with regard to all general conditions.

Sd/-
Additional Director
Urban Estate Department
Haryana, Panchkula."

*Land of Mani Ram :*

He is owner of plot of land admeasuring 800 sq. yards. According to him, the plot had some commercial and residential construction. He challenged the acquisition notifications vide CWP No. 14583 of 1995. His writ petition was dismissed by the High Court on May 11, 1998 on the basis of the report of the Joint Inspection Committee as it did not recommend release of his land. He, thereafter, applied for release of his land from acquisition to the State Government under Section 48. His representation was accepted and release order came to be issued (except road portion) on July 9, 2003 on the condition that he would utilize the land for conforming use.

*Land of Sumitra Devi :*

She is owner of plot of 400 sq. yards having no construction at all. She challenged the acquisition notifications along with one of the appellants herein - Hari Ram (Civil Appeal No. 5440 of 2000) and one Naresh Kumar. Insofar as Naresh Kumar is concerned, who was owner of land admeasuring 500 sq. yards, the Joint Inspection Committee recommended exclusion of his land from acquisition and, accordingly, High Court granted relief to Naresh Kumar. However, insofar as Hari Ram and Sumitra Devi are concerned, their writ petition was dismissed as the Joint Inspection Committee had not recommended their land to be released from acquisition. In respect of the land owned by Sumitra Devi, Joint Inspection



Committee gave its report thus:

"The land of the petitioner measures 400 sq. yards in area, the location of which is shown on tentative layout plan at No. 19C. The plot is vacant at site except boundary wall. The details of plot are shown in the site sketch plan at Annexure 19C. The committee does not recommend its release."

As regards Hari Ram (one of the appellants), the report reads thus :

"The land of the petitioners measure 400 sq. yards in area, the location of which is shown on tentative layout plan at no. 19B. A small room (6' x 6') along with boundary wall stand constructed at site prior to notification of land u/s 4. The small room is not inhabited by anyone. The construction details are shown in the site sketch plan at Annexure 19B. The committee does not recommend its release from acquisition."

Smt. Sumitra Devi then made representation to the State Government for release of her land from acquisition under Section 48 of the Act. Initially part of the land was released from acquisition but later on by order dated February 7, 2004, her entire land stood released from acquisition.

22. The State Government had also released land of few landowners whose lands were acquired under the same acquisition notifications and there was no challenge to the acquisition by them but they made representation under Section 48 of the Act for release of their lands and that prayer was acceded to. One of such instances is that of landowner Vinod Kumar who is owner of the land admeasuring 800 sq. yards having construction of one room and kitchen. His land was released from acquisition by the State Government on May 6, 1999 by the following order ;

"From:

Director,
Urban Estate Department,
Haryana, Panchkula.

To

Administrator,
Haryana, Panchkula.
Gurgaon.
Memo No.3506 dated 06.05.1999

Subject:- Release of land in Sector 1 Narnaul — Shri Vinod Kumar

On the above subject, in reference to your letter bearing Memo No. T.P.-98/21765 dated 24.12.98.

In this matter, the Government has decided to return the land of Khasra No.1052 measuring 800 sq. yards/ built up area belonging to Shri Vinod Kumar Gupta in Sector 1 Narnaul by releasing from acquisition proceedings. All conditions would be applicable on the applicant and the applicant would have to pay the proportionate development charges of this land to Haryana Urban Development Authority. So you are requested to get the agreement executed from the party for all conditions.

Sd/-
Addl. Director
Urban Estate Department
Haryana, Panchkula."

23. There are various orders placed on record evidencing release of lands from acquisition by the State Government out of same acquisition proceedings. It is not necessary to multiply such orders; reference to one of such orders would suffice. As early as on February 28, 1997, land of 13 landowners was released from acquisition. The said release order reads thus :



"From

The Director,
Urban Estate Deptt., Haryana
Panchkula.

To

The Administrator
Haryana Urban Development Authority
Gurgaon.
Memo No.: 1-971

Dated: 28.02.1997

Sub: FOR RELEASING THE LAND ACQUIRED IN SECTION 1 NARNAUL

In connection with aforesaid subject.

In this connection a decision has been taken by the Government and it has agreed to release the land/ structure of the below mentioned applicants acquired in sector-1 Narnaul. A1 the conditions of release will be applicable on the applicants and they will also have to pay the development charges to HUDA according to rules. An agreement be also got executed from the parties regarding conditions of release. All the parties will have to withdraw their cases from the court. The details of the land released is as under:-

| Sr. No. | Name of Party | Khasra No. | Area |
|---|---|---|---|
| 1. | Rao Gulab Singh s | 1273 | 300 Sq. Yard |
| 2. | Sh. Surender Singh son Sh. Surajbhan | 1294 | 300 - do- |
| 3. | Smt. Krishna Devi w/o Bhup Singh | 1294 | 300 –do- |

| | | | | |
|---|---|---|---|---|
| 4. | Sh. Ravinder Singh s/o Sh. Naresh Singh | 1294 | 300 | –do- |
| 5. | Sh. Om Parkash Son of Sh Mukh Ram | 1297/2 1100, 1101 | 300 | –do- |
| 6. | Sh. Ranbr Singh son of Sh. Khushi Ram | 1297/2 | 210 | –do- |
| 7. | Smt. Babli Devi and Ram Chander | 1097/2 1100, 1101 | 300 | -do- |
| 8. | Sh Bhm Singh s/o Harwai Lal | 1384 | 300 | Sq.Yard |
| 9. | Mewa Singh | 1320 | 150 | –do- |
| 10. | Matadin&Prithvi Singh | 1320 | 300 | –do- |
| 11. | Sh. Rohtash | 1265/2 | 240 | –do- |
| 12. | R.K.Punia | 1057/2 | 400 | –do- |
| 13. | Sh. K.K. Yadav | 1058 | 1200 | -do- |

You may also verify, if you so like the detail of the land released by the Govt. by its decision from the original record from the Land Acquisition Officer, Gurgaon. Copy of the letter Sr. No._____ Dated _____ from the Land Acquisition Officer Gurgaon alongwith a copy of the list of released land is attached herewith.

Dy. Director
Urban Estate Deptt. Haryana
Panchkula."

24. As a matter of fact, lands of more than 40 landowners out of the same acquisition proceedings have been released by the State Government under Section 48 of the Act. Some of the release orders have been passed in respect of landowners who had not challenged the acquisition



proceedings and some of them had challenged the acquisition proceedings before the High Court and whose cases were not recommended by Joint Inspection Committee for withdrawal from acquisition and whose writ petitions were dismissed. Some of these landowners had only vacant plots of land and there was no construction at all. In most of these cases, the award has been passed and, thereafter, the State Government has withdrawn from acquisition. It is not the case of the respondents that withdrawal from acquisition in favour of such landowners has been in violation of any statutory provision or contrary to law. It is also not their case that the release of land from acquisition in favour of such landowners was wrong action on their part or it was done due to some mistake or a result of fraud or corrupt motive. There is nothing to even remotely suggest that the persons whose lands have been released have derived the benefit illegally. As noticed above, prior to October 26, 2007, the State Government did not have uniform policy concerning withdrawal from acquisition. As regards the guidelines provided in the letter dated June 26, 1991, this Court has already held that classification on the basis of nature of construction cannot be validly made and such policy is not based on intelligible differentia and a rational basis. What appears from the available material is that for release of the lands under the subject acquisition, no policy has been adhered to. This leads to an irresistible conclusion that no firm policy with regard to release of land from acquisition existed. It is true that any action or order contrary to law does not confer any right upon any person for similar treatment. It is equally true that a landowner whose land has been acquired for public purpose by following the prescribed procedure cannot claim as a matter of right for release of his/her land from acquisition but where the State Government exercises its power under Section 48 of the Act for withdrawal from acquisition in respect of a particular land, the landowners who are similarly situated have right of similar treatment by the State Government. Equality of citizens' rights is one of the fundamental pillars on which edifice of rule of law rests. All actions of the State have to be fair and for

legitimate reasons. The Government has obligation of acting with substantial fairness and consistency in considering the representations of the landowners for withdrawal from acquisition whose lands have been acquired under the same acquisition proceedings. The State Government cannot pick and choose some landowners and release their land from acquisition and deny the same benefit to other landowners by creating artificial distinction. Passing different orders in exercise of its power under Section 48 of the Act in respect of persons similarly situated relating to same acquisition proceedings and for same public purpose is definitely violative of Article 14 of the Constitution and must be held to be discriminatory. More so, it is not even the case of the respondents that release of land from acquisition in favour of various landowners, as noticed above, was in violation of any statutory provision or actuated with ulterior motive or done due to some mistake or contrary to any public interest. As a matter of fact, vide order dated August 19, 2008, this Court gave an opportunity to the State Government to consider the representations of the appellants for release of their land and pass appropriate order but the State Government considered their representations in light of the policy dated October 26, 2007 ignoring and overlooking the fact that for none of the landowners whose lands have been released from acquisition, the policy dated October 26, 2007 was applied. The State Government has sought to set up make believe grounds to justify its action that development planning has been kept into consideration and that the appellants have been offered developed plots of double the area of construction while the fact of the matter is that in some cases where the plots were vacant and had no construction, the entire plot has been released from acquisition and also the cases where one room or two rooms construction was existing, the whole of plot has been released. While releasing land of more than 40 landowners having plots of size from 150 sq. yards to 1500 sq. yards, if development plan did not get materially disturbed in the opinion of the State Government, the same opinion must hold good for the



appellants' lands as well. It is unfair on the part of the State Government in not considering representations of the appellants by applying the same standards which were applied to other landowners while withdrawing from acquisition of their land under the same acquisition proceedings. If this Court does not correct the wrong action of the State Government, it may leave citizens with the belief that what counts for the citizens is right contacts with right persons in the State Government and that judicial proceedings are not efficacious. The action of State Government in treating the present appellants differently although they are situated similar to the landowners whose lands have been released can not be countenanced and has to be declared bad in law.

25. Consequently, these appeals are allowed and the order of the State Government dated September 29, 2008 is set aside. The respondent no.1 (State of Haryana) is directed to issue appropriate order/s concerning the appellants' lands on the same terms and in the same manner as has been done in the matters of Sumitra Devi, Ram Kala, Mani Ram and others. Obviously, the portion of the lands which in the layout plan forms part of roads or common sites or public utility area shall not be considered for release. No order as to costs.

N.J. Appeals allowed.

AJMER SINGH

*v.*

STATE OF HARYANA

(Criminal Appeal No. 436 of 2009)

FEBRUARY 15, 2009

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

*Narcotic Drugs and Psychotropic Substances Act, 1985:*

*s.20 – Prosecution under – Conviction by courts below – On appeal, conviction upheld.*

*s. 50 – Applicability of – In case of search and recovery from bag, briefcase, container etc. – Held: Such case does not come within ambit of s. 50 – The provision is applicable only in a case of search of person.*

*Evidence – Official witness – Not corroborated by independent witness – In a case under Narcotic Drugs and Psychotropic Substances Act – Authenticity of – Held: Normally in a charge under the Act, corroboration from independent witness is expected, but it is not inviolable rule – The obligation to take public witness is not absolute.*

*Criminal Law – Principle of parity – Applicability of – Held: The principle is applicable to the co-accused i.e. the accused who is involved in the same crime and must be convicted in single trial – It is not applicable in a case where the other accused is convicted in a separate trial arising out of separately registered FIR.*

*Words and Phrases:*

*'Search of person' – Meaning of, in the context of s. 50 of Narcotics Drugs and Psychotropic Substances Act, 1985.*





*'Co-accused' – Meaning of.*

**The Police party, while on patrol duty apprehended appellant accused alongwith another accused finding their activities as suspicious. The accused were given an option to be searched either by the Gazetted Officer or the Magistrate. They opted to be searched by Gazetted Officer. On direction of the Gazetted Officer, the bag they were carrying was searched before him. The bag carried by the appellant-accused was found containing 500 gms of *charas*. The accused was arrested and charge-sheeted u/s. 20 of the Act. The other accused was tried separately. Trial Court convicted the appellant-accused. High Court confirmed the conviction. Hence the present appeal.**

**Appellant contented that his conviction was illegal in view of non-compliance of provision under Section 50 of the Act; that the evidence of official witnesses was not corroborated by independent witnesses; and that as the other accused was awarded lesser punishment, on the principle of parity, punishment awarded to the appellant-accused was not justified.**

**Dismissing the appeal, the Court**

**HELD: 1.1. The question of compliance or non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the Act. [Para 13] [797-H; 798-A-B]**

**1.2 Applying the interpretation of the word "search of person" to facts of present case, it is clear that the compliance of Section 50 is not required. Therefore, the**

**search conducted by the Investigation Officer and the evidence collected thereby, is not illegal. [Para 15] [799-G-H; 800-A]**

*State of Punjab v. Baldev Singh* **(1999) 6 SCC 172, followed**

*Ali Mustaffa Abdul Rahman Moosa vs. State of Kerala*, **(1994) 6 SCC 569;** *Pooran Mal vs. Director of Inspection (Investigating), New Delhi and Ors.* **(1974) 1 SCC 345;** *Madan Lal vs. State of Himachal Pradesh* **2003 Crl. L. J. 3868;** *State of Himachal Pradesh vs. Pawan Kumar*, **2005 4 SCC 350, relied on**

**2.1. It is not correct to say that the evidence of the official witnesses cannot be relied upon as their testimony has not been corroborated by any independent witness. It is clear from the testimony of the prosecution witnesses PW-3, PW-4 and PW-5, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. It may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. [Para 16] [800-B-F]**

**2.2. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the**



**recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. In the present case, both the trial court and the High Court by applying recognized principle of evaluation of evidence of witnesses has rightly come to the conclusion that the appellant was arrested and 'Charas' was recovered from the possession of the appellant for which he had no licence. [Para 16] [800-F-H; 801-A]**

**3.1. The principle of parity in criminal case is that, where the case of the accused is similar in all respects as that of the co-accused then the benefit extended to one accused should be extended to the co-accused. For applying the principle of parity both the accused must be involved in same crime and must be convicted in single trial, and consequently, a co-accused is one who is awarded punishment along with the other accused in the same proceedings. [Paras 18 and 23] [801-C-D; 804-C-D]**

*Harbans Singh v. State of Uttar Pradesh and Ors*. **(1982) 2 SCC 101;** *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra,* **(2003) 2 SCC 708 – relied on.**

*R. v. Christie* **2004 Carswell Alta 1224 Alberta Court of Appeal, 2004;** *Wahby v The Queen,* **(2004) WASCA 308 2004 WL 3061688;** *Goddard v The Queen,* **(1999) 21 WAR 541;** *R v Hildebrandt* **187 A Crim R 42 2008 WL 3856330; 2008 VSCA 142;** *Postiglione v The Queen* **(1997) 189 CLR 295; 94 A Crim R 397, referred to**

**3.2. The principle of parity cannot be applied to the present case as the record shows that the other accused was convicted vide a separate trial arising out of a separately registered F.I.R.. Merely because the other**

**accused happened to be searched on 24.1.1996 before the same gazetted officer, he cannot be said to be a co-accused in the present case. Further, the sentence of the other accused was altered by the High Court vide a separate judgment arising out of a separate appeal. [Para 23] [804-D-F]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(1999) 6 SCC 172** | **followed** | **Para 12** |
| **(1994) 6 SCC 569** | **Relied on** | **Para 12** |
| **(1974) 1 SCC 345** | **Relied on** | **Para 12** |
| **2003 Crl. L. J. 3868** | **Relied on** | **Para 13** |
| **(2005) 4 SCC 350** | **Relied on** | **Para 14** |
| **(1982) 2 SCC 101** | **Relied on** | **Para 18** |
| **(2003) 2 SCC 708** | **Relied on** | **Para 19** |
| **2004 Carswell Alta 1224 Alberta Court of Appeal, 2004** | **Referred to** | **Para 20** |
| **(2004) WASCA 308 2004 WL 3061688** | **Referred to** | **Para 20** |
| **(1999) 21 WAR 541** | **Referred to** | **Para 20** |
| **187 A Crim R 42 2008** | | |
| **WL 3856330 2008 VSCA 142** | **Referred to** | **Para 21** |
| **(1997) 189 CLR 295 94 A Crim R 397** | **Referred to** | **Para 22** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 436 of 2009.



