ARUN RAJ

v.

UNION OF INDIA AND ORS.

(Criminal Appeal No. 1123 of 2008)

MAY 13, 2010

[DR. MUKUNDAKAM SHARMA AND H.L. DATTU, JJ.]

Penal Code, 1860/Army Act, 1950:

s.302 and s. 69 of Army Act – Court Martial proceeding – For trial of offence of murder – Eye-witness to the incident – Dying declaration made to another witness – Offence alleged to be result of an incident occurring a day prior to the incident – General Court Martial finding the accused guilty of the offence – Sentenced to life imprisonment and dismissal from service – Conviction and sentence confirmed by Confirming Authority, Chief of Army Staff and in writ petition by High Court – On appeal, plea that offence falls under Exception I to s. 300 IPC and since the accused caused single stab injury, he was liable to be punished u/s. 304 (Part II) – Held: Conviction u/s. 302 justified – Evidence of the case makes it clear that s. 304 (Part II) not attracted – The case does not fall under Exception I to s.300 – Once intention to cause death is proved, infliction of single or multiple blows becomes irrelevant.

Penal Code, 1860:

s. 300 Exception I – Applicability of – Discussed.

s. 304 (Part II) – Applicability of – Discussed.

Doctrines:

'Doctrine of provocation' – Meaning and applicability of.

Appellant-accused, an army official was charged for

having caused death of one of his colleagues (deceased). Court Martial proceedings were initiated against him u/s. 302 IPC r/w Section 69 of Army Act, 1950.

According to prosecution on the day of the incident the accused made complaint to his superior officer that the deceased and PW3 had abused him. After making the complaint, he came to the barrack with a kitchen knife concealed in his *'lungi'* and stabbed the deceased on the right side of his chest, while he was sleeping in the barrack on a cot. PW-1 was the eye-witness to the incident. General Court Martial found the appellant guilty of the charges and sentenced him to 7 years RI and dismissed him from service for the offence punishable u/s. 69 of Army Act r/w. 302 IPC. On revision, Confirming Authority held that once appellant is found guilty of the offence of murder, he could be either sentenced to life imprisonment or death sentence. General Court Martial, accordingly, revising the sentence, sentenced him to life imprisonment and dismissal from service. The same was confirmed by the Confirming Authority. A petition against the same to the Chief of Army Staff u/s. 164 of Army Act was rejected.

Appellant-accused filed a writ petition contending that charge framed was vague and that facts of the case did not justify punishment of life imprisonment as the accused can be punished at the most u/s. 304 (Part-II) and not u/s. 302 IPC. High Court dismissed the writ petition. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The conviction of the appellant for the offence under Section 302 IPC is not bad in law. Under *Exception I* to Section 300 IPC, an injury resulting into death of the person would not be considered as murder when the offender has lost his self-control due to the

grave and sudden provocation. The provision itself makes it clear by the *Explanation* provided, that what would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact. Provocation is an external stimulus which can result into loss of self-control. Such provocation and the resulting reaction need to be measured from the surrounding circumstances. Here the provocation must be such as will upset not merely a hasty, hot tempered and hypersensitive person but also a person with calm nature and ordinary sense. What is sought by the law by creating the exception is that to take into consideration situations wherein a person with normal behavior reacting to the given incidence of provocation. Thus, the protection extended by the exception is to the normal person acting normally in the given situation. [Paras 6 and 16] [20-C; 11-H; 12-A-D]

Mancini v. Director of Public Prosecution **(1942) A.C. 200;** *Rex v. Lesbini* **(1914) 3 K.B.1116, referred to.**

1.2. The facts like that there was time lag of 40-45 minute after appellant had come from the office of Higher Officer after complaining and was present with the appellant in the same barrack without any conversation between them, that he had got the knife which was sharp enough to have the knowledge that it might cause death of a human being when stabbed, that the knife was hidden and removed by appellant only when he was about to stab the deceased, that the appellant stabbed the deceased on the chest which is a fragile portion of the body and can cause death when stabbed by sharp weapon and also that the eyewitness was unable to link the abusing and the altercation of the deceased and appellant to the action of stabbing, rules out the possibility of the offence being committed due to 'grave and sudden' provocation. The appellant clearly had time to deliberate and plan out the death of the deceased. The

appeal has no merit and the appellant cannot get benefit of the Exception I to Section 300 of I.P.C. [Para 8] [74-A-E]

2.1. Essentially the ingredients for bringing an act under Part II of Section 304 are:- (i) act is done with the knowledge that it is likely to cause death, (ii) there is no intention to cause death, or to cause such bodily injury as is likely to cause death. The first ingredient is easily solved by referring to the weapon used by the appellant to strike a knife blow to the appellant. The appellant in this instance has used a kitchen knife. A kitchen knife with sharp edges is a dangerous weapon and it is very obvious that the appellant was aware that the use of such a weapon can cause death or serious bodily injury that is likely to cause death. As far as the second ingredient is concerned, there has been no sudden altercation which ensued between the appellant and the deceased in the present case. The fact that the appellant waited till the next day, went on to procure a deadly weapon like a kitchen knife and then proceeded to strike a blow on the chest of the appellant when he was sleeping, points unerringly towards due deliberation on the part of the appellant to avenge his humiliation at the hands of the appellant. The nature of weapon used and the part of the body where the blow was struck, which was a vital part of the body helps in proving beyond reasonable doubt, the intention of the appellant to cause the death of the deceased. Once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows. There is no fixed rule that whenever a single blow is inflicted, Section 302 would not be attracted. [Paras10, 11 and 14] [15-D-H; 16-C-G; 19-E]