From the Judgment & Order dated 7.12.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 926-SB of 1997.

R.S. Dhull, Sanjay Jha and Dharam Bir Raj Vohra for the Appellants.

Manjit Singh, AAG and Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

**H.L. DATTU, J.** 1. This appeal, is directed against the judgment and order of the High Court of Punjab and Haryana in Criminal Appeal No.926-SB of 1997 dated 7.12.2007, whereby and where under, the High Court has upheld the conviction of the appellant by the Additional Sessions Judge, Kurukhestra, vide judgment and order dated 5.11.1997/ 6.11.1997 in Sessions Case No.14 of 1996, for offences punishable under Section 20 of the Narcotics Drugs & Psychotropic Substances Act, 1985.

2. The factual matrix of the case is as under : That on 24.1.1996, ASI Maya Ram accompanied by other police officials, namely, Head Constable Raja Ram and Constables Gian Chand and Shyam Singh was on patrol duty. The said police party was present near the Markanda Bridge when the accused along with another person Randhir Singh were seen coming from the side of Ismailabad. On seeing the police party, the appellant and other person Randhir Singh made an attempt to turn back and escape. However, the police over-powered them as their activities were found suspicious. Thereafter, they were served with a notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') vide memo (Ex.PD) giving an option to them to be searched either by the Gazetted officer or the Magistrate. They signed the memo by making the choice to be searched by the Gazetted officer and they were arrested by the

Head Constable Raja Ram and C-1 Gian Chand. Both of them were produced before the then D.S.P., Pehowa, Shri Paramjit Singh Ahalawat who is a Gazetted Officer, and on his direction, the bag that they were carrying was searched before him. The bag that was carried by the appellant on his shoulder was found to be containing 500 grams of charas wrapped in wax paper. Out of that, 50 grams of charas was taken as sample. Thereafter, the sample and residue were sealed separately with seal 'MR' of the Investigating Officer and 'PSA' of the D.S.P. Seal MR was handed over to HC Raja Ram while seal 'PSA' was retained by the D.S.P. himself. FIR was registered being Case F.I.R. No. 14 dated 24.1.1996 and the property was taken into possession by drawing a mahazar. The rough site plan was also prepared and the accused was arrested after informing the grounds of arrest. The statements of witnesses were recorded and challan was issued on receipt of the report of the Chemical Examiner Exhibit PH. The accused was charge-sheeted under Section 20 of the Act and he pleaded not guilty and claimed trial. The other person who was also apprehended on the same day, was also charge- sheeted and tried separately.

**Case of Prosecution before the Trial Court:**

3. The prosecution examined Constable Balkar Singh PW-1, MHC Som Nath PW-2, DSP Paramjit Singh Ahalawat PW-3, Head Constable Raja Ram PW-4, ASI Maya Ram PW-5 and SI Dilpanjir Singh PW-6. The prosecution also got marked the Chemical Examination Report and closed the prosecution evidence. The accused was called upon to lead evidence in defence, if any. The statement of the accused under Section 313 of the Criminal Procedure Code was recorded by putting incriminating evidence against him. Being confronted with incriminating circumstance appearing against him, the accused pleaded innocence and false implication.

4. The case of the appellant before the Sessions Court :



(a) that there was no strict compliance of the Section 50 of the Act.

(b) independent witnesses not joined and associated during the search.

(c) that the accused was falsely implicated in the case.

**Decision of Sessions Court:**

5. The Additional Session Judge has observed that the accused was given an option, whether he should be searched by a Gazetted officer or a Magistrate and after obtaining his option, he was produced before Deputy Superintendent of Police, who is a Gazetted Officer and on his direction the accused was searched and, therefore, there is compliance of Section 50 of the Act. Secondly, the prosecution has shown that there were enough efforts taken by the Investigation Officer to implead independent witness. Thirdly, there has been no missing link in the evidence and thus the prosecution has been able to prove the case beyond reasonable doubt that the accused "retained in his conscious possession 500 grams of charas without any permit or license on 24.1.1996". Thus, the accused was held guilty under Section 20 of the Act and was convicted vide judgment dated 5.11.1996. The accused was sentenced to undergo rigorous imprisonment for a period of ten years and a fine of Rs.1,00,000/-(Rupees one lac). In default of payment of fine, to further undergo rigorous imprisonment for another one year.

**Appeal before the High Court:**

6. Feeling aggrieved by the decision of Additional Session Judge, Kurukshetra, the accused preferred Criminal Appeal No.926-SB of 1997 before the High Court of Punjab and Haryana.

7. Apart from reiterating the contentions canvassed before the learned Sessions Judge, the learned counsel for the

accused-appellant had also contended that there was delay of 15 days in sending the sample for chemical examination to FSL, Madhuban (Karnal) and no explanation is given by the prosecution for the delay caused. The High Court while considering this issue has concluded that the delay is properly explained by the prosecution. It has further observed that, the statement of the witnesses and the report of the FSL, Madhuban shows that the sample was received in sealed cover and there was no tampering of the sample, and therefore, the said FSL, Madhuban Report must be held to have full evidentiary value.

**Appeal:**

8. Before us the learned counsel for the appellant contended that the prosecution has failed to establish the guilt of the accused ; that the conviction and sentence of the appellant is illegal in view of failure to observe the safeguards, while conducting search and seizure, as provided under Section 50 of the Act ; that the prosecution has not joined any independent witnesses to prove the fact of recovery of 'Charas' from the possession of the accused ; that the principle of parity requires the awarding of lesser punishment as has been done in the case of co-accused Randhir Singh.

9. In order to appreciate the contention raised by the learned counsel appearing for appellant, it is necessary to notice Section 50 of the Act. It reads:

> *"Conditions under which search of persons shall be conducted.* (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.



> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-Section (1).\
>
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4) No female shall be searched by anyone excepting a female."

10. Section 43 of the Act empowers an officer referred to in Section 42 to conduct search and seizure and arrest in public places. The provision reads as under:

> "Power of seizure and arrest in public places. Any officer of any of the departments mentioned in Section 42 may—
>
> (a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance;
>
> (b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.
>
> Explanation.—For the purposes of this Section, the expression "public place" includes any public conveyance,

hotel, shop, or other place intended for use by, or accessible to the public."

11. Section 42 of the Act reads as under :

"Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is embowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish



evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-Section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

12. The object, purpose and scope of Section 50 of the Act was the subject matter of discussion in number of decisions of this Court. The Constitution Bench of five Judges of this Court in the case of *State of Punjab v. Baldev Singh,* [(1999) 6 SCC 172], after exhaustive consideration of the decision of this court in the case of *Ali Mustaffa Abdul Rahman Moosa vs. State of Kerala,* [(1994) 6 SCC 569] and Pooran Mal vs. Director of Inspection (Investigation), New Delhi & Ors., [(1974) 1 SCC 345], have concluded in para 57 :

(I) When search and seizure is to be conducted under the provision of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render

the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article, recovered from his person, during such search.

(IV) The investigation agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non compliance of the procedure i.e. informing the accused of the right under sub-Section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

13. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, brief case etc., carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of Section 50 of the N.D.P.S. Act is relevant



only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the N.D.P.S. Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res-integra in view of the observations made by this court in the case of *Madan Lal vs. State of Himachal Pradesh* 2003 Crl.L.J. 3868. The Court has observed:

> "A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (See *Kalema Tumba vs. State of Maharashtra and Anr*. (JT 1999 (8) SC 293), *State of Punjab vs. Baldev Singh* (JT 1994 (4) SC 595), *Gurbax Singh vs. State of Haryana* (2001 (3) SCC 28). The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh's* case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."

14. In *State of Himachal Pradesh vs. Pawan Kumar,* [2005 4 SCC 350], this Court has stated:

> "A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body or a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton etc. of

varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

After discussion on the interpretation of the word 'person', this Court concluded:

"that the provisions of section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which (the accused) may be carrying"

The court further observed :

"In view of the discussion made, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused."

15. It appears from the evidence on record that the accused was confronted by ASI Maya Ram and other police officials on 24.1.1996 and he was informed that he has the right to either be searched before the Gazetted Officer or before a Magistrate and the accused chose the later. Thereafter, the accused was taken to the DSP, Pehowa, Shri Paramjit Singh Ahalawat and as directed by him, the bag carried by accused on his shoulder was searched and the charas was found in that bag. Thus, applying the interpretation of the word "search of person" as laid down by this court in the decision mentioned above, to facts of present case, it is clear that the compliance of Section 50 of the Act is not required. Therefore, the search



conducted by the investigation officer and the evidence collected thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel of the appellant as regards the non-compliance of Section 50 of the Act.

16. The learned Counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3 Paramjit Singh Ahalwat, D.S.P., Pehowa, PW-4 Raja Ram, Head Constable and PW-5 Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. In the present case, both the trial court and the High Court by applying recognized principle of evaluation of evidence of witnesses has rightly come to the conclusion that the

appellant was arrested and Charas was recovered from the possession of the appellant for which he had no licence. We find no good reason to differ from that finding.

17. The learned counsel for the appellant further contends that the sentence of ten years rigorous imprisonment deserves to be modified and the accused deserves to be acquitted on the ground of parity as the sentence of other accused Randhir Singh, who was searched on 24.1.1996 and convicted by the additional Session Judge for being in possession of one Kilogram of charas, without any permit or license, has been reduced to that already suffered by him.

18. The principle of parity in criminal case is that, where the case of the accused is similar in all respects as that of the co-accused then the benefit extended to one accused should be extended to the co-accused. With regard to this principle, it is important to mention the observation of this court in the case of *Harbans Singh v. State of Uttar Pradesh and Ors.,* [(1982) 2 SCC 101]. In that case it was held, that, in view of commutation of death sentence of one of the accused, who was similarly placed as that of appellant, award of death sentence to appellant was unjustified and, hence, the death sentence of the appellant was stayed till the decision of the President on commutation of sentence. An important observation of this Court on the point need to be noticed at this stage:

> "it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is shared."

19. In the case of Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra, [(2003) 2 SCC 708], this Court maintained that as the second accused was placed on the same situation as the appellant, Article 21 of the Constitution would not permit this



court to deny the same benefit to the second accused.

20. The Court of Appeal Albert, *Canada in R. v. Christi*e [2004 Carswell Alta 1224 Alberta Court of Appeal, 2004] discussed the meaning of the principle in connection with sentencing in criminal cases. The Court of Appeal stated:

> "40. Parity is a principle which must be taken into account in any sentence, and particularly where the offence was a joint venture. There will, of course, be cases where the circumstances of the co-accused are sufficiently different to warrant significantly different sentences, such as where one co-accused has a lengthy related criminal record or played a much greater role in the commission of the offence."

Thus, expressing its view on 'parity in sentencing' the Court observed:

> "43. What we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together, particularly in cases involving joint ventures."

Also the observation of the Court of Appeal Alberta in the case of *Wahby v The Queen,* [(2004) WASCA 308 2004 WL 3061688] whereby, the Court quoted the explanation given in the case of *Goddard v The Queen,* [(1999) 21 WAR 541], is relevant for the discussion in present case:

> "In considering the application of the principle, all the circumstances of the case are to be taken into account; those concerned with the commission of the offence and those which are personal to the offender before the court and the co-offender. Where there are differences, as almost inevitably there will be, true parity will be produced by different sentences, each proportionate to the criminal

culpability of each offender, bearing in mind, as is often said but is worth repeating, that sentencing is not and should not be a process involving a search for mathematical precision, but is an act of discretion informed by the proper application of sentencing principles to the particular case. Inevitably there will be a range of appropriately proportionate sentences which may be passed for the offence before the court."

21. The Court of Appeal of the Supreme Court of Victoria, Australia in the case of *R v Hildebrandt* [187 A Crim R 42 2008 WL 3856330; [2008] VSCA 142] observed:

"Judicial expositions of the meaning of the parity principle are not entirely uniform. The term "the parity principle" is used in at least two senses in the relevant authorities. First, to express the recognition that like cases should be treated alike (itself an emanation of equal justice). Secondly, the phrase is used to describe the requirement to consider the "appropriate comparability" of co-offenders, and in that sense, comprehends the mirror propositions that like should be treated alike, and that disparate culpability or circumstances may mandate a different disposition."

22. In the case *Postiglione v The Queen* [(1997) 189 CLR 295; 94 A Crim R 397] Dawson and Gaudron JJ stated:

"The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated ...Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due



proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality."

The Court, therefore, concluded the principle to mean:

"……it the concept simply is that, when two or more co-offenders are to be sentenced, any significant disparity in their sentences should be capable of a rational explanation."

23. What can be inferred from the above decision is, that for applying the principle of parity both the accused must be involved in same crime and must be convicted in single trial, and consequently, a co-accused is one who is awarded punishment along with the other accused in the same proceedings. However, we are unable to apply the principle of parity to the present case as the record show that the accused Randhir Singh was convicted vide a separate trial arising out of a separately registered F.I.R. Merely because the accused Randhir Singh happened to be searched on 24.1.1996 before the same gazetted officer i.e. D.S.P., Pehowa, Shri Paramjit Singh Ahalawat, he cannot be said to be a co-accused in the present case. Further, the sentence of accused Randhir Singh was altered by the Punjab and Haryana High Court vide a separate judgment dated 3.12.2002 arising out of a separate appeal being Criminal Appeal No.855-57 of 1999. Therefore, we do not find any merit in the contention canvassed by learned counsel for the appellant.

24. In view of the aforesaid findings, we do not find any infirmity in the impugned order of the High Court. Accordingly, the present appeal fails and is dismissed.

K.K.T. Appeal dismissed.