State of Rajasthan v. Dhool Singh **(2004) 12 SCC 546;** *Virsa Singh v. State of Punjab* **AIR 1958 SC 465;** *Anil v. State of Haryana* **(2007) 10 SCC 274, relied on.**

Bhera v. State of Rajasthan **(2000) 10 SCC 225;** *Kunhayippu v. State of Kerala* **(2000) 10 SCC 307;** *Masumsha Hasansha Musalman v. State of Maharashtra* **(2000) 3 SCC 557;** *Guljar Hussain v. State of U.P.* **1993 Supp (1) SCC 554;** *K. Ramakrishnan Unnithan v. State of Kerala* **(1999) 3 SCC 309;** *Pappu v. State of M.P.* **(2006) 7 SCC 391;** *Muthu v. State by Inspector of Police, Tamil Nadu* **(2007) 12 SCALE 795, distinguished.**

2.2. It is necessary to prove first that there was an intention of causing bodily injury; and that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. From the evidence on record, it is very clear that the appellant intended to cause death. In light of this finding, the evidence on record makes it clear that Section 304 (Part-II) IPC will not be attracted. In the present case, there was due deliberation on the part of the appellant and he assaulted the deceased a day after he misbehaved with him. Hence it is not correct to say that the appellant had no intention to cause death of the deceased. [Para 15] [19-F-H; 20-A-B]

Case Law Reference:

(1942) A.C. 200	**referred to.**	**Para 7**
(1914) 3 K.B.1116	**referred to.**	**Para 7**
(2000) 10 SCC 225	**distinguished.**	**Para 11**
(2000) 10 SCC 307	**distinguished.**	**Para 11**
(2000) 3 SCC 557	**distinguished.**	**Para 11**
1993 Supp (1) SCC 554	**distinguished.**	**Para 11**
(1999) 3 SCC 309	**distinguished.**	**Para 11**
(2006) 7 SCC 391	**distinguished.**	**Para 11**
(2007) 12 Scale 795	**distinguished.**	**Para 11**

(2004) 12 SCC 546	**relied on.**	**Para 11**
AIR 1958 SC 465	**relied on.**	**Para 12**
(2007) 10 SCC 274	**relied on.**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1123 of 2008.

From the Judgment and order dated 25.08.2005 of the High Court of Bombay in CRL WP No. 677 of 2000.

K.K. Mani, Ankit Swarup and K, Lakshminarayan for the Appellant.

Brijender Chahar, R.Balasubramaniyam, Naresh Kaushik, Anil Katiyar and D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal by special leave is limited to a particular question only, namely, correctness of the conviction of the appellant Arun Raj for an offence under Section 302 of Indian Penal Code and the propriety of the sentence passed thereunder by the Presiding Officer of General Court Martial under the Indian Army Act. The short facts are these - The appellant joined the Indian Army in the year 1983 and in the year 1998 he was working as Ex-Signalman (Lance Nayak) of 787 (Independent) Air Defence Brigade Signal Company. On 22.3.1998, one Mr. S.S.B Rao (PW-4) was the Section In-Charge of Operator Section. At about 1 PM, Mr. Rao returned from lunch and the appellant reported to him that Havildar R.C Tiwari (deceased) and Havildar Inderpal (PW-3) abused him by using the word “Gandu”. On Mr. Rao making an inquiry into the same, they replied in the negative, despite the appellant making repeated assertion that they insulted him using the said word. The appellant also brought to the information of Mr. Rao that in the previous night there was a heated discussion between the appellant and the deceased and Inderpal, and the matter was reported to the superior

officer. Paulose (PW-1), after having his lunch, returned to the barrack from the rank mess and he was relaxing in the cot. At this point of time, he saw the appellant coming towards the door. He was wearing a half T-shirt and lungi. The cot of the deceased was near the door and he was sleeping on it. The appellant took out a knife which was hidden in the lungi and stabbed the deceased on the right side of the chest. On witnessing the incident, PW-1 was shocked and shouted to the appellant as to why he did it. On hearing the shout of PW-1, people came in and gathered immediately. The appellant was separated by the crowd and the deceased was sent to the hospital where he finally succumbed to the injury. Major Prabal Datta (PW-9) testified that there was no external injury on the body of the deceased except the stab injury caused by a knife.

2. An FIR was lodged at the Dehu Road Police Station vide CR-26 of 1998 under Section 302 of Indian Penal Code. Thereafter, investigation commenced, during the course of which the body of the deceased was sent for post mortem and an inquest Panchnama was also prepared. On completion of the investigation, the charge-sheet was prepared against the appellant/accused and forwarded to the Judicial Magistrate 1st Class, Vadgaon Maval. In the meantime, since the appellant belonged to the armed forces, court martial proceedings were initiated under the provisions of the Army Act. Charges were framed against the appellant under Section 302 read with Section 69 of the Army Act for committing civil offence, i.e., knowingly causing the death of the deceased on 22.3.1998. On the appellant pleading not guilty, the General Court Martial proceeded to record the evidence of witnesses. The prosecution examined 18 witnesses. The General Court Martial after appreciating the facts and the evidence on record, found the appellant guilty of the offence for which he was charged and after hearing his submission with regard to the quantum of sentence, sentenced the appellant to undergo 7 years of rigorous imprisonment and he was also dismissed from service for committing the offence of murder punishable under Section

69 of the Army Act read with Section 302 of IPC. However upon revision, the Confirming Authority by an order dated 15.12.1998 held that the sentence awarded by the General Court Martial after finding the appellant guilty of murder under Section 69 of the Army Act read with Section 302 of IPC, was not justiciable and further observed that once the appellant was held guilty under the abovementioned Sections, he could be either sentenced to life imprisonment and fine or sentenced to death. Accordingly, the General Court Martial by an order dated 15.1.1999, revised the sentence and sentenced the appellant to imprisonment for life and dismissal from service, which was subsequently confirmed by the Confirming Authority. Being aggrieved by this order, the appellant filed a petition before the Chief of Army Staff under Section 164 of the Army Act, which was rejected. The appellant being aggrieved by the same filed a writ petition before the Bombay High Court.

3. The learned Counsel for the appellant raised two contentions before the High Court of Judicature at Bombay in the Writ proceedings. Firstly, it was submitted that the charge framed against the appellant was vague, as a result of which, entire Court Martial proceedings was vitiated. The second submission was that the intervention of High Court was required as the facts and circumstances of the case does not justify the punishment of life imprisonment as the offence revealed from the material evidence is only punishable under Section 304 Part II and not under Section 302 of Indian Penal Code. As regards the first contention, the High Court has observed that as the appellant was informed of all the allegations put forth against him at the time of Court Martial proceedings, the charge framed against the appellant cannot be said to be vague. Considering the second contention, the High Court found the testimony of PW-1 Paulose who is the eyewitness and PW-3 Haveldar Indrpal to whom the dying declaration was given by the deceased, is reliable and, hence, observed that there is no doubt about the fact that appellant caused the death of the

deceased by stabbing him with a knife. Therefore, the submission that there was no intention on the part of the appellant to kill the deceased as only one stab injury was found on deceased, was rejected by the Court. The High Court while considering the decision on which reliance was placed by learned counsel for the accused observed, that there was no sudden quarrel and the murder was not caused on spur of moment and no sufficient provocation is found for the offence committed by appellant to fall under section 304 Part II of Indian Penal Code. As the offence was found to be committed with enough time to mediate on the action to commit the murder of deceased, appellant was said to have intention to cause the death of the deceased. Thus, the High Court found the charge under Section 302 of Indian Penal Code proved and the procedure under Army Act followed without any infringement of principles of natural justice and, accordingly, the Writ Petition was dismissed vide judgment dated 25.8.2005.

4. We now come to the particular question to which this appeal is limited, namely, propriety of the conviction and sentence passed on the appellant for the offence under Section 302 IPC read with Section 69 of the Army Act, 1950. Mr.K.K.Mani, the learned counsel for the appellant contends, that, the death of the deceased was caused due to grave and sudden provocation and, therefore, offence would fall under Exception I of Section 300 I.P.C. Further, it is contended that the offence committed by the appellant is liable for punishment under Section 304 Part II of the I.P.C., as there is absence of any intention on part of the appellant to cause death. Mr.Mani also cited few decisions of this Court to support his submission that the single stab injury caused by the appellant to the deceased only amounts to offence punishable under Section 304 Part II and not under Section 302 of I.P.C. Per contra, the learned counsel for the Union of India submitted that, the findings of the Court Martial and the punishment upheld by the High Court need not be interfered by this Court as the facts and the

evidence on record are enough to prove that the offence committed by the appellant falls under Section 302 of I.P.C. It is also contended that the scope of judicial review is for limited purpose and that cannot be used to re-appreciate the evidence recorded in Court Martial proceedings to arrive at a different conclusion.

5. We now consider the first contention of the learned counsel for the appellant. It is not in dispute that the cause of death of deceased is due to the stabbing by a knife by appellant. However, it is argued on behalf of the appellant that the appellant caused the said injury because on 23.03.1998 deceased Havildar R.C.Tiwari and Havildar Inderpal (PW-3) abused the appellant and he was provoked to 'punish' the deceased. Thus, the stab injury caused to the deceased was a result of such grave and sudden provocation and thus the incident took place on spur of moment. Therefore, the case of the appellant falls under Exception I of Section 300 of I.P.C.

At this state itself, it is relevant to notice Section 300 of I.P.C.:

"*Section 300. Murder*

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly

If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly

If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is

sufficient in the ordinary course of nature to cause death, or-

4thly

If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception I-When culpable homicide is not murder-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First-That the provocations not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly-That the provocations not given by anything done in the lawful exercise of the right of private defence.