NATIONAL SMALL INDUSTRIES CORP. LTD.
*v.*
HARMEET SINGH PAINTAL AND ANR.
(Criminal Appeal No. 320-336 of 2010 )

FEBRUARY 15, 2010

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

*Negotiable Instruments Act, 1881: ss.138, 141 – Vicarious liability of Directors of a Company – Held: Director of a Company who is not in-charge of and is not responsible for the conduct of the business of the company would not be liable for a criminal offence under s.138 – s.141 is a penal provision creating vicarious liability, and must be strictly construed – Complaint under s.138 must spell out as to how and in what manner the accused-director was in-charge of or was responsible to the accused company for the conduct of its business – If averments made against accused-Directors are unspecific and general and no particular role is assigned to them, then vicarious liability in accordance with s.141 cannot be fastened on them – On facts, in the absence of specific averment as to the role of the respondents and particularly since they were in no way connected with the affairs of the company, the summoning orders against them were rightly quashed by High Court – Companies Act, 1956 – s.291.*

**The question which arose for consideration in these appeals was whether High Court was justified in quashing the summoning orders passed by trial court against accused-Directors under Section 138 of the Negotiable Instruments Act, 1881, on the ground that the averments made against them were unspecific and general and no particular role was assigned to them.**





**Dismissing the appeals, the Court**

**HELD: 1.1. Section 141 of the Negotiable Instruments Act requires that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, were in-charge of, and were responsible to the company for the conduct of the business of the company. Every person connected with the company would not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence would be liable for criminal action. If a Director of a Company who was not in-charge of and was not responsible for the conduct of the business of the company at the relevant time, he would not be liable for a criminal offence under the provisions. The liability arises from being in-charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. [Para 9] [814-A-D]**

**1.2. Section 141 is a penal provision creating vicarious liability, and must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner the accused was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability. A company may have a number of Directors and to make any or all the Directors as accused in a complaint**

**merely on the basis of a statement that they are in-charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141. In order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the concerned Directors should be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned Directors were alleged to be in-charge of and was responsible for the conduct and affairs of the company. [Paras 10 and 14] [814-E-H; 815-A; 818-F-G]**

*SMS Pharmaceuticals v. Neeta Bhalla and Anr.* **(2005) 8 SCC 89;** *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya* **(2006) 10 SCC 581;** *Saroj Kumar Poddar v. State (NCT of Delhi)* **(2007) 3 SCC 693; *N.K. Wahi v. Shekhar Singh & Ors.* (2007) 9 SCC 481; *Ramraj Singh v. State of M.P. & Anr.* (2009) 6 SCC 729;** *SMS Pharmaceuticals v. Neeta Bhalla* **(2007) 4 SCC 70;** *Everest Advertising Pvt. Ltd. v. State Govt. of NCT of Delhi & Ors.* **(2007) 5 SCC 54;** *N. Rangachari v. Bharat Sanchar Nigam Ltd.* **(2007) 5 SCC 108;** *Paresh P. Rajda v. State of Maharashtra & Anr.* **(2008) 7 SCC 442;** *K.K. Ahuja v. V.K. Vora & Anr.* **(2009) 10 SCC 48, referred to.**

**2.1. Section 291 of the Companies Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. A company, though a legal entity, can act only through its Board of Directors. The settled position is that a Managing Director is *prima facie* in-charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct**



**of the business of the company. [Para 24] [826-C-E]**

**2.2. Section 141 does not make all the Directors liable for the offence. For fastening the criminal liability, there is no presumption that every Director knows about the transaction. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company. Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with. Vicarious liability on the part of a person must be pleaded and proved and not inferred. If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with. If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint. The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases. [Para 25] [828-A-H]**

**2.3. In the appeals of National Small Industries Corporation, respondent No.1 was no more a Director of the company when the cheques alleged in the complaint were signed and the same is evidenced from the Sixth Annual Report for the year 1996-97 of the accused company. The said report is dated 30.08.1997 and the**

**same was submitted with the Registrar of Companies on 05.12.1997 and assigned as document No. 42 dated 09.03.1998 by the Department. Those documents were placed before this Court by respondent No.1 as an additional document. In view of these particulars and in addition to the interpretation relating to Section 141, no liability could be fastened on respondent No.1. Further, it was pointed out that though he was an authorized signatory in the earlier transactions, after settlement and in respect of the present cause of action, admittedly fresh cheques were not signed by the first respondent. In the same way, respondent no.1 in the appeal of the DCM Financial Services, also filed additional documents to show that on the relevant date, namely the date of issuance of cheque he had no connection with the affairs of the company. In the absence of specific averment as to the role of the respondents and particularly in view of the acceptable materials that at the relevant time, they were in no way connected with the affairs of the company, the conclusion arrived at by the High Court is upheld. [Paras 26 and 27] [829-A-F]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2005) 8 SCC 89** | **referred to** | **Para 14** |
| **(2006) 10 SCC 581** | **referred to** | **Para 15** |
| **(2007) 3 SCC 693** | **referred to** | **Para 16** |
| **(2007) 9 SCC 481** | **referred to** | **Para 17** |
| **(2009) 6 SCC 729** | **referred to** | **Para 18** |
| **(2007) 4 SCC 70** | **referred to** | **Para 19** |
| **(2007) 5 SCC 54** | **referred to** | **Para 20** |
| **(2007) 5 SCC 108** | **referred to** | **Para 21** |
| **(2008) 7 SCC 442** | **referred to** | **Para 22** |
| **(2009) 10 SCC 48** | **referred to** | **Para 23** |



CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 320-336 of 2010.

From the Judgment & Order dated 24.10.2007 of the High Court of Delhi at New Delhi in Crl. M.C. No. 1853, 1854, 1857, 1862, 1863, 1864, 1865,1866, 1867, 1868, 1869, 1905, 1906, 2568, 2597, 2598 & 2603 of 2005.

WITH

Crl. Appeal No. 337/2010.

Sanat Kumar, Sanjay Sharma and Sanjay Sharawat for the Appellants.

P.P. Malhotra, ASG, Vikas Bansal, Sadhna Sandhu, Anil Katiyar, Vikash Mehta, Narhari and Rohit Bhat for the Respondents.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. Leave granted in all the above special leave petitions.

2. The appeals arising out of S.L.P. (Criminal) Nos. 445-461 of 2008 have been filed by the appellant-National Small Industries Corporation Limited against the common judgment and order dated 24.10.2007 passed by the High Court of Delhi at New Delhi in a batch of cases whereby the High Court quashed the summoning orders passed by the trial Court against respondent No.1 - Harmeet Singh Paintal, under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (for short "the Act")

3. The connected criminal appeal arising out of S.L.P. Crl. No. 1079 of 2008 is filed against the judgment and order dated 24.05.2007 passed by the High Court of Delhi in Criminal Revision Petition No. 163 of 2005, whereby the High Court

quashed the summoning order passed by the trial Court against respondent No.1 - Dev Sarin under Section 138 read with Section 141 of the Act.

4. Since all these appeals are identical and same legal issues arise, they are being disposed of by this common judgment.

5. The appellant - National Small Industries Corporation Ltd. had filed 12 criminal complaints under Section 138 read with Sections 141 and 142 of the Act against M/s Jay Rapid Roller Limited, a Company incorporated under the Companies Act, its Managing Director - Shri Sukhbir Singh Paintal, and its Director - Shri Harmeet Singh Paintal. It is the claim of the appellant that so as to make the Managing Director and Director of the Company liable to be prosecuted under the provisions of the Act, they had specifically averred in the complaint that all the accused persons approached it for financing of bill integrated market support programme. It was also stated that the accused persons had issued cheques which were dishonoured on presentation against which the appellant had filed criminal complaints under the provisions of the Act against all the respondents herein. It is their further case that all the accused persons accepted their liability and delivered various cheques, which are the subject matter of the present appeals.

6. In the connected appeal, the appellant - DCM Financial Services Ltd., entered into a hire purchase agreement on 25.02.1996 with M/s International Agro Allied Products Ltd. At the time of entering into contract, the Company handed over post-dated cheques to the appellant towards payment of monthly hire/rental charges. Respondent No.1 – Dev Sarin was one of the Directors of the said Company. The cheque issued by International Agro and Allied Products Ltd. in favour of the appellant was duly presented for payment on 28.10.1998 and the same was returned unpaid for the reason that the Company had issued instructions to the bankers stopping payment of the



cheque. The appellant issued a legal notice on 05.12.1998 to the Company, Respondent No.1 and other Directors under Section 138 of the Act informing them about the dis-honouring of the cheque in question. Despite the service of the notice, the Company did not make the payment to the appellant. The appellant, on 11.01.1999, filed a complaint before the Metropolitan Magistrate, New Delhi against respondent No.1 and others under Section 138 read with Section 141 of the Act. By order dated 04.02.1999, the Metropolitan Magistrate, New Delhi, after recording evidence summoned the accused persons including respondent No.1 herein. Respondent No.1 filed an application before the Additional Sessions Judge, Delhi for dropping of proceedings against him. By order dated 08.09.2004, the Metropolitan Magistrate dismissed the said application. Aggrieved by the said order, the respondent filed a petition under Section 482 of the Criminal Procedure Code before the High Court for quashing of the complaint. The High Court, after finding that the averments against respondent No.1 are unspecific and general and no particular role is assigned to the appellant, quashed the summoning order insofar as it concerned to him.

7. In this factual matrix, the issue which arises for determination before this Court is whether the order of the High Court quashing the summoning orders insofar as the respondents are concerned is sustainable and what should be the averments in the complaint under Section 138 read with Section 141 of the Act against the Director of a Company before he can be subjected to criminal proceedings.

8. Heard learned counsel for the appellants as well as the learned ASG and senior counsel for the respondents.

9. Section 138 of the Act refers about penalty in case of dishonour of cheque for insufficiency of funds in the account. We are more concerned about Section 141 dealing with offences by Companies which reads as under:-

"141. *Offences by companies*.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.— For the purposes of this section,—*

(*a*) 'company' means any body corporate and includes a firm or other association of individuals; and



(*b*) 'director', in relation to a firm, means a partner in the firm."

It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact that if a Director of a Company who was not in-charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in-charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.

10. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No.1 was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in-charge of and responsible for the conduct of the business of the company

without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

11. In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company.

12. In the light of the above provision and the language used therein, let us, at the foremost, examine the complainta filed by National Small Industries Corporation Limited and the DCM Financial Services Ltd. In the case of National Small Industries Corpn. Ltd., the High Court has reproduced the entire complaint in the impugned order and among other clauses, clause 8 is relevant for our consideration which reads as under:

> "8. That the accused No. 2 is the Managing Director and accused No. 3 is the Director of the accused company. The accused No. 2 and 3 are the in-charge and responsible for the conduct of the business of the company accused No. 1 and hence are liable for the offences."

13. In the case of DCM Financial Services Ltd., in complaint-Annexure-P2 the relevant clause is 13 which reads as under:

> "13. That the accused No. 1 is a Company/Firm and the accused Nos. 2 to 9 were in charge and were responsible to the accused No. 1 for the conduct of the business to the accused No. 1 at the time when offence was committed. Hence, the accused Nos. 2 to 9 in addition to the accused No. 1, are liable to be prosecuted and punished in accordance with law by this Hon'ble Court as provided by section 141 of the N.I. Act, 1881. Further the offence has been committed by the accused No. 1 with the consent and connivance of the accused Nos. 2 to 9."



14. Now, let us consider whether the abovementioned complaint in both cases has satisfied the necessary ingredients to attract Section 141 insofar as the respondents, namely, Directors of the company are concerned. Section 141 of the Act has been interpreted by this Court in various decisions. As to the scope of Section 141 of the Act, a three-Judge Bench of this Court considered the following questions which had been referred to it by a two-Judge Bench of this Court in *SMS Pharmaceuticals vs. Neeta Bhalla and Anr.* (2005) 8 SCC 89:

> "(*a*) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.
>
> (*b*) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.
>
> (*c*) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

While considering the above questions, this Court held as under:

> **"18.** To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal

process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

**19.** In view of the above discussion, our answers to the questions posed in the reference are as under:

(*a*) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(*b*) The answer to the question posed in sub-para (*b*) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot



be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(*c*) The answer to Question (*c*) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

Therefore, this Court has distinguished the case of persons who are in-charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in-charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the concerned Directors should be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned Directors were alleged to be in- charge of and was responsible for the conduct and affairs of the company.

15. In *Sabitha Ramamurthy vs. R.B.S.*

*Channabasavaradhya***,** (2006) 10 SCC 581, this Court while dealing with the same issue observed as under:

> "……It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted. Not only the averments made in para 7 of the complaint petitions do not meet the said statutory requirements, the sworn statement of the witness made by the son of the respondent herein, does not contain any statement that the appellants were in charge of the business of the Company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance with the statutory requirements. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor. In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view."



16. In *Saroj Kumar Poddar vs. State (NCT of Delhi)* (2007) 3 SCC 693, while following *SMS Pharmaceuticals case* (supra) and *Sabhita Ramamurthy case* (supra), this Court held that with a view to make the Director of a company vicariously liable for the acts of the company, it was obligatory on the part of the complainant to make specific allegations as are required under the law and under Section 141 of the Act and further held that in the absence of such specific averments in the complaint showing as to how and in what manner the Director is liable, the complaint should not be entertained. The relevant portion of the judgment is reproduced hereinbelow:-

> "12. A person would be vicariously liable for commission of an offence on the part of a company only in the event the conditions precedent laid down therefor in Section 141 of the Act stand satisfied. For the aforementioned purpose, a strict construction would be necessary.
>
> 13. The purported averments which have been made in the complaint petitions so as to make the appellant vicariously liable for the offence committed by the Company read as under:
>
> "That Accused 1 is a public limited company incorporated and registered under the Companies Act, 1956, and Accused 2 to 8 are/were its Directors at the relevant time and the said Company is managed by the Board of Directors and they are responsible for and in charge of the conduct and business of the Company, Accused 1. However, cheques referred to in the complaint have been signed by Accused 3 and 8 i.e. Shri K.K. Pilania and Shri N.K. Munjal for and on behalf of Accused 1 Company.
>
> 14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors

were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in para 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act."

17. *In a subsequent decision in N.K. Wahi vs. Shekhar Singh & Ors.,* (2007) 9 SCC 481 while following the precedents of *SMS Pharmaceuticals's case* (supra), *Sabhita Ramamurthy's case* (supra) and *Saroj Kumar Poddar's case* (supra), this Court reiterated that for launching a prosecution against the alleged Directors, there must be a specific allegation in the complaint as to the part played by them in the transaction. The relevant portion of the judgment is as under:

**"7.** This provision clearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.

**8.** To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the



conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable."

18. The said issue again came up for consideration before a three-Judge Bench of this Court recently in *Ramraj Singh vs. State of M.P. & Anr.* (2009) 6 SCC 729. In this case, the earlier decisions were also considered in detail. Following the decisions of *SMS Pharmaceuticals'* case (supra), *Sabhita Ramamurthy's* case (supra), *Saroj Kumar Poddar's* case (supra) and *N.K. Wahi's* case (supra) this Court held that it is necessary to specifically aver in a complaint under Section 141 that at the time when the offence was committed, the person accused was in-charge of, and responsible for the conduct of the business of the company. Furthermore, it held that vicarious liability can be attributed only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused/Director therein vicariously liable for the offence committed by the company. It was further held that before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted. Thus, the issue in the present case is no more res integra and has been squarely covered by the decisions of this Court referred above. It is submitted that the aforesaid decisions of this Court have become binding precedents.

19. In the case of second *SMS Pharmaceuticals* vs. *Neeta Bhalla***,** (2007) 4 SCC 70, this Court has categorically held that there may be a large number of Directors but some of them may not assign themselves in the management of the day-to-day affairs of the company and thus are not responsible for the conduct of the business of the company.

Para 20 of the said judgment is relevant which is reproduced hereunder:-

> "20. The liability of a Director must be determined on the date on `which the offence is committed. Only because Respondent 1 herein was a party to a purported resolution dated 15-2-1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefor must be satisfied."

20. Relying on the judgment of this Court in *Everest Advertising Pvt. Ltd***.** *vs. State Govt. of NCT of Delhi & Ors***.,** (2007) 5 SCC 54, learned counsel for the appellants argued that this Court has not allowed the recalling of summons in a criminal complaint filed under sections 138 and 141. However, a perusal of the judgment would reveal that this case was of recalling of summons by the Magistrate for which the Magistrate had no jurisdiction. Further, para 22 of the judgment would reveal that in the complaint "allegations have not only been made in terms of the wordings of section but also at more than one place, it has categorically been averred that the payments were made after the meetings held by and between the representative of the Company and accused nos. 1 to 5 which would include Respondent Nos. 2 and 3." In para 23, this Court concluded that "it is therefore, not a case where having regard to the position held by the said respondents in the Company,



they could plead ignorance of the entire transaction". Furthermore, this Court has relied upon *S.M.S. Pharamaceutical's* case (three-Judge Bench) (supra), *Saroj Kumar Poddar's* case (supra) and *N.K. Wahi's* case (supra).

21. Relying on the judgment of this Court in *N. Rangachari vs. Bharat Sanchar Nigam Ltd.,* (2007) 5 SCC 108, learned counsel for the appellants further contended that a payee of cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in-charge of its affairs and the Directors are prima facie in that position. However, it is pertinent to note that in this case it was specifically mentioned in the complaint that (i) accused no. 2 was a director and in charge of and responsible to the accused Company for the conduct of its business; and (ii) the response of accused no. 2 to the notice issued by BSNL that the said accused is no longer the Chairman or Director of the accused Company was false and by not keeping sufficient funds in their account and failing to pay the cheque amount on service of the notice, all the accused committed an offence. Therefore, this decision is clearly distinguishable on facts as in the said case necessary averments were made out in the complaint itself. Furthermore, this decision does not and could not have overruled the decisions in *S.M.S. Pharmaceutical's* case (three-Judge Bench)(supra), *Ramraj Singh's* case (three-Judge Bench)(supra), *Saroj Kumar Poddar's* case (supra) and *N.K. Wahi's* case (supra) wherein it is clearly held that specific averments have to be made against the accused Director.

22. Learned counsel for the appellants after elaborately arguing the matter, by inviting our attention to *Paresh P. Rajda vs. State of Maharashtra & Anr.,* (2008) 7 SCC 442 contended that a departure/digression has been made by the Court in the case of *N. Rangachari vs. BSNL* (supra). However, in this case also the Court has observed in para 4 that the High Court had noted that an overall reading of the complaint showed that specific allegations had been leveled against the accused as

being a responsible officer of the accused Company and therefore, equally liable. In fact, the Court recorded the allegations in the complaint that the Complainant knew all the accused and that accused no. 1 was the Chairman of the accused Company and was responsible for day to day affairs of the Company. This Court though has only noted the decision in *N. Rangachari's* case (supra) and observed that an observation therein showed a slight departure vis-à-vis the other judgments **(i.e.** *S.M.S. Pharmaceuticals* first case and *S.M.S. Pharmaceutical's* second case), but then Court went on to record that in *N.K. Wahi's* case (supra) this Court had reiterated the view in *S.M.S. Pharmaceutical's* case (supra). The Court then concluded in para 11 that it was clear from the aforequoted judgments that the entire matter would boiled down to an examination of the nature of averments made in the complaint. On facts, the Court found necessary averments had been made in the complaint.

23. Though, the learned counsel for the appellants relying on a recent decision in *K.K. Ahuja vs***.** *V.K. Vora & Anr.*, (2009) 10 SCC 48, it is clearly recorded that in the complaint it was alleged that the accused were in-charge of and was responsible for the conduct of the day-to-day business of the accused Company and further all the accused were directly and actively involved in the financial dealings of the Company and the same was also reiterated in the pre-summoning evidence. Furthermore, this decision also notes that it is necessary to specifically aver in a complaint that the person accused was in-charge of and responsible for the conduct of the business of the Company. After noting *Saroj Kumar Poddar's* case (supra) and *N.K. Wahi's* case (supra), this Court further noted in para 9 that "……the prevailing trend appear to require the Complainant to state how a Director who is sought to be made an accused, was in-charge of the business of the Company, as every Director need not be and is not in-charge of the business of the Company…..". In Para 11, this Court has further recorded that "…..When conditions are prescribed for extending



such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative…" Though the Court then said that an averment in the complaint that the accused is a Director and in-charge of and responsible for the conduct of the business may be sufficient but this would not take away from the requirement that an overall reading of the complaint has to be made to see whether the requirements of Section 141 have been made out against the accused Director or not. Furthermore, this decision cannot be said to have overruled the various decisions of this Court.

24. Section 291 of the Companies Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. A company, though a legal entity, can act only through its Board of Directors. The settled position is that a Managing Director is *prima facie* in-charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses 24, 26, 30, 31 and 45 of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:

(a) the Managing Director/s;

(b) the whole-time Director/s;

(c) the Manager;

(d) the Secretary;

(e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;

(f) any person charged by the Board of Directors with the responsibility of complying with that provision;

Provided that the person so charged has given his consent in this behalf to the Board;

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.

But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in- charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.

25. From the above discussion, the following principles emerge :



(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

26. Apart from the legal position with regard to compliance of Section 141 of the Act, in the appeals of National Small Industries Corporation, respondent No.1-Harmeet Singh Paintal was no more a Director of the company when the cheques alleged in the complaint were signed and the same is evidenced from the Sixth Annual Report for the year 1996-97 of the accused company. The said report is of dated 30.08.1997 and the same was submitted with the Registrar of Companies on 05.12.1997 and assigned as document No. 42 dated 09.03.1998 by the Department. Those documents have been placed before this Court by respondent No.1 as an additional document. In view of these particulars and in addition to the interpretation relating to Section 141 which we arrived at, no liability could be fastened on respondent No.1. Further, it was pointed out that though he was an authorized signatory in the earlier transactions, after settlement and in respect of the present cause of action, admittedly fresh cheques were not signed by the first respondent. In the same way, in the appeal of the DCM Financial Services, the respondent therein, namely, Dev Sarin also filed additional documents to show that on the relevant date, namely the date of issuance of cheque he had no connection with the affairs of the company.

27. In the light of the above discussion and legal principles, we are in agreement with the conclusion arrived at by the High Court and in the absence of specific averment as to the role of the respondents and particularly in view of the acceptable materials that at the relevant time they were in no way connected with the affairs of the company, we reject all the contentions raised by learned counsel for the appellants. Consequently, all the appeals fail and are accordingly dismissed.

D.G. Appeals dismissed.



UNION OF INDIA & ANR.

*v.*

DINESH KUMAR

(Civil Appeal No. 1208 of 2010)

FEBRUARY 16, 2010

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

*Border Security Force Act, 1968 – s. 117(2) – Border Security Force Rules, 1969 – rr. 99 and 149(1) – Recording of reasons in support of order passed by Summary Security Force Court and appellate authority – Requirement of – Held: SSFC u/r. 149 or appellate authority u/s. 117(2) are not required to give reasons in support of its decision – r. 99 was amended requiring the authority of General Security Force Court or Petty Security Force Court to give reasons in support of their findings – No such amendment was made to r. 149 which is applicable in case of Summary Security Force Court – Provisions for SSFC and appellate authority are pari materia – On facts, High Court erred in setting aside the orders of authorities that the finding of guilt recorded by SSFC and appellate authority was bad as no reasons were given by the authorities – Thus, matters remitted back to High Court for reconsideration on merits.*

**The question which arose for consideration in these appeals was whether the Summary Security Force Court, and the appellate authority u/s. 117 (2) of the Border Security Force Act, 1968 are required to give reasons in support of its decision. This Court had remitted the matters to High Court.**

**Now giving reasons for remitting the matters, the Court**

**HELD: 1.1 Chapter XI of the Border Security Force Rules, 1969 deals with the proceedings before Summary Security Force Court (SSFC). Chapter IX deals with the procedure for Security Force Courts. Rule 99, which is included in Chapter IX, deals with Record and announcement of finding. Under the amended Rule 99(1), it became necessary for the SSFC to give brief reasons in support of the findings, where the procedure of SSFC was being followed. Rule 99 will not apply to SSFC. The procedure for SSFC is provided in Chapter XI (Rules 133 to Rule 161). Though Rule 99 was amended requiring authority of General Security Force Court or Petty Security Force Court to give reasons in support of their findings, no such amendment was made to Rule 149 which is applicable in case of SSFC. Since Rule 149 was left intact in contradistinction to Rule 99, the authorities of SSFC were not required to give reasons in support of their findings in all these cases and the High Court gravely erred in setting aside the orders of authorities on that count alone. [Paras 8 and 9] [840-C-F]**

**1.2. Section 117 of the Border Security Force Act, 1968 provides for remedy against order, finding or sentence of Security Force Court, which could include the SSFC also. The provisions for the SSFC and the appellate authority are *pari materia*, more particularly in case of r. 149 and s. 117(2) of the Act, with the provisions which were considered in both the above authorities. Therefore, there cannot be any escape from the conclusion that the reasons would not be required to be given by the SSFC under r. 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the Legislature chose not to amend Rule 149, though it specifically amended Rule 99 w.e.f. 9.7.2003. [Para 12] [843-B-F]**

*S.N. Mukherjee Vs. Union of India* **1990 (4) SCC 594, followed.**



*Som Datt Datta Vs. Union of India* AIR 1969 SC 414; *Nirmal Lakra Vs. Union of India & Ors.* **2003 DLT (102) 415, referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **AIR 1969 SC 414** | **Referred to.** | **Para 10** |
| **1990 (4) SCC 594** | **Followed.** | **Para 12** |
| **2003 DLT (102) 415** | **Referred to.** | **Paras 12, 13** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1208 of 2010

From the Judgment & Order dated 01.09.2005 of the High Court of Delhi at New Delhi in Writ Petition No. 6856 of 2000.

WITH

C.A. Nos. 1209, 1210, 1212, 1213, 1214, 1215, 1217, 1219, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1249, 1250, 1251, 1252, 1253, 1255, 1556, 1257, 1258, 1259, 1261, 1262, 1263, 1264, 1265, 1267, 1268, 1269, 1270, 1271, 1274, 1275, 1277, 1279, 1280, 1281, 1282 of 2010

P.P. Malhotra, ASG, Ms. Rekha Pandey,Ms. Sunita Sharma, S.N.Terdol, Ruhitas Nagar (for Sushma Suri), Satbir, Dr. Sushil Balwada, Anil Kanwal, Sanjay Kumar, Sarada Devi, S. N.Pandey, Chander Shekhar Ashri, K. P. Mani (for M/s. K.J. John & Co., Ranbir Singh Yadav, K.K. Tyagi, Iftekhar Ahmad (for P. Narasimhan), D.C. Yadav (for Dr. Kailash Chand), Anil Gautam (for Anil Kumar Bakshi), B.S. Mor, S.R. Kalkal (for R.C. Kaushik), Gp. Cap. Karan Singh Bhati, Parmanand Pandey, J.P. Dhanda, Mrs. Raj Rani Dhanda, Satya Mitra Garg, Pankaj Kumar Singh, J.P.N. Gupta, Dr. Vinod Tewari, K.L.Janjani, M.A.

Chinnasamy, K. Rajeev, Bishram Singh (for S.P. Sharma), Gopal Singh, Ms. Vimla Sinha, Shankar Divate, Jatendra Singh, Ms. Priyanka Singh (for S.K. Sabharwal), Nar Hari Singh (for Vikas Mehta), Dr. Nafis A. Siddiqui, Subramonium Prasad, A.V. Palli, Mrs. Rekha Palli, Atul Sharma, Davendra Singh, Shibashish Misra, Abhisth Kumar, Ajay Chaudhary, Shilpa Chouhan, (for Rajesh Singh), Ashok Kumar Singh, Surinder Dutt Sharma, Naresh Kumar Gaur, Anis Suhrawardy, Shamama Anis, S. Mehdi Imam, Pervez Dabas, Kanwar C.K. Khan, Irshad Ahmad, Ramesh Kumar, Imran K. Burney, Vikas Singh, Dr. Krishan Singh Chauhan, K. C. Lamba, Chand Kiran, Kartar Singh, Jagdev Singh Manhas for the Appearing Paries.

The Judgment of the Court was delivered by:

**V.S. SIRPURKAR, J.** 1. This judgment will dispose of 62 Civil Appeals mentioned above.

2. We had, by earlier orders, directed the remand of all these matters to the High Court and now we proceed to give reasons in support of our orders.

3. All these appeals have been filed by the Union of India. The main contesting respondents in all these appeals are the members of the Border Security Force. The respondents in all the matters succeeded before the High Court, which took the view that the orders passed against them by the Summary Security Force Court (hereinafter referred to as 'SSFC' for short) and the appellate authority were bad and illegal, as there were no reasons given by any of these authorities.

4. On that count, the High Court directed remand in all the matters to the appellate authority under Section 117 (2) of The Border Security Force Act, 1968 (hereinafter referred to as 'the Act' for short) for rewriting the order, giving reasons in support of the conclusions reached by the same. The lead judgment was passed on 16.1.2006 in Writ Petition (Civil) No. 9427 of 2005



filed by one Constable Hans Raj. Relying on that judgment, all the other Writ Petitions in the above appeals before us were directed to be disposed of. The Union of India has now challenged the lead judgment, as well as other judgments, which were passed relying upon the same.

5. The common question that falls for consideration in all these appeals can be stated as under:-

Whether the Summary Security Force Court (SSFC) is required to give reasons in support of its verdict?

Similarly,

Whether the appellate authority under Section 117 (2) is required to give reasons while considering the correctness, legality or propriety of the order passed?

6. It is a common ground that in all these appeals, no reasons were given by either the SSFC or by the authority under Section 117 of the Act, which acts as an appellate authority.