Explanation-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

6. The aforesaid Section provides five exceptions wherein the culpable homicide would not amount to murder. Under *Exception I*, an injury resulting into death of the person would not be considered as murder when the offender has lost his

self-control due to the grave and sudden provocation. It is also important to mention at this stage that the provision itself makes it clear by the *Explanation* provided, that what would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact. Provocation is an external stimulus which can result into loss of self-control. Such provocation and the resulting reaction need to be measured from the surrounding circumstances. Here the provocation must be such as will upset not merely a hasty, hot tempered and hypersensitive person but also a person with calm nature and ordinary sense. What is sought by the law by creating the exception is that to take into consideration situations wherein a person with normal behavior reacting to the given incidence of provocation. Thus, the protection extended by the exception is to the normal person acting normally in the given situation.

7. The scope of the "doctrine of provocation" was stated by Viscount Simon in Mancini v. Director of Public Prosecution, (1942) A.C. 200 at p.206: "*it is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result, must be such as temporarily deprive the person provoked of the power of self-control as result of which he commits the unlawful act which caused death. The test to be applicable is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini, (1914) 3 K.B.1116 so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is very different thing from making use of a deadly instrument like a*

concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

8. It is, therefore, important in the case at hand to consider the reasonable relationship of the action of appellant of stabbing the deceased, to the provocation by the deceased in the form of abusing the appellant. At this stage, it would be useful to recall the relevant chain of events in brief to judge whether there was sufficient provocation and the criterion under the provision are satisfied to bring the offence under the Exception I. As is already stated, on the previous night of the incidence, there was altercation between the appellant and deceased, as the deceased had abused the appellant. On 23.3.1998 at about 1.00 PM, the deceased complained to the Higher Officer-Mr.S.S.B.Rao about the said incident. Thereafter, he returned to his barrack and was present there before the happening of the incident. In the testimony, (PW-1) Paulose states that he was also present in the same barrack after he came back from Other Rank Mess at 2.15 PM and was relaxing on his cot which was in the corner of the same barrack. At that time he saw the appellant coming towards the door on which he thought that the appellant was coming for either urinal or to collect his clothes spread out in sun. The appellant who was wearing a half T-shirt and lungi came near the cot of the deceased which was at the door and took out a knife from the lungi and stabbed on the right side of chest of the deceased when he was asleep. PW-1 agreed at the time of examination of witness, that he was shocked to see the appellant stab the deceased and he also shouted at the appellant asking him what was he doing. Thus, PW-1 was unable to relate the actions of appellant to the abuses by deceased or the altercation which happened the previous night. Further, it is clear from the testimony of the PW-1 and the evidence collected (ME-1), that the knife which was completely made of iron and had a sharp edge was hidden at the waistline of the lungi of the appellant. Major Prabal Datta, PW-9 was the Regimental Medical Officer

at 19 AD Regt. In his cross examination, he has stated, that there was not much time lag between the occurrence of the incident and the deceased being rushed to the hospital. The facts like that there was time lag of 40-45 minute after appellant had come from the office of Higher Officer after complaining and was present with the appellant in the same barrack without any conversation between them, that he had got the knife which was sharp enough to have the knowledge that it might cause death of a human being when stabbed, that the knife was hidden and removed by appellant only when he was about to stab the deceased, that the appellant stabbed the deceased on the chest which is a fragile portion of the body and can cause death when stabbed by sharp weapon and also that the eyewitness was unable to link the abusing and the altercation of the deceased and appellant to the action of stabbing, rules out the possibility of the offence being committed due to 'grave and sudden' provocation. The appellant clearly had time to deliberate and plan out the death of Havildar R C Tiwari (the deceased). We, therefore, conclude that the first contention of the learned counsel for the appellant has no merit and the appellant cannot get benefit of the Exception I to Section 300 of I.P.C.

9. We now turn to second point urged on behalf of the appellant. It is contended by learned counsel that there was no intention on the part of the appellant to cause the death of the deceased and, hence, Section 304 Part II of the IPC which deals with culpable homicide not amounting to murder, will be attracted. Alternatively, it is contended that the appellant dealt one single blow on the deceased, and hence, intention to cause death cannot be attributed to the appellant and, hence, the act of the appellant will not fall under Section 302 of IPC but under Section 304 Part II. In light of these contentions, it is necessary to look into the wordings of the relevant provision. Section 304 of IPC reads:-

"Section 304. Punishment for culpable homicide not

amounting to murder

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life ,or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

Or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

10. Essentially the ingredients for bringing an act under Part II of the Section are:-

(i) act is done with the knowledge that it is likely to cause death,

(ii) there is no intention to cause death, or to cause such bodily injury as is likely to cause death.