7. Before we approach this question, it must be stated in all fairness that majority of the Learned Counsel appearing on behalf of the respondents, agreed to have the judgment in their favour set aside, provided the matter is remanded back to the High Court for deciding the Writ Petitions on merits. This was obviously because in all these matters, the merits of the Writ Petition were not considered and all the Writ Petitions were allowed for the sole reason that the appellate authority or the SSFC had not recorded any reason in support of the verdict given by them. In fact, Shri P.P. Malhotra, Learned ASG also fairly conceded that the Writ Petitions were not decided on merits by the High Court and they were allowed on the preliminary ground that no reasons were given by the authorities under the Act. There were very little or almost no arguments led on behalf of the respondents supporting the order. However,

in order to put the record straight and before acting on the request, we must consider the arguments led by the Learned ASG, who contended that there is no requirement of giving any reasons either by the SSFC or by the appellate authority under Section 117 of the Act.

8. Under the scheme of The Border Security Force Act, there are three kinds of Security Force Courts. Section 64 of the Act provides for those three kinds, they being (a) General Security Force Courts; (b) Petty Security Force Courts; and (c) Summary Security Force Courts. We are concerned here only with Summary Security Force Courts (SSFC). Section 70 provides that a SSFC may be held by the Commandant of any unit of the Force and he alone shall constitute the Court. Sub-Section (2) of Section 70 suggests that the proceedings shall be attended throughout by two other persons who shall be officers or subordinate officers or one of either, and who shall not as such, be sworn or affirmed. Section 74 speaks about the powers of a SSFC. Sub-Section (1) thereof provides that the SSFC may try any offence punishable under the Act, subject to the provisions of Sub-Section (2). Sub-Section (2) provides that when there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court for the trial of the alleged offender, an officer holding a Summary Security Force Court shall not try without such reference any offence punishable under any of the Sections 14, 17 and 46 of this Act, or any offence against the officer holding the Court. Sub-Section (3) provides that the SSFC could try any person, subject to the Act and under the command of the officer holding the Court, except an officer or a subordinate officer. Sub-Section (4) controls the power of granting sentence and suggests that the SSFC may pass any sentence except the sentence of death or imprisonment for a term exceeding the limit specified in sub-Section (5). Sub-Section (5) provides the limit referred to under sub-Section (4) as under:-



(a) one year, if the officer holding the Security Force Court has held either the post of Superintendent of Police or a post declared by the Central Government by notification to be equivalent thereto, for a period of not less than three years or holds a post of higher rank than either of the said posts; and

(b) three months, in any other case.

It is, therefore, clear that the SSFC can try all the offences, however, has limited powers in respect of the sentence which also depends upon the rank of the officer holding the SSFC. The offences under the Act are as mentioned in Chapter III while Chapter IV deals with the punishments. Section 117 of the Act provides for remedy against order, finding or sentence of Security Force Court, which could include the SSFC also. Under sub-Section (1) thereof, a petition could be filed by the aggrieved person before such person, officer or authority, who is empowered to confirm any finding or sentence of the SSFC and such officer or the authority has to specify himself/itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates. Sub-Section (2) thereof provides that any finding or sentence of the SSFC, which has been confirmed, could be challenged by the aggrieved person before the Central Government, the Director General or any prescribed officer, who is superior in command to one who confirms the finding and sentence, and such appellate authority like the Central Government, the Director General or the prescribed officer may pass such order thereon, as it/he thinks fit. Section 141 of the Act provides for the power to make rules, under which the Central Government may make rules for the purpose of carrying into effect the provisions of the Act. Such rules have been framed, they being *Border Security Force Rules, 1969.* Chapter XI of the said Rules deals with the proceedings before SSFC. Rule 148 runs as under:-

*148. Verdict:* The Court shall after the evidence for

prosecution and defence has been heard, give its opinion as to whether the accused is guilty or not guilty of the charge or charges.

Rule 149 is the most important Rule, on which Shri Malhotra, Learned ASG has heavily relied upon. The Rule is as under:-

149. *Finding:*

(1) The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of "Guilty" or of "Not Guilty".

(2) When the Court is of opinion as regards any charge that the facts proved do not disclose the offence charged or any offence of which he might under the Act legally be found guilty on the charge as laid, the Court shall find the accused "Not Guilty" of that charge.

(3) When the Court is of opinion as regards any charge that the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defence, it may, instead of finding of "Not Guilty" record a special finding.

(4) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.

(5) The Court shall not find the accused guilty on more than one of two or more charges laid in the alternative, even if conviction upon one charge



necessarily connotes guilt upon the alternative charge or charges.

It is important to note at this juncture that in the same Rules, Chapter IX deals with the procedure for Security Force Courts. Rule 99, which is included in Chapter IX, is of importance for the decision in these appeals. Before its amendment in the year 2003, the Rule was as under:-

99. *Record and announcement of finding:-*

(1) The finding on every charge upon which the accused is arraigned shall be recorded and except as provided in these rules, shall be recorded simply as a finding of "Guilty" or of "Not Guilty".

(2) Where the Court is of opinion as regards any charge that the facts proved do not disclose the offence, charge or any offence of which he might under the Act legally be found guilty on the charge as laid, the Court shall acquit the accused of that charge.

(3) If the Court has doubts as regards any charge whether the facts proved show the accused to be guilty of the charge as laid, it may, before recording a finding on that charge, refer to the confirming authority for an opinion, setting out the facts which it finds to be proved and may if necessary, adjourn for that purpose.

(4) Where the Court is of opinion as regards any charge that the facts which it finds to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge but are nevertheless sufficient to prove the offence stand in the charge, and that the difference is not so material as to have prejudiced the accused in his defence,

it may, instead of a finding of "Not Guilty" record a special finding.

(5) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.

(6) Where there are alternative charges, and the facts proved appear to the Court not to constitute the offence mentioned in any of those alternative charges, the Court shall record a finding of "Not Guilty" on that charge.

(7) The Court shall not find the accused guilty on more than one of two or more charges laid in the alternative, even if conviction upon one charge necessarily connotes guilty upon the alternative charge or charges.

(8) If the Court thinks that the facts proved constitute one of the offences stated in two or more of the alternative charges, but doubts which of those offences the facts do at law constitute, it may, before recording a finding on those charges, refer to the confirming authority for an opinion, setting out the facts which it finds to be proved and stating that it doubts whether those facts constitute in law the offence stated in such one or other of the charges and may, if necessary, adjourn for that purpose.

(9) Not relevant.

After the amendment of Rule 99(1), the same was in the following form:-

99. *Record and announcement of finding:-*

(1) The finding on every charge upon which the accused is arraigned shall be recorded and except



as provided in these rules, shall be recorded simply as a finding of "Guilty" or of "Not Guilty". After recording the finding on each charge, the Court shall give brief reasons in support thereof. The Law Officer or, if there is none, the Presiding Officer shall record or cause to be recorded such brief reasons in the proceedings. The above record shall be signed and dated by the Presiding Officer and the law Officer, if any.

Therefore, under Rule 99(1), it became necessary for the SSFC to give brief reasons in support of the findings, where the procedure of SSFC was being followed.

9. It is needless to mention that Rule 99 will not apply to SSFC. The procedure for SSFC is provided in Chapter XI (Rules 133 to Rule 161), which alone is relevant here. It must be noted here that though Rule 99 was amended requiring authority of General Security Force Court or Petty Security Force Court to give reasons in support of their findings, no such amendment was made to Rule 149 which is applicable in case of SSFC. Shri Malhotra, Learned ASG, therefore, rightly argued that since Rule 149 was left intact in contradistinction to Rule 99, the authorities of SSFC were not required to give reasons in support of their findings in all these cases and the High Court has gravely erred in setting aside the orders of authorities on that count alone.

10. Shri Malhotra, Learned ASG further argued that if the SSFC was not required to give reasons under Rule 149, then the appellate/revisional authority under Section 117(2), also need not record its reasons while dealing with the appeal. Shri Malhotra further pointed out that in all the above matters, the SSFC only recorded findings in terms of Rule 149(1) by recording the verdict of guilty and the said verdict has been confirmed by the appellate authority under Section 117(2) of the Act in the similar manner without giving any reasons. Shri Malhotra pointed out that the High Court has allowed all the Writ

Petitions only on the sole ground that the reasons have not been given by the appellate authority or the SSFC. He pointed out that if the SSFC was not required to give any reasons, even the appellate authority under Section 117(2) of the Act was not required to record any reasons. For this, Shri Malhotra relied on the decision in *Som Datt Datta Vs. Union of India* [AIR 1969 SC 414], which decision is followed by the Constitution Bench in the decision in *S.N. Mukherjee Vs. Union of India* [1990 (4) SCC 594]. There also, the question arose as to whether the court martial authorities in case of Army personnel, as also the appellate authorities, dealing with the proceedings, were required to give reasons and whether the absence of reasons would invalidate the verdict. In *Som Datt Datta Vs. Union of India* (cited supra), a contention was raised that the order of the Chief of the Army Staff confirming the proceedings of the court martial under Section 164 of the Army Act, 1950 was illegal since no reason had been given in support of the order by the Chief of the Army Staff and that the Central Government had also not given any reasons while dismissing the appeal of the petitioner in that case under Section 165 of the Army Act, 1950. The Court took the view that while Section 162 of the Army Act expressly provided that the Chief of Army Staff may for reasons based on the merits of the case, set aside the proceedings or reduce the sentence to any other sentence which the Court might have passed, there was no express obligation imposed by Sections 164 and 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the court martial. In *Som Datt Datta Vs. Union of India* (cited supra), no other Section of the Army Act or any of the Rules made thereunder, had been brought to the Court's notice, from which necessary implication could be drawn that such a duty to give reasons was cast upon the Central Government or upon the confirming authority.

11. In *S.N. Mukherjee Vs. Union of India* (cited supra), again more or the less same question came before the



Constitution Bench of this Court in respect of the provisions under Section 164 of the Army Act, as also the Army Rules. The Court held that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions must record the reasons for its decision. The Court was of the view that such reasons, if recorded, would enable the higher Courts like Supreme Court and the High Courts to effectively exercise the appellate or supervisory power. It also expressed that the requirement of recording reasons would necessarily (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimize chances of arbitrariness in decision making. This Court also further went on to hold that the reasons need not be as elaborate, as in the decision of a Court of law and that the extent and nature of the reasons would depend on particular facts and circumstances. What was necessary was that the reasons were clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. However, the Court further went on to hold that the provisions of the Army Act and Rules suggested that at the stage of recording of findings and sentence, the court martial is not required to record its reasons. This Court also held that the judge-advocate plays an important role during the course of trial at a general court martial and he is enjoined to maintain an impartial position. This Court further held that under the Army Rules, the court martial records its findings after the judge-advocate has summed up the evidence and has given his opinion upon the legal bearing of the case and that the members of the court have to express their opinion as to the findings by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It was held that it was only in case of Rule 66(1) of the Army Rules, where there was a recommendation for mercy, the reasons were required to be given. The Court further went on to hold in paragraph 48 that reasons are also not required to be recorded for an order passed by the confirming authority, confirming the findings and

sentence recorded by the court martial. It further went on to hold that even the Central Government, dismissing the post-confirmation petition, is not required to record the reasons. Ultimately in para 48, the Court observed:-

> "48. For the reasons aforesaid, it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial as well as for the order passed by the Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in *Som Datt Datta Case* the submission of Shri Ganguli that the said decision needs reconsideration cannot be accepted and is, therefore, rejected."

12. On this backdrop, it is clear that the provisions for the SSFC and the appellate authority are *pari materia,* more particularly in case of Rule 149 and Section 117(2) of the Act, with the provisions which were considered in both the above authorities. Therefore, there cannot be any escape from the conclusion that as held by the Constitution Bench, the reasons would not be required to be given by the SSFC under Rule 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the Legislature has chosen not to amend Rule 149, though it has specifically amended Rule 99 w.e.f. 9.7.2003. It was pointed out that inspite of this, some other view was taken by the Delhi High Court in the decision in *Nirmal Lakra Vs. Union of India & Ors.* [2003 DLT(102) 415]. However, it need not detain us, since Rule 149 did not fall for consideration in that case. Even otherwise, we would be bound by law declared by the Constitution Bench in the decision in *S.N. Mukherjee Vs. Union of India* (cited supra).

13. As has already been stated above, the contention of Shri Malhotra, Learned ASG was not traversed by most of the Learned Counsel appearing for the respondents and those who



feebly controverted the same, could not show any decision excepting the decision in *Nirmal Lakra Vs. Union of India & Ors.* [2003 DLT(102) 415], which does not consider Rule 149 and more particularly, the aspect of its non-amendment in contradistinction with the amendment of Rule 99.

14. It was, however, urged by all the Learned Counsel appearing on behalf of the respondents that since Delhi High Court has disposed of all the petitions only on the sole ground of the absence of reasons in support of the findings by SSFC and the appellate authority, the other contentions on merits of the Writ Petitions were not considered. They, therefore, urged that we should remand back all these matters. We had accordingly remanded the matters. Shri Malhotra, Learned ASG also very fairly conceded that the merits of the Writ Petitions were not considered and, therefore, on that count, it would only be proper to remand the matters back to the Delhi High Court for reconsideration on merits. We have ordered accordingly. In the result, all these appeals filed by the Union of India succeed. All the matters are sent back to the Delhi High Court, which shall be now considered on the other contentions raised on merits. Since the matters have become very old, we would request the High Court to dispose of these appeals as early as possible and not beyond six months from the date when the records reach Delhi High Court.

N.J. Reasons given for remitting the matters to High Court.

GYAN MANDIR SOCIETY AND ANR.
*v.*
ASHOK KUMAR & ORS.
(Special Leave Petition (Civil) No. 21954 of 2009)

FEBRUARY 16, 2010

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

*EDUCATION/Educational Institutions:*

*Taking over/Shifting of School – Society running a school, allotted an alternative school site and asked to vacate the existing site – Society starting school at allotted site and the existing school taken over by NDMC on "as is where is basis" – Writ petition seeking absorption of teachers and adjustment of students of existing school on freeship basis in the new school of the Society – HELD: The view taken by the High Court that the society was obliged to absorb the teachers and the students from existing school, does not suffer from any error of law or jurisdiction to warrant interference in exercise of powers under Article 136 of the Constitution – However, the direction regarding free transportation to students from existing school locality to the new school does not have any contractual or other legal basis and is, therefore, deleted – Constitution of India, 1950 – Article 136.*

CIVIL APPELLATE JURISDICITION : SLP (Civil) No. 21954 of 2009.

From the Judgment & Order dated 20.7.2009 of the High Court of Delhi at New Delhi in L.P.A. No. 1307 of 2007.

Ashok Desai, Rohit Choudhary, B.R. Menon, Preeti Khewani, B. Vijayalakshmi Menon for the Petitioners.





Sanjiv Sen, Prashant Kumar, Anuja Chopra for the Respondents.

The Order of the Court was delivered

**ORDER**

**T.S. THAKUR, J.** 1. In this petition for special leave to appeal the petitioners call in question the correctness of an order dated 20th July, 2009 passed by a Division Bench of the High Court of Delhi whereby L.P.A. No.1307 of 2007 filed by the petitioners has been dismissed with costs assessed at Rs.75,000/- and directions issued by the learned Single Judge of the High Court in W.P.(C) No. 11778 of 2006 affirmed.