11. The first ingredient is easily solved by referring to the weapon used by the appellant to strike a knife blow to the appellant. The appellant in this instance has used a kitchen knife. A kitchen knife with sharp edges is a dangerous weapon and it is very obvious that the appellant was aware that the use of such a weapon can cause death or serious bodily injury that is likely to cause death. As far as the second ingredient is concerned, the appellant's learned counsel contended that the fact that there was one single blow struck, proves that there was no intention to cause death. In support of the plea, reliance is placed on the decisions of this court in the case of *Bhera v. State of Rajasthan,* [(2000) 10 SCC 225], *Kunhayippu v. State of Kerala,* [(2000) 10 SCC 307], *Masumsha Hasansha*

Musalman v. State of Maharashtra, [(2000) 3 SCC 557], *Guljar Hussain v. State of U.P.,* [1993 Supp (1) SCC 554], *K. Ramakrishnan Unnithan v. State of Kerala,* [(1999) 3 SCC 309], *Pappu v. State of M.P.,* [(2006) 7 SCC 391], *Muthu v. State by Inspector of Police, Tamil Nadu,* [(2007) 12 Scale 795]. A brief perusal of all these cases would reveal that in all these cases there was a sudden and instantaneous altercation which led to the accused inflicting a single blow to the deceased with a sharp weapon. Hence, there has been conviction under Section 304 Part II as delivering a single blow with a sharp weapon in a sudden fight would not point towards intention to cause death. These cases are clearly distinguishable from the case at hand, purely on the basis of facts. In the present case, there has been no sudden altercation which ensued between the appellant and the deceased in the present case. The deceased called the appellant 'gandu' following which there was a heated exchange of words between the two, the day before the murder. The next day, however, the appellant concealed a kitchen knife in his lungi and went towards the cot of the deceased and struck the deceased a blow on the right side of the chest, while the deceased was sleeping. The fact that the appellant waited till the next day, went on to procure a deadly weapon like a kitchen knife and then proceeded to strike a blow on the chest of the appellant when he was sleeping, points unerringly towards due deliberation on the part of the appellant to avenge his humiliation at the hands of the appellant. The nature of weapon used and the part of the body where the blow was struck, which was a vital part of the body helps in proving beyond reasonable doubt, the intention of the appellant to cause the death of the deceased. Once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows. This court in the case of *State of Rajasthan v. Dhool Singh,* [(2004) 12 SCC 546] while dismissing a similar contention has stated that, "It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact

whether the respondent caused the death of the deceased with an intention of causing death or not. In the instant case, it is true that the respondent had dealt one single blow with a sword which is a sharp-edged weapon measuring about 3 ft. in length on a vital part of body, namely, the neck. This act of the respondent though solitary in number had severed sternoclinoid muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury, in our opinion, not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. The reasoning of the High Court as to the intention and knowledge of the respondent in attacking and causing death of the victim, therefore, is wholly erroneous and cannot be sustained."

12. In the case of *Virsa Singh v. State of Punjab,* [AIR 1958 SC 465], this court while referring to intention to cause death laid down:-

> "27. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient

> in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

This court further observed:-

> "33. It is true that in a given case the enquiry may be linked up with the seriousness of the injury,. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial; scratch and that by accident this victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guess-work and fanciful conjecture."

13. In *Anil v. State of Haryana,* [(2007) 10 SCC 274], while referring to *Virsa Singh* (supra) this court laid down:-

> "19. In *Thangaiya v. State of T.N.,* relying upon a celebrated decision of this Court in *Virsa Singh v. State of Punjab* 1958 CriLJ 818 , the Division Bench observed:
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> 17. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh case

for the applicability of Clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under Clause "thirdly" of Section 300 IPC. culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to, cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

18. Thus, according to the rule laid down in Virsa Singh case even if the intention of the appellant was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

14. In the aforesaid decision, this Court held that there is no fixed rule that whenever a single blow is inflicted Section 302 would not be attracted.

15. It is clear from the above line of cases, that it is necessary to prove first that there was an intention of causing bodily injury; and that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. From the evidence on record, it is very clear that the appellant intended to cause death. In light of this finding, the evidence on record makes it clear that Section 304 Part II of the IPC will not be attracted. Further PW-1, in his cross-examination asserts that the deceased held his hand out after he was stabbed in the chest. It is very likely that this action on the part of the deceased prevented the appellant from stabbing him multiple

number of times. The argument might deserve some merit in case there is a sudden altercation which ensues in the heat of the moment and there is no deliberate planning. In the present case, as stated above there was due deliberation on the part of the appellant and he assaulted the deceased a day after he misbehaved with him. Hence, the contention of the learned counsel that the appellant had no intention to cause death of the deceased has no merit and, accordingly, it is rejected.

16. We, accordingly, hold that the conviction of the appellant for the offence under Section 302 of Indian Penal Code, is not bad in law. In our opinion, the appeal has no merit and, accordingly, it is dismissed.

K.K.T. Appeal dismissed.

PURAN CHAND
v.
STATE OF HARYANA
(Criminal Appeal No. 1818 of 2009)

MAY 13, 2010

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

Penal Code, 1860 – s.302 r/w s.34 – Death of married woman due to burn injuries – Dying declaration recorded by Judicial Magistrate, First Class after Doctor gave medical certificate that deceased was in a fit mental state to give the dying declaration – Trial court convicted all the three accused viz., husband, brother-in-law and aunt-in-law of the deceased by placing reliance upon the dying declaration – High Court acquitted the aunt-in-law but confirmed the conviction of husband and brother-in-law – Further appeal by brother-in-law before Supreme Court on ground that the dying declaration was not credible – Held: The dying declaration was recorded by an independent witness, who was working as a Judicial Magistrate, First Class, and before it commenced, the Magistrate had satisfied himself about the ability of deceased to make a dying declaration – There was also an endorsement from the doctor as regards the fitness of the victim to give the dying declaration – Dying declaration was not only voluntary but truthful also and, hence, it could be relied upon as was done by the trial Court and the High Court – Conviction of appellant brother-in-law maintained.

Evidence Act, 1872 – s.32 – Dying declaration – Principles governing dying declaration re-iterated.

A married woman died of burn injuries. It was alleged by the prosecution that kerosene oil had been sprinkled on the deceased and thereafter she was set on fire.

Pursuant to the incident, the deceased had been removed to a hospital where she gave a dying declaration. The dying declaration was got recorded by PW13, a First Class Judicial Magistrate, after PW14, the attending doctor, gave medical certificate that the deceased was in a fit mental state to give the dying declaration.

Trial court convicted all the three accused viz., husband, brother-in-law and aunt-in-law of the deceased u/s.302 r/w s.34, primarily, by placing reliance upon the said dying declaration. On appeal, the High Court acquitted the aunt-in-law but confirmed the conviction of husband and brother-in-law. The husband chose not to file any further appeal.

The brother-in-law, i.e. the appellant, however, challenged his conviction before this Court contending that the dying declaration was tutored and that there were intrinsic defects in the dying declaration which militated against its credibility.

It was contended that, firstly, the name of the appellant was not to be found in the dying declaration and there was a mere reference to the *Jeth* (elder brother of the husband); that there was one more brother of the deceased's husband, and it was not certain as to whether the deceased referred to appellant. It was further contended that the deceased had suffered 90 per cent of burns and, therefore, it was not possible that she would be in her senses while making the dying declaration; that no kerosene oil residues were found on the clothes which were seized; and also that the evidence of PW-5, PW-10 and PW-8, who claimed that an oral dying declaration was made to them, was also not reliable in view of the evidence of PW-4 who had stated that no such oral dying declaration was made by the deceased.

Dismissing the appeal, the Court

HELD:1. Ordinarily, though the oral dying declaration is an extremely weak type of evidence, it would not be unnatural for a burnt woman, to confide in her near relations like her cousin, PW-5, father PW-1 and PW-8 who is also a near relation. The deceased would rather be keen to express herself regarding the cause of her death. Had the prosecution relied only on the oral dying declaration, things could have been different. However, there is a dying declaration, Ex. P.F/3, which is recorded by a Judicial Magistrate, First class.[Para 8] [31-F-H; 32-A-B]

2.1. The dying declaration has been recorded by an independent witness who was working as a Judicial Magistrate, First Class, and before it commenced, the Magistrate had satisfied himself about the ability of deceased to make a dying declaration. Also, there is an endorsement from PW14, who had examined deceased and had given a certificate that deceased was in a fit mental state to give the statement. He had also endorsed at the end of the dying declaration that she was conscious and was in the fit state of mind while giving her statement. He has been cross-examined in details without any breakthrough. Therefore, it cannot be said that deceased was not in a fit state of mind while making her statement. A feeble argument was raised that the accused was a Tailor, yet, his occupation was stated to be a Teacher by deceased. There is a simple explanation that usually a tailor is called Tailor Master. It may be that the same expression might have been used by deceased. Even elsewhere in the record of this case such expression seems to have been used. The confusion might have been created because of the use of the word "*master*". Even at the end of the dying declaration, a further endorsement was made by PW14 certifying that, firstly, the witness was conscious all through the time when her statement was being recorded and, secondly,

that no relatives of her were present at that time, which was also countersigned by the Magistrate who recorded the statement. The dying declaration was not only voluntary but truthful also and, hence, it could be relied upon as was done by the Trial Court and the Appellate Court. [Paras 9, 10] [32-B-E; 33-B-E]

2.2. The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. Number of times, a young girl or a wife who makes the dying declaration could be under the impression that she would lead a peaceful, congenial, happy and blissful married life only with her husband and, therefore, has tendency to implicate the inconvenient parents-in-law or other relatives. [Para 11] [33-F-H; 34-A-B]

2.3. Number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the Court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. When there are more than one dying declarations, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone

can be accepted while the other innocuous dying declarations have to be rejected. Such trend will be extremely dangerous. However, the Courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests. [Para 11] [34-A-D]

2.4. Again, it is extremely difficult to reject a dying declaration merely because there are few factual errors committed. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The Courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned. [Para 12] [34-E-G]

2.5. The law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused. In the present case the dying declaration passes all the tests referred above. [Para 13] [34-H; 35-A-B; 36-C]

Sham Shankar Kankaria v. State of Maharashtra **2006) 13 SCC 165;** *Paniben v. State of Gujarat (***1992) 2 SCC 474;** *Munnu Raja v. State of M.P.* **(1976) 3 SCC 104;** *State of U.P. v. Ram Sagar Yadav* **(1985) 1 SCC 552;** *Ramawati Devi v. State of Bihar* **(1983) 1 SCC 211;** *K. Ramachandra Reddy v. Public Prosecutor* **(1976) 3 SCC 618;** *Rasheed Beg v. State of M.P.* **(1974) 4 SCC 264;** *Kake Singh v. State of M.P.***[(1981) supp. SCC 25;** *Ram Manorath v. State of U.P.* **(1981) 2 SCC 654;** *State of Maharashtra vs. Krishnamurti Laxmipati Naidu* **(1980) Supp. SCC 455;** *Surajdeo Ojha v. State of Bihar*