2. The facts giving rise to the filing of the writ petition and the Letters Patent Appeal have been set out in detail by the High Court making it unnecessary for us to state them over again. Suffice it to say that W.P.(C) 11778 of 2006 was filed by the teachers employed with the petitioner society running a neighbourhood school at Tis January Lane, New Delhi falling within the NDMC area. With the allotment of an area measuring 2.284 acres at Sadiq Nagar in favour of the petitioner - society the temporary allotment made in favour of the petitioner's society at Tis January Lane came to an end on 31st of March, 1997. The society was accordingly asked to hand over the possession of the land but since the school was catering to the needs of about 500 students and several teachers had been employed by the society to impart education to the students, practical difficulties were encountered in handing over the site. After detailed deliberations and prolonged correspondence the NDMC offered to take over the school on "as is where is" basis. A letter to that effect was issued by the L&DO on 1st April, 2002. The possession of the school was pursuant to that letter handed over to the L&DO on 8th March, 2006, who on the same day delivered the possession of the school building to the NDMC.

3. In the meantime the society filed Writ Petition (Civil) 17889-90 of 2005 seeking permission to construct a building for a senior secondary school at Sadiq Nagar over the site allotted in its favour. The High Court allowed that writ petition by its order dated 16th March, 2006. It is note-worthy that in the said proceedings the society had made a categorical statement that students studying in the Tis January Lane school can be accommodated by the society in the school being run by it at Andrews Ganj on freeship basis and if fees are charged, the same shall not be in excess of what they were paying in the Tis January Lane school.

4. W.P.(C) No.11778 of 2006 was at that stage filed by the teachers employed by the society for its Tis January Lane school in which they prayed for the following reliefs:-

(a) issue a writ in the nature of mandamus to respondent No.1 to cancel the allotment of the Sadiq Nagar site of school measuring 2.34 acres allotted to respondent Nos. 4 & 5 vide dated 27.08.1975;

(b) issue appropriate writ, orders and directions to the respondent No.3 to immediately and forthwith to take over the possession of the said Indian school/site from the respondent Nos. 4 & 5 and to seize all the records of the public school with freezing of the bank accounts of respondent No. 4 & 5;

(c) issue appropriate writ, orders or directions to respondent No. 3 to de-recognize the said public school at Sadiq Nagar, New Delhi and to make arrangements for shifting the existing school at Tis January Lane to the Sadiq Nagar site;

(d) issue appropriate orders/directions to respondent No. 3 to ensure the protection of the services of the petitioners and the payment of the arrears of their salaries at the earliest;



(e) issue appropriate writ, order or directions for holding an enquiry under the direct supervision of this Hon'ble Court to fix the responsibilities of the concerned officials of the State whereby the Sadiq Nagar site of the school located at Josip Broz Tito Marg, New Delhi was misused for running a public school in the name and style of "Indian School" on the site allotted for shifting the existing Smt. R.K.K. Gyan Mandir Middle School from Tis January Lane, New Delhi and

(f) issue such other writ, order/orders/directions, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in the light of the above averment and in order to secure the ends of justice for which acts the humble petitioners shall remain grateful to this Hon'ble Court.

5. A Single Bench of the High Court allowed the above writ petition by its order dated 20th September, 2007 with the following directions :-

(1) The Respondent Nos. 4 and 5 shall ensure that the Petitioner Nos. 2 to 16 are accommodated appropriately in its unaided school, i.e. Indian School, within four weeks from today; the said teachers shall be absorbed on permanent basis; their salary, allowances and other conditions shall be preserved with continuity of service. The arrears of 5% contribution for the last one year, payable to the petitioner Nos.2 to 16, shall be paid by the society within 6 weeks, to them. This shall be over and above the Rs.1,00,000/- amount volunteered to be paid by the society, as a good will gesture to them. That amount too shall be paid, if not already paid.

(2) Simultaneously, the said respondents shall take steps to effectuate their statement about

assimilating all the existing students (from the aided school in the Tis January Lane) in the Indian school, on "freeship basis". The said students shall not be required to pay any amount over and above what has been paid by them all this while.

(3) The society and fourth respondent shall ensure that the students of the aided school are given free transportation to the unaided school, and back to the Tis January Lane area as long as the students of the aided school study in the Indian school. It shall do all things necessary to meaningfully assimilate such children in the Indian school.

(4) The GNCT shall ensure compliance with the above directions; if necessary, it shall sanction additional sections, wherever required in the unaided school, to accommodate the influx of the students from the aided school as well as teachers and employees from there. It shall continue to preserve and protect the status of the petitioner employees as employees of an aided school.

(5) A status report disclosing due compliance with the above directions, and action taken in that regard shall be filed within 6 weeks, before this court, by the fourth and fifth respondents, and GNCT.

6. Aggrieved by the above order the society preferred Letters Patent Appeal No.1307 of 2007 which has been as noticed earlier dismissed by the Division Bench of the High Court by the order impugned in this petition with costs assessed at Rs.75,000/-.

7. When the matter came up before this Court on 16th December, 2009, Mr. Desai, learned senior counsel for the petitioners made a statement that the petitioner society was prepared to absorb all the students and the teachers employed



for the school at Tis January Lane, New Delhi, from the next academic year, provided the students and the teachers were willing to join the petitioners-school. Mr. Sen, learned counsel appearing for the NDMC was also granted time to seek instructions as to whether the NDMC was prepared to absorb the teachers.

8. Pursuant to the above direction, Mr. Sen submitted at the bar that while the NDMC is willing to accommodate students, who are not willing to join the Indian School of the petitioner society it has no legal obligation what so ever to absorb the teachers who were employed by the petitioner society for running the school at Tis January Lane. It was argued that since the teachers had themselves not prayed for any direction from the High Court for absorption in the service of NDMC, there was no question of issuing any direction to that effect especially when the same would go beyond the prayer made in the writ petition. It was submitted that the High Court had rightly concluded that the society was obliged not only to adjust the students but also the teachers employed in connection with the running of the school at Tis January Lane.

9. There is in our opinion considerable merit in the submission of Mr. Sen. The High Court has after a careful consideration of the matter correctly held that the society was obliged to absorb the teachers and the students from Tis January Lane. The view taken by the High Court does not suffer from any error of law or jurisdiction to warrant interference by this Court in exercise of its powers under Article 136 of the Constitution. In fairness to Mr. Desai, we must mention that even he did not pursue the challenge to the orders passed by the High Court in so far as the same directs the society to adjust and absorb the students and teachers from the Tis January Lane school. All that Mr. Desai argued was that direction No.3 issued by the learned Single Judge and upheld by the Division Bench of the High Court was totally beyond the scope of writ petition inasmuch as there was neither any prayer in the petition

regarding grant of free transportation to the students from Tis January Lane nor was there any legal justification for the issue of any such direction. He urged that this Court could delete the said direction and dispose of the present petition.

10. Mr. Sen, learned counsel appearing for the NDMC had no objection to that course of action. Even otherwise, we are of the view that the direction regarding free transportation to students from Tis January Lane to the Indian school does not have any contractual or other legal basis to support the same. According to the petitioner society also the school is not providing any transportation to the students nor is there any obligation to do so. Be that as may be, whether or not free transport should be offered to students who may be adjusted in the Indian school was never the matter in issue before the High Court or in the writ petition filed by the teachers. The students were also not parties to the proceedings either individually or collectively. That being the position, we are of the view that direction No.3 issued by the learned Single Judge and affirmed by the High Court needs to be deleted and is accordingly deleted. We may however clarify that this order would not prevent the students from seeking appropriate redress in appropriate proceedings before the competent Court or authority and claiming free transportation to and fro Indian school established by the petitioner society. In any such proceedings the prayer regarding transportation shall be examined uninfluenced by the observations made in this order. Beyond the modification indicated above we see no reason what so ever to interfere with the orders passed by the High Court. The petition is, with the above observations, disposed of. No costs.

R.P. Petition Disposed of.



SANTURAM YADAV AND ANR.

*v.*

SECRETARY, KRISHI UPAJ M.S. BEMETARA AND ANR.

(Civil Appeal Nos.1750-1751 of 2010)

FEBRUARY 16, 2010

**[P. SATHASIVAM AND R.M. LODHA, JJ.]**

*Industrial Disputes Act, 1947 – s.25F – Daily wage workers – Termination of – Claim for re-instatement – Dismissed by Labour Court on ground of failure of the workers to establish that they worked for more than 240 days continuously in one calendar year – High Court affirmed the order of Labour Court – On facts, held: Relevant documents and communications, though available with the workers, were not placed before the Labour Court and High Court – Matter therefore remitted to Labour Court to consider the claim of the workers afresh.*

**Appellants were working on daily wage basis. At the threat of removal, they approached the Labour Court. A compromise was entered into between the parties in terms of which the respondent-management agreed to reinstate the appellants. The Labour Court passed award in terms of the compromise.**

**The appellants were later dismissed from service. The claim laid by them for re-instatement was dismissed by the Labour Court on ground of their failure to establish that they worked for more than 240 days continuously in one calendar year. The High Court affirmed the order of Labour Court.**

**In appeal to this Court, the appellants stated that though they had adequate materials in support of their claim for reinstatement, however, it was not placed before**

**the Labour Court and the High Court, and accordingly prayed that the same be considered by this Court in order to render substantial justice to them.**

**Allowing the appeals, the Court**

**HELD: The compromise memo between the workmen and the management, followed by the award of the Labour Court as well as the materials furnished about the number of days on which the appellants worked and the wages received, clearly support their stand. In view of the peculiar facts, namely, the stand taken by the Management in the form of compromise agreeing to reinstate and provide seniority to the appellants from the date of their first appointment, as evidenced in the "Compromise Deed", the information/materials mentioned above cannot be ignored lightly, though not projected before the Labour Court and the High Court. Considering the abundant materials which were unfortunately not placed before the Labour Court and in order to give an opportunity to these workmen, the order of the Labour Court, and the order of the High Court are set aside and the matter is remitted to the Labour Court with a direction to consider the claim of the workmen afresh. The workmen are permitted to place relevant documents in support of their claim before the Labour Court. The respondents/management are also permitted to place the relevant material, if any, in support of their defence. Both the workmen and the management are permitted to place their relevant materials in support of their respective stand and thereafter, the Labour Court is directed to consider and pass appropriate orders in accordance with law, after affording opportunity to both parties. [Para 9] [858-B-H; 859-A-B]**

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



**Case Law Reference:**

**(2006) 4 SCC 1 referred to Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1750-1751 of 2010.

From the Judgment & Order dated 2.11.2006 of the Learned Single Judge of Hon'ble High Court of Chhattisgarh at Bilaspur in Writ Petition No. 5508 of 2006 and final order dated 6.11.2007 passed by Division Bench in Writ Appeal (P.R.) No. 6823 of 2007

Akshat Shrivastava, Inderjeet Yadav, Raj Kumar Gupta and Dharam Bir Raj Vohra for the Appellants.

Milind Kumar, A. Patnaik and D.B. Ray for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1 Leave granted.

2. These appeals are directed against the final order dated 02.11.2006 passed by the learned single Judge of the High Court of Chhattisgarh at Bilaspur in Writ Petition No. 5508 of 2006 and final order dated 06.11.2007 passed by the Division Bench of the same High Court in W.A. (P.R.) No. 6823 of 2007 whereby the High Court dismissed the writ petition and the writ appeal filed by the appellants herein.

3. Brief Facts:

According to the appellants, on 05.08.1989, they were selected on the temporary post of Nakedar by a duly constituted Selection Committee on the pay-scale determined by the Collector. At the threat of removal, the appellants approached the Labour Court in 1994. At this stage, respondent No.1 and the appellants filed a joint petition dated 10.01.1995 for compromise in which respondent No.1 agreed to reinstate the

appellants and also to grant seniority and other benefits from the date of their initial appointment that is 05.08.1989. On the basis of the compromise petition, the award dated 27.04.1995 was passed by the Labour Court, Durg, directing the respondent-therein to reinstate the appellants herein. Again in 2000, when an attempt was made to remove the appellants arbitrarily, initially it was the High Court which granted status quo in their favour and thereafter the higher authorities intervened and prevented the respondents from victimizing the appellants. In view of the said efforts, the respondents once again ordered reinstatement of the appellants on 06.01.2001.

4. Despite such voluminous material demonstrating the continuous working of the appellants with the respondents, according to the appellants they were dismissed on the ground of failure to establish that they worked for more than 240 days continuously in one calendar year. Aggrieved by the same, the appellants approached the High Court by way of a writ petition. By the order impugned, the High Court, after pointing out that the appellants were on daily wage basis and have not completed 240 days in one calendar year which is the condition precedent for attracting the provisions of Section 25F of the Industrial Disputes Act, 1947 confirmed the order of the Labour Court and dismissed their writ petition. The said order is under challenge in these appeals.

5. Heard Mr. Akshat Shrivastava, learned counsel for the appellants and Mr. Milind Kumar, learned counsel for the respondents.

6. At the outset, learned counsel appearing for the appellants-workmen fairly stated that because of the ignorance though the appellants were having adequate materials in the form of documents and communications from the respondents/employer, they were not properly placed the same before the



Labour Court in support of their claim for reinstatement. He also submitted that even before the High Court these additional documents were not placed for consideration and requested this Court to consider the same in order to render substantial justice to the workmen. The appellants have filed a separate application for taking those additional documents Annexures P-18 and P-19 on record. Considering the plight of the workmen, we perused the said Annexures P-18 and P-19 which contain details such as number of days worked in a month, salary paid by the respondents commencing from year 1994 ending with 2004. The documents in Annexures P-18 and P-19 clearly show the number of days on which both the appellants worked.

7. Apart from the above details, the appellants have also pressed into service Annexure-P4, the terms and conditions of compromise entered into between the appellants/workmen and the Krishi Upaj Mandi Samiti, Bemetara/Management. Since Annexure-P4 was pressed into service by the workmen, it is useful to refer the same:

"ANNEXURE P/4

BEFORE THE HON'BLE LABOUR COURT, DURG

Case No. 18/1994 I.D. Act
Date of Institution: 10.01.1995

Balram Singh Rajput, Clerk
Santuram Yadav, Nakedar
Santosh Yadav, Bhritya ….First Party

AND

Krishi Upaj Mandi Samiti, Bemetara ….Second Party

Both parties respectfully submits that the both parties

have arrived at compromise under the following terms and conditions

TERMS AND CONDITIONS OF COMPROMISE

1. That the second party will reinstate the first party workmen into their services and they will be granted seniority from the date of their first appointment.

2. That towards the symbolic backwages for the period in the meantime, the second party will pay a sum of Rs.1/- per workmen.