(1980) Supp SCC 769; *Nanhau Ram v. State of M.P.***[(1988) Supp. SCC 152;** *State of U.P. v. Madan Mohan* **(1989) 3 SCC 390;** *Mohanlal Gangaram Gehani v. State of Maharashtra* **(1982) 1 SCC 700;** *Gangotri Singh v. State of U.P.* **(1993) Supp (1) SCC 327;** *Goverdhan Raoji Ghyare v. State of Maharashtra* **(1993) Supp (4) SCC 316;** *Meesala Ramakrishan v. State of A.P.* **(1994) 4 SCC 182 and** *State of Rajasthan v. Kishore* **(1996) 8 SCC 217, relied on.**

3. As regards the contention that on the half burnt clothes of deceased, there were no traces of kerosene and, therefore, the whole story of burning her by pouring kerosene on her body has to be disbelieved, it is to be seen that the seizure of these clothes was proved by PW-8. He spoke about the seizure of an empty can, smelling of kerosene oil, a match box with 4 or 5 burn match sticks, a quilted bed (probably meaning 'mattress'), smelling of kerosene from it which was semi burnt and some sample of soil. According to him, they were packed in the parcels separately and sealed. On this backdrop, when the recovery memo is seen, it mentions one empty tin box, match box, two burnt match sticks, earth which was put in plastic *Dibbi,* clothing of the deceased of light blue colour, bed sheet (*Bichhona*) with marks of fresh burns. The witness, however, has not referred in his Examination-in-Chief to the cloth parcel (Exhibit 4) with some partially burnt pieces of clothes. The FSL report suggests that kerosene residues were detected in Exhibit 5, which was a plastic bag containing a partially burnt coloured check cotton *gadda*. It clearly suggests that no kerosene residues could be detected on Exhibits 1, 2, 3, 4 or 6. From this, it was urged that particularly, the parcel Nos. 1, 3 and 4 were bound to carry kerosene residues if the prosecution story was truthful. However, it is to be seen that the mattress did have kerosene residues. While this incident has taken place on 15.12.1997, parcels seems to have been sent only on 29.12.1997 i.e. after about

14 days of the incident, which reached the FSL Laboratory on 31.12.1997. The FSL report bears a date 5.6.1998. There is thus the possibility of the articles losing the kerosene residues due to the long interval of time, yet it has to be noted that the mattress which undoubtedly a thick material, did have the kerosene residues. Ordinarily, there was no reason for the mattress having the kerosene residues unless kerosene was poured on the same. It is again to be noted that even the plastic container, containing kerosene, was also found not having any kerosene traces. Therefore, this circumstance will not help the accused as some kerosene traces have been found on the mattress where deceased was sleeping. Even if this circumstance is ignored, the fact of the matter is that the dying declaration has been found to be voluntarily truthful and unblemished. That would clinch the issue against the accused. [Para 14] [36-D-H; 37-A-E]

4. The appreciation by the Trial Court and the Appellate Court on the overall circumstances and their finding of conviction is correct. [Para 15] [37-E-F]

Case Law Reference:

(2006) 13 SCC 165	**relied on**	**Para 13**
(1992) 2 SCC 474	**relied on**	**Para 13**
(1976) 3 SCC 104	**relied on**	**Para 13**
(1985) 1 SCC 552	**relied on**	**Para 13**
(1983) 1 SCC 211	**relied on**	**Para 13**
(1976) 3 SCC 618	**relied on**	**Para 13**
(1974) 4 SCC 264	**relied on**	**Para 13**
(1981) supp. SCC 25	**relied on**	**Para 13**
(1981) 2 SCC 654	**relied on**	**Para 13**

(1980) Supp. SCC 455	**relied on**	**Para 13**
(1980) Supp SCC 769	**relied on**	**Para 13**
(1988) Supp. SCC 152	**relied on**	**Para 13**
(1989) 3 SCC 390	**relied on**	**Para 13**
(1982) 1 SCC 700	**relied on**	**Para 13**
(1993) Supp (1) SCC 327	**relied on**	**Para 13**
(1993) Supp (4) SCC 316	**relied on**	**Para 13**
(1994) 4 SCC 182	**relied on**	**Para 13**
(1996) 8 SCC 217	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1818 of 2009.

From the Judgment and order dated 27.03.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 565 of 1999.

Sibo Sankar Mishra, for the Appellant.

Rao Ranjit (for Kamal Mohan Gupta) for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. The judgment of the High Court confirming the conviction and sentence for the offences under Section 302 read with Section 34, Indian Penal Code is in challenge in this appeal. Originally, there were three accused persons, namely, Gurdial (accused No.1), Puran Chand (accused No.2), the present appellant and Rajo Devi (accused No.3). However, accused No.3, Rajo Devi was acquitted by the High Court and accused No.1, Gurdial has not chosen to file an appeal. It is only Puran Chand (accused No.2) who is in appeal before us.

2. Gurdial got married to one Santosh on 08.12.1997. According to the prosecution, she was harassed for dowry just after one week of the marriage and was set to fire on the fateful day i.e. on 15.12.1997 by as many as three accused persons, they being, Gurdial, her husband, Puran Chand, her elder brother-in-law and Rajo Devi, the paternal aunt of accused No.1, Gurdial. The incident took place at about 4 a.m. in the morning. According to the prosecution, accused No.1 and accused No.2 sprinkled Kerosene Oil and in this conspiracy even Rajo Devi (accused No.3) was a party. All this was done on account of the less dowry received in the marriage which had taken place hardly a week earlier to the incident. Santosh was taken to the General Hospital, Sector-13, Chandigarh by Pawan Kumar, PW-4 and ultimately she breathed her last in the evening on the same day. It was found that she had suffered 90 per cent of burns but before that her dying declaration was got recorded by PW-13, Shri A.K. Bishnoi. According to the prosecution, before recording this dying declaration, an opinion was taken about her fitness by Dr. Siri Niwas, PW-14. The said dying declaration is Ex.P.F/3 and the medical certificate is Ex.P.F/5. Fourteen witnesses were examined at the trial including her relations, investigating team, Magistrate and the Doctor. The Trial Court convicted all the three accused persons. However, the High Court acquitted Rajo Devi, giving her the benefit of doubt and that is how accused No.2, Puran Chand has come up before us challenging his conviction.

3. The defence was that of denial and it was stated to be an accident. It was also stated by the present appellant that he was staying separate from his brother Gurdial and had unnecessarily been implicated. Three defence witnesses were also examined.

4. The defence did not prevail and that is how accused No.2 is before us.

5. The main thrust of the argument of the Learned Counsel was against the dying declaration. It was claimed that the dying

declaration was tutored one. Learned Counsel earnestly argued that there were some intrinsic defects in the dying declaration which militated against its credibility. It was pointed out that, firstly, the name of Puran Chand, the present appellant was not to be found in the dying declaration and there was a mere reference to the *Jeth* (elder brother of the husband). It was suggested by the Learned Counsel that there was one more brother of accused No.1, Gurdial and it was not certain as to whether the deceased referred to accused No.2, Puran Chand. It was then pointed out that Santosh, the deceased had suffered 90 per cent of burns and, therefore, it was not possible that she would be in her senses while making the dying declaration. Lastly, it was pointed out that there was no Kerosene Oil residues found on the clothes which were seized. It was also suggested further that the evidence of Mohan Lal (PW-5), Chand Kiran (PW-10) and Mam Chand (PW-8), who claimed that an oral dying declaration was made to them, was also not reliable in view of the evidence of PW-4, Pawan Kumar who had stated that no such oral dying declaration was made by Santosh.

6. We will first examine the claim regarding the oral dying declaration. It has come in the evidence that after Santosh got burnt, she was reached to the Yamuna Nagar Hospital. The information of the burning was given by PW-4, Pawan Kumar to PW-5, Mohan Lal in the morning itself on which both went to the Hospital. According to Mohan Lal (PW-5), he was told orally by Santosh that she was burnt by the two accused persons while accused No.3, Rajo Devi held her hands. The Trial Court has disbelieved this part of the evidence of Mohan Lal (PW-5) about the participation of accused No.3, Rajo Devi. However, the rest of the testimony about the participation of accused No.1, Gurdial and accused No.2, Puran Chand has been believed by the Trial Court. It is to be noted that at the time she made oral dying declaration, she did not merely refer to Puran Chand as *Jeth* but had specifically taken his name.

7. We have closely examined the evidence of PW-5, Mohan Lal. The evidence of Mohan Lal (PW-5) has been corroborated by Mam Chand (PW-8) who is another witness who was present at the time of seizure of material objects at the spot, which, according to him, were smelling of kerosene. This witness has not stated anything about any dying declaration in his examination-in-chief but, strangely enough, it was brought in his cross-examination by the defence that he reached the Post Graduate Institute at about 3 p.m. He also referred to a dialogue between Chand Kiran and Santosh wherein Santosh told her father that she was burnt by her brother-in-law and her husband. This witness has referred to the active advice having been given by her Phupha Saas, meaning sister of her father-in-law. He also asserted that Gurdial and Puran Chand were not present at the Post Graduate Institute at that time. It is extremely strange that such material things should have been brought on record in cross-examination.

8. The last witness in this line is Chand Kiran (PW-10), the father of Santosh who had spoken about the oral dying declaration made to him by Santosh involving all the three accused persons. He had also referred to the evidence of Mam Chand, who was the brother-in-law and had claimed that his daughter told him that she was burnt by her husband Gurdial and her *Jeth*, Puran Chand at the instance of Rajo Devi. Nothing has been brought in the cross-examination of this witness. The evidence of these three witnesses is complimentary to each other and, thus, is more acceptable in comparison to the evidence of Pawan Kumar (PW-4). Ordinarily, though the oral dying declaration is an extremely weak type of evidence, it would not be unnatural for a burnt woman, to confide in her near relations like her cousin, Mohan Lal (PW-5), father Chand Kiran (PW-1) and Mam Chand (PW-8) who is also a near relation. Santosh would rather be keen to express herself regarding the cause of her death. Had the prosecution relied only on the oral dying declaration, things

could have been different. However, there is a dying