3. That the first party workmen will get salary from the date of their joining of duty and as per the Circular No. 2546 dated 28.02.1994 of the Hon'ble Collector, Durg in the following manner

Balram Singh Rajput, Clerk - Rs. 1412/-

Santu Ram Yadav, Nakedar - Rs. 996/-

Santosh Kumar Yadav, Bhritya - Rs. 996/-

Per month. Apart from the aforesaid Circular, the Circulars issued by the Hon'ble Collector in this reference, shall also be applicable on both parties.

It is respectfully prayed that an Award may be passed under the terms and conditions of the aforesaid compromise.

Prayed accordingly.

Durg

Date: Advocate for the Second Party

Applicant:

1. Balram Singh Rajput, Clerk



2. Santu Ram Yadav, Nakedar

3. Santosh Kumar Bhritya

Advocate for the First Party"

8. Based on the compromise between the appellants and the respondent-management, the Labour Court, Durg by award dated 27.04.1995 while making a reference about justifiability of the termination of service of these workmen recorded the compromise deed and directed the management to reinstate Santuram Yadav and Santosh Yadav, the appellants herein.

9. On going through Annexure P-4, compromise memo between the workmen and the management, followed by an award dated 27.04.1995 of the Labour Court, Durg as well as the materials furnished in the form of Annexures P-18 and P-19 about the number of days on which both the appellants worked and the wages received clearly support their stand. We are conscious of the fact of the implication of Constitution Bench decision of this Court in Secretary, *State of Karnataka and Others vs. Umadevi and Others,* (2006) 4 SCC 1. However, in view of the peculiar facts, namely, the stand taken by the Management in the form of compromise agreeing to reinstate and provide seniority from the date of their first appointment 05.08.1989, as evidenced in the "Compromise Deed", we are of the view that the information/materials mentioned above cannot be ignored lightly though not projected before the Labour Court and the High Court. Considering the abundant materials which were unfortunately not placed before the Labour Court and in order to give an opportunity to these workmen, we set aside the order of the Labour Court, Durg dated 08.08.2006 in case No. 56/ID Act/Reference/2005 and the order of the High Court dated 02.11.2006 in Writ Petition No. 5508 of 2006 and order dated 06.11.2007 in W.A. (P.R.) No. 6823 of 2007 and remit the matter to the Labour Court, Durg with a direction to consider the claim of the workmen afresh. The workmen are permitted to place Annexures 4, 5, 18 and 19 as well as any

other relevant documents in support of their claim before the Labour Court. The respondents/management are also permitted to place the relevant material, if any, in support of their defence. Both the workmen and the management are permitted to place their relevant materials in support of their respective stand within a period of eight weeks and thereafter, Labour Court, Durg is directed to consider and pass appropriate orders in accordance with law, after affording opportunity to both parties, within a period of three months thereafter.

10. The civil appeals are allowed on the above terms. No costs.

B.B.B. Appeals allowed.



B. MANMAD REDDY & ORS.
*v.*
CHANDRA PRAKASH REDDY & ORS.
(Civil Appeal Nos. 933-935 of 2004 etc.)

FEBRUARY 17, 2010

**[MARKANDEY KATJU AND T.S. THAKUR, JJ.]**

*Service Law:*

*Andhra Pradesh Education Service Rules – r. 3 Note 6 – Classification of officers, drawn from different sources and integrated into one class / cadre / category, into separate categories for the purpose of promotion – Propriety of – Held: Such classification is unjustified and discriminatory – Note 6 to r. 3 is unconstitutional – Constitution of India, 1950 – Article 14.*

**The question for consideration in the instant cases was whether persons drawn from different sources and integrated into one class / cadre / category, can be classified into separate categories for purposes of promotion on the basis of the source from which they were drawn, as provided under Note 6 to Rule 3 of Andhra Pradesh Education Service Rules.**

**Dismissing the appeals, the Court**

**HELD: 1. Tribunal and the High Court were justified in holding that Note 6 to Rule 3 of Andhra Pradesh Education Service Rules, was unconstitutional inasmuch as the same classified officers eligible for appointment against class II category 1 posts depending upon whether they were direct recruits or promotees. Such a classification based on the birth mark that stood obliterated after integration of officers coming from different source into a common cadre/category would be**

**wholly unjustified and discriminatory. [Para 12] [870-C-D]**

**2. Any imbalance among those eligible for appointment against class II category 1 posts coming from different sources and categories would itself not justify a classification like the one made in Note 6. There is no gainsaying that classification must rest on a reasonable and intelligible basis and the same must bear a nexus to the object sought to be achieved by the statute. By its very nature, classification can and is often fraught with the danger of resulting in artificial inequalities which make it necessary to subject the power to classify to restraints lest the guarantee of equality becomes illusory on account of classifications being fanciful instead of fair, intelligible or reasonable. [Para 13] [870-E-G]**

*The State of Jammu and Kashmir vs. Shri Triloki Nath Khosa and Ors.* **1974 (1) SCC 19;** *Roshan Lal Tandon vs. Union of India* **1968 (1) SCR 185, relied on**

**Case Law Reference:**

| | | |
|---|---|---|
| **1968 (1) SCR 185** | **Relied on** | **Para 9** |
| **1974 (1) SCC 19** | **Relied on** | **Para 10** |

CIVIL APPELLATE JURISDICITION : Civil Appeal Nos. 933-935 of 2004.

From the Judgment & Order dated 10.1.2003 of the High Court of Andhra Pradesh at Hyderabad in Writ Petition Nos. 537, 2073 and 2075 of 2002.

WITH

C.A. Nos. 937-939 of 2004

Dr. Rajeev Dhavan, A. Mariarputham, I. Venkatanarayan, D. Rama Krishna Reddy (for D. Bharathi Reddy) T. Anamica,



Chandra Mohan Anisetty, Manoj Saxena, Mayank Nigam (for T.V. George), D. Bharat Kumar, Balasubrahmanyam Kamarsu (for Abhijit Sengupta) for the appearing parties.

The Judgment of the Court was delivered by

**T.S. THAKUR, J.** 1. These appeals by special leave arise out of a common order passed by the High Court of Andhra Pradesh whereby Writ Petition Nos.537, 2073, 2075, 7234 and 11033 of 2002 have been partly allowed, and the order passed by Andhra Pradesh Administrative Tribunal set aside to the extent the same had declared Note 1(i) to Rule 3 of the Andhra Pradesh Educational Service Rules to be unconstitutional. To the extent the Tribunal had declared Note 6 to Rule 3 of the Rules aforementioned to be ultra vires the High Court has affirmed the view taken by the Tribunal and dismissed the writ petitions. It is noteworthy that the State of Andhra Pradesh has not assailed the judgment delivered by the High Court of Andhra Pradesh. The present appeals have been preferred by the direct recruits to the Andhra Pradesh State Educational Service who contend that the Tribunal and the High Court fell in error in declaring Note 6 to Rule 3 of the Rules in question to be unconstitutional.

2. The short question that falls for consideration and that was argued at considerable length before us by learned counsel for the parties is whether persons drawn from different sources and integrated into one class/cadre/category can be classified into separate categories for purposes of promotion on the basis of the source from which they were drawn. The question is, in our opinion, squarely covered by the decisions of this Court to which we shall presently refer but before we do so, we may briefly set out the factual backdrop in which controversy arises.

3.In exercise of the powers vested in it under Sections 78 and 99 of the Andhra Pradesh Education Act, 1982 and in suppression of the earlier rules, the Government of Andhra

Pradesh framed what are known as "Andhra Pradesh Educational Service Rules". Rule 2 of the said Rules provides for the composition of the service which broadly speaking comprises four distinct classes of employees enumerated under the said Rules. Each one of these classes in turn comprises different category of officers enlisted therein. For instance in Class-I there are in all three category of officers. In class II there are seven category of officers; while in class III there are 13 category of officers. So also in class IV there are four category of officers. Rule 3 of the said Rules prescribes the method of appointment and specifies the appointing authority for different category of posts. Since we are concerned only with promotions to class II category I posts, we may extract Rule 3 to the extent the same regulates promotion for that class and category:

> *"3. Method of Appointment and Appointing Authority:-* The Method of appointment and appointing authority for different categories of posts of service shall be as follows:

| Class | Category | Method of Appointment | Appointing Authority |
|---|---|---|---|
| | 1. | xxxx | xxx |
| I | 1(a) | xxxx | xxx |
| | 2. | xxxx | xxx |
| | 3. | xxxx | xxx |
| II | 1 | By promotion from Categories1,2,3,4,5,8, 10, 11 and 12 of Class III | Government |
| xx | xxx | xxxx | xxx" |

4. Under Rule 3 are placed Notes 1 to 9 which govern several aspects relating to preparation of seniority lists and the method of recruitment to be adopted for different posts as also the academic qualifications required for such promotions.



5. The High Court has, as noticed earlier, declared Note 1 to be intra vires to which finding there is no challenge before us. It is the validity of Note 6 to Rule 3 which prescribes a roster for promotion to the post of District Educational Officer and Deputy Director comprising category 1 of Class II, that is under attack before us. The Note reads:

> "NOTE 6 : for the purpose of promotion to category 1 of class II, the following 12 point cycle shall be followed from the feeder categories:
>
> 1. A.D., G.A.O, and A.P.O.
> 2. Direct recruit Dy.E.O./Gazetted Head Master Grade-I, Lecturer IASE/CTE/SCERT, Senior Lecturer DIET and Special Officer (OS)
> 3. Promotee Dy.E.O./Gazetted Head Master Gr.I and P.E.O.
> 4. Promotee Lecture IASE/CTE/SCERT, Senior Lecturer DIET and A.D. (NFE)
> 5. Direct Recruit Dy.E.O./Gazetted Head Master Gr.I, Lecturer IASE/CTE/SCERT, Senior Lecturer DIET and Special Officer (O.S.)
> 6. Promotee Lecture IASE/CTE/SCERT, Senior Lecturer DIET and A.D. (NFE)
> 7. A.D., G.A.O, and A.P.O.
> 8. Direct recruit Dy.E.O./Gazetted Head Master Grade-I, Lecturer IASE/CTE/SCERT, Senior Lecturer DIET and Special Officer (OS)
> 9. Promotee Dy.E.O./Gazetted Head Master Gr.I and P.E.O.

10. Promotee Lecturer IASE/CTE/SCERT, Senior Lecturer DIET and A.D. (NFE)

11. Direct Recruit Dy.E.O./Gazetted Head Master Gr.I, Lecturer IASE/CTE/SCERT, Senior Lecturer DIET and Special Officer (O.S.)

12. Promotee Lecturer IASE/CTE/SCERT, Senior Lecturer DIET and A.D. (NFE)"

6. A careful reading of Rule 3 (supra) would show that for posts in Class II category (1) comprising District Educational Officer and Deputy Director, officers comprising categories 1 to 5, 8, 10, 11 and 12 of class III are eligible for appointment. This implies that vacancies in category 1 of class II shall be filled up in terms of the 12 point cycle stipulated in Note 6 (supra). A closer reading of Note 6 and the roster for appointment prescribed therein would indicate that appointments against vacancies in class II category 1 would, inter alia, depend upon whether the eligible officer is a direct recruit or a promotee. For instance, a vacancy at roster Point 2 would go to a direct recruit Deputy Educational Officer or a direct recruit Gazetted Head Master Grade I or Lecturer IASE/CTE/SCERT or a direct recruit Senior Lecturer DIET or a Special Officer (OS). In contradiction, a promotee Deputy Educational Officer or a promotee gazetted Head Master Grade I will not be eligible for consideration against a vacancy falling at roster Point 2. Similarly, a promotee Lecturer IASE/CTE/SCERT or promotee senior Lecturer DIET even when he or she is a member of the same class as their direct recruit counterparts in that category shall have to wait for a vacancy to occur at roster Point 4. Suffice it to say that while roster Points 2, 5, 8 and 11 have been allotted to direct recruits, the promotees have been treated differently and can be considered for vacancies at roster points 4, 6, 10 and 12 only. This classification of persons drawn from different sources who stand integrated into one class for the purpose of promotion is what was assailed on behalf of the promotee officers before



the Tribunal primarily on the ground that direct recruits and the promotees may have come from different sources but once they are integrated into one class, there can be no classification as between them on the basis of their birth marks. The integration of promotees and direct recruits into one class would wipe out their birth marks with the result that the same can not be made a basis for a valid classification. Any such classification would amount to classifying equals in the matter of further promotion based solely on the source from which they were drawn. Relying upon the decisions of this Court, the Tribunal and the High Court have held that inasmuch as Note 6 to Rule 3 classifies the promotees and direct recruits for the purpose of future promotion, even after their integration into one cadre the same was discriminatory hence ultra vires of Articles 14 and 16 of the Constitution.

7. Appearing for the appellants Dr. Rajeev Dhavan, learned senior counsel argued that in *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Ors.* 1974 (1) SCC 19, this Court has recognised that a classification based on higher educational qualifications was permissible even when those for whom the classification was made were integrated into one class. He urged that the decision of this Court in *Roshan Lal Tandon Vs. Union of India* 1968 (1) SCR 185, reliance whereupon was placed by the Tribunal as also by the High Court in support of the view taken by them stood diluted to that extent implying thereby that the law declared in *Roshan Lal Tandon's* case (supra) could admit of exceptions, one of which based on higher qualifications was recognised in *Triloki Nath's* case (supra). Dr. Dhavan strenuously argued that this Court could recognise the need for correcting imbalance, if any, in the filling up of posts by persons drawn from different categories as yet another exception to the Rule stated in *Roshan Lal Tandon's* case (supra). He contended that the Government had reserved to itself the power to review the roster from time to time, which power of review would, according to Dr. Dhawan, enable the Government to ensure a fair distribution

of vacancies among all those eligible for appointment against the same, but who came from different sources.

8. Mr. A. Mariarputham, learned senior counsel appearing for the contesting respondents, on the other hand, submitted that the view taken by the Tribunal and the High Court of Andhra Pradesh declaring Note 6 to Rule 3 was legally unexceptionable inasmuch as the said note was on the face of it discriminatory in so far as the same classified those integrated into a particular category based not on their educational or other qualification but whether they were promotees or direct recruits. The legal position, argued the learned counsel, was much too well settled by the decisions of this Court to admit of any doubt or call for any reconsideration. It was also not, according to the learned counsel, possible to carve out an exception to the well settled legal position governing permissible classifications based on an assumed imbalance in the filling up of vacancies from out of officers drawn from different sources.

9. In *Roshan Lal Tandon's* case (supra), one of the questions that fell for consideration was whether the promotees and direct recruits who formed one class in Grade 'D' could thereafter be classified again depending upon the source from which they were drawn for the purpose of promotion to the next higher Grade 'C'. This Court observed:

> "In our opinion, the constitutional objection taken by the petitioner to this part of the notification is well-founded and must be accepted as correct. At the time when the petitioner and the direct recruits were appointed to Grade 'D', there was one class in Grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'."



10. The above decision was noticed by the Constitution Bench of this Court in *Triloki Nath's* case (supra). In that case diploma holder engineers had challenged the validity of certain service rules, inter alia, on the ground that inasmuch as the said Rules made a distinction between Degree Holder members of the Engineering service and Diploma Holders for purposes of promotion to the post of Executive Engineers the same was unconstitutional being violative of Articles 14 and 16 of the Constitution. The Rules in that case provided for promotion of only such of the Assistant Engineers as possessed a bachelor's degree in engineering or qualification of A.M.I.E. and as had put in seven years of service in the J & K Engineering Service. The High Court had allowed the petitions of Diploma Holders and struck down the Rule as unconstitutional, holding that the Diploma Holders and the Degree Holders having been integrated into one category, no distinction or classification based on educational qualification could thereafter be made between them. In an appeal to this Court that view was reversed. This Court held that a classification must be truly founded on substantial differences that distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. Having said so, this Court observed:

> "33. Judged from this point of view, it seems to us impossible to accept the respondents' submission that the classification of Assistant Engineers into degree-holders and diploma-holders rests on any unreal or unreasonable basis. The classification, according to the appellants, was made with a view to achieving administrative efficiency in the Engineering services. If this be the object, the classification is clearly co-related to it, for higher

educational qualifications are at least presumptive evidence of a higher mental equipment. This is not to suggest that administrative efficiency can be achieved only through the medium of those possessing comparatively higher educational qualifications but that is beside the point. What is relevant is that the object to be achieved here is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterized as arbitrary or absurd. That is the farthest that judicial scrutiny can extend."

11. The Court also observed that the classification made on the basis of educational qualifications with a view to achieving administrative efficiency can not be said to rest on any fortuitous circumstance and that one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. The ratio of the decision in *Roshan Lal Tandon's* case (supra) was reiterated by their Lordship in the following words:

"44. The key words of the judgment are: "The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C', (emphasis supplied). By this was meant that in the matter of promotional opportunities to Grade 'C', no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice train examiners who were recruited directly to Grade 'D' as train examiners formed one common class with skilled artisans who were promoted to Grade 'D' as train examiners, no favoured treatment could be given to the former merely because they were directly recruited as train examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning



of the observation extracted above and no more than this can be read into the sentence next following: "To put it differently, once the direct recruits and promotees are absorbed into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'." In terms, this was just a different way of putting what had preceded."

12. In the light of the above pronouncements, the Tribunal and the High Court were, in our view, justified in holding that Note 6 to Rule 3 was unconstitutional inasmuch as the same classified officers eligible for appointment against class II category 1 posts depending upon whether they were direct recruits or promotees. Such a classification based on the birth mark that stood obliterated after integration of officers coming from different source into a common cadre/category would be wholly unjustified and discriminatory.

13. That leaves us with the question whether any imbalance among those eligible for appointment against class II category 1 posts coming from different sources and categories would itself justify a classification like the one made in Note 6. Our answer is in the negative. There is no gainsaying that classification must rest on a reasonable and intelligible basis and the same must bear a nexus to the object sought to be achieved by the statute. By its very nature classification can and is often fraught with the danger of resulting in artificial inequalities which make it necessary to subject the power to classify to restraints lest the guarantee of equality becomes illusory on account of classifications being fanciful instead of fair, intelligible or reasonable. We may gainfully extract the note of caution sounded by Krishna Iyer J. in his Lordship's separate but concurring judgment in *Triloki Nath's* case (supra) :

"……..The dilemma of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep

the constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees. These are perhaps meta-judicial matters left to the other branches of Government, but the Court must hold the Executive within the leading strings of egalitarian constitutionalism and correct, by judicial review, episodes of subtle and shady classification grossly violative of equal justice. That is the heart of the matter. That is the note that rings through the first three fundamental rights the people have given to themselves."

14. In the result we find no merit in these appeals which fail and are hereby dismissed but without any order as to costs.

K.K.T. Appeals dismissed.



CHAIRMAN, MAGADH GRAMIN BANK AND ANR.
*v.*
MADHYA BIHAR GRAMIN BANK AND ORS.
(Civil Appeal No. 4194 of 2003)

FEBRUARY 17, 2010

**[MARKANDEY KATJU AND T.S. THAKUR, JJ.]**

***Regional Rural Banks Act**: s.17(1), second proviso.*

*Facility of automatic switch over from scale II to scale III – Grant of – Held: Facility shall stand granted to the officers w.e.f. 16th December, 2002 – However, payment already made to employees be not recovered from them for the period earlier to 16th December, 2002.*

*Computer increment, computer allowance – Grant of – Letter dated 6th January, 2003 from Government of India to NABARD shows that grant of computer increment to employees/officers of RBBs was declined – Since the Government's decision denies benefit of computer increments, direction issued by High Court requiring respondent-bank to grant the said benefit not sustained.*

***Appeal**: Government's decision regarding grant of certain benefits not challenged in writ petitions filed by aggrieved-employees before High Court – Plea before Supreme Court that Government's decision was arbitrary and ought to be set aside by permitting employees to amend the writ petitions or by remanding the matter to High Court – Held: Not tenable – Employees cannot be permitted to challenge the said decision in appeal before Supreme Court as High Court did not have an occasion to examine the matter in the writ petitions heard and disposed of by it.*

**The question which arose for consideration in these appeals was whether employees of RRB are entitled to the facility of automatic switchover from Scale II to Scale**

**III and grant of computer increment and computer allowance.**

**Partly allowing the appeals, the Court**

**HELD: 1. The facility of automatic switch over from scale II to scale III shall stand granted to the officers w.e.f. 16th December, 2002 subject to the conditions stipulated in the order. However, the payment already made to the employees should not be recovered from them for the period earlier to 16th December, 2002. [Paras 6, 7] [876-H; 877-A-E]**

**2. A perusal of letter dated 6th January, 2003 from the Government of India to NABARD would show that the grant of computer increment to the employees/officers of RBBs was not favoured by the banks and the NABARD which consensus was agreed to by the Government of India thereby effectively declining the grant of computer increment to the employees/officers of the RRB. The decision of the Government was not in question before the High Court in their writ petitions. Therefore, there is no reason to allow the employees to challenge the said decision in these proceedings when the High Court did not have an occasion to examine the matter in the writ petitions heard and disposed of by it. Since the Government's decision denies the benefit of computer increments, the direction issued by the Single Judge and upheld by the Division Bench in appeal to the extent requiring the respondent-bank to grant the said benefit cannot be sustained. [Paras 8 and 9] [877-G-H; 878-A-B-D-H]**

*South Malabar Gramin Bank v. Coordination Committee of South Malabar Gramin Bank Employees Union* **2001 (1) SCC 101;** *All India Regional Rural Bank Officers Federation and Ors. v. Govt. of India and Ors.* **2002 (3) SCC 554, referred to.**

**Case Law Reference:**

**2001 (1) SCC 101 referred to Para 2**



**2002 (3) SCC 554 referred to Para 4**

CIVIL APPELLATE JURISDICITION : Civil Appeal No. 4194 of 2003.

From the Judgment & Order dated 4.2.2003 of the High Court of Judicature at Patna in L.P.A. No. 84 of 2003.

WITH

C.A. No. 4483 of 2003.

Parag P. Tripathi, ASG, Rakesh Dwivedi, S.B. Upadhyay, Dhruv Mehta, Yashraj Singh Deora, Mohit Abraham, T.S. Sabarish, Tannushree Mukherjee (for K.L. Mehta & Co.), K.T. Anantharam, Mukti Choudhary, Rahul Dua, Ankit Dalela, Dr. R.N. Upadhya (for P.V. Yogeswaran) Kumud Lata Das, Rashmi Malhotra, Shalinder Saini (for S.N. Terdal for the appearing parties.

The Judgment of the Court was delivered by

**T.S. THAKUR, J.** 1. These appeals by special leave arise out of an order passed by the High Court of Judicature at Patna whereby LPA No.84 of 2003 filed by the appellant-bank has been dismissed in limine and the order passed by a Single Bench of that Court allowing Writ Petitions No.7367 of 2001 and 5924 of 2002 affirmed. The controversy in the appeals lies in a narrow compass but before we come to the precise issue that falls for our consideration, we may briefly set out the facts giving rise to the proceedings before the High Court and the present appeals before us.

2. In *South Malabar Gramin Bank Vs. Coordination Committee of South Malabar Gramin Bank Employees Union* (2001 (1) SCC 101) this Court, inter alia, held that the Central Government was vested with the power to determine the pay structure of the employees working in the Regional Rural Banks in accordance with second proviso to sub-section (1) of Section 17 of RRB Act, and that it should try to maintain parity between the pay structure of the employees of the RRBs and those

working in the nationalized commercial banks. As a sequel to the said direction the Government of India, Ministry of Finance, Department of Economic Affairs (Banking Division) issued notification dated 11th April, 2001, inter alia, determining the pay scales of the employees of RRBs and granting to them the benefit of 6th and 7th Bipartite Settlements and Officers Wage Revision w.e.f. 1st November, 1992 and 1st November, 1997 respectively. The notification attempted to bring at par the pay scales of the RRB employees and those of their counterparts in other nationalized banks. It was then followed by a letter dated 25th April, 2001, defining the expressions "Basic Pay and Dearness Allowance" used in the notification. The clarification was to the effect that "Basic Pay and the Dearness Allowance" would mean "Basic Pay, Dearness Pay, Dearness Allowances, ad hoc or additional D.A.; interim relief or any other allowance which form part of pay or D.A."

3. Pursuant to the above, the appellant-bank issued a circular dated 16th May, 2001, giving to its employees the benefit of what is known as "computer increment" as per 6th and 7th Bipartite Settlements and Officers Wage Revision. The circular envisaged that each staff member shall file an undertaking that he/she shall refund in lump the excess amount drawn by them in case a contrary decision is received from the Government of India/NABARD sponsor bank. This circular was some time later recalled by an order dated 5th June, 2001 and the benefit of computer increment and automatic switch over from scale II to scale III granted to the employees of the appellant-bank withdrawn. The order further directed that the amount already paid shall be recovered from the employees concerned.

4. Aggrieved by the order aforementioned, the employees-association filed Writ Petition No.7367 of 2001 challenging the validity of the withdrawal order on several grounds. While the said writ petition was still pending, this Court passed an order dated 7th March, 2002 in *All India Regional Rural Bank Officers Federation and Ors. Vs. Govt. of India and Ors.* 2002



(3) SCC 554 whereby paragraphs 2 and 3 of the notification dated 11th April, 2001 were quashed and the Government directed to issue a fresh notification for proper implementation of the judgment of this Court. The Government of India accordingly appears to have examined the matter and issued a fresh notification dated 17th April, 2002, para 5 whereof provides as under:

> "All other allowances should be immediately revised, if not already revised pursuant to order dated 11.4.2001 by respective sponsor banks after negotiations with RRB employees."

5. In the writ petition filed by the association before the High Court, the Bank filed an affidavit in reply, inter alia, stating that the matter relating to the grant of "computer increment", "computer allowance" and "automatic switchover from scale II to scale III" was pending consideration of the Government of India which is the authority competent under Section 17 of the RRB Act. A learned Single Judge of the High Court of Judicature at Patna, however, allowed the Writ Petition Nos.7367 and 5924 of 2002 by a common order dated 17th December, 2002 and directed the appellant-bank to act upon the decision dated 17th April, 2002, taken by the Government of India, Ministry of Finance, Department of Economic Affairs (Banking Division) in its letter and spirit and to pay to the employees the benefits admissible to them in accordance with law. The said direction proceeded on the premise that the decision of the Government of India dated 17th April, 2002, particularly, clause (5) of the notification issued by the Government envisaged grant of all allowances admissible to the employees of the nationalised banks to those serving in the RRBs. A Letters Patent Appeal preferred against the said order, having been dismissed summarily, the appellant-bank has filed appeal to this Court by special leave as already noticed above.

6. Appearing for the appellant-bank, Mr. Dhruv Mehta, learned counsel, submitted that so far as grant of automatic switch over from scale II to scale III was concerned, the issue

stood finally resolved by the Government and NABARD who have now taken a decision to extend the facility of automatic switch over to the employees working in the RRB w.e.f. 16th December, 2002. In support of his submissions, Mr. Mehta drew our attention to a letter dated 11th April, 2002 addressed by NABARD to the Government of India suggesting certain modalities and conditions for the grant of automatic switch over facility to the officers of RRBs and order dated 6th January, 2003 issued by the said bank pursuant to the decision taken by the Government of India on the subject. A careful reading of the said order would show that the Government of India and NABARD have agreed to the grant of automatic switch over from scale II to scale III to the officers of RRBs w.e.f. 16th December, 2002 subject to the conditions stipulated in the said order. Mr. Mehta argued, and in our opinion rightly so, that the facility of automatic switch over from scale II to scale III shall stand granted to the officers w.e.f. 16th December, 2002 subject to the conditions stipulated in the said order and that the directions issued by the High Court can subject to that modification be affirmed.

7. Mr. Rakesh Dwivedi, learned senior counsel, appearing for the respondents-writ petitioners were agreeable to the disposal of these appeals subject to the condition that the payment already made to the employees shall not be recovered from them for the period earlier to 16th December, 2002. We order accordingly.

8. The only other question that had fallen for consideration before the High Court and that need be noticed by us relates to the grant of computer increment to the employees of the RRBs. Mr. Tripathi, Additional Solicitor General, appearing for the Government of India, has placed before us a compilation of documents comprising a letter dated 6th January, 2003 from the Government of India to NABARD approving the consensus of the bank as set out in NABARD's letter dated 23rd July, 2002. A perusal of the said letter would show that the grant of computer increment to the employees/officers of RBBs was not



favoured by the banks and the NABARD which consensus was agreed to by the Government of India thereby effectively declining the grant of computer increment to the employees/ officers of the RRB. It was contended by Mr. Tripathi and Mr. Mehta that the Government of India had taken a conscious decision on the subject leaving no manner of doubt relating to the admissibility of computer increment to the employees/ officers of RRBs.

9. The material placed on record was not disputed by Mr. Dwivedi. Mr. Dwivedi fairly conceded that the Government's decision, as is evident from the documents placed on record, does indeed deny the said benefit to the employees of RRBs. It was, however, argued by the learned counsel that the decision of the Government of India was arbitrary and ought to be set aside by permitting the respondents to amend the writ petitions suitably or by remanding the matter back to the High Court. We are not impressed by that submission. We say so because the legality of the decision taken by the Government was not in question before the High Court in the writ petitions filed by the respondents. We, therefore, see no reason why we should allow the employees to challenge the said decision in the present proceedings when the High Court did not have an occasion to examine the matter in the writ petitions heard and disposed of by it. Since the Government's decision denies the benefit of computer increments the direction issued by the learned Single Judge and upheld by the Division Bench in appeal to the extent requiring the respondent-bank to grant the said benefit cannot be sustained. We, however, make it clear that this order shall not prevent the respondent-association or any member thereof from challenging in appropriate proceedings the validity of the decision taken by the Government of India on all such grounds as may be open to them but subject to all just exceptions including delay and laches. These appeals are accordingly allowed in part and the orders passed by the High Court to the extent indicated above set aside. The parties are left to bear their own costs.

D.G. Appeals partly allowed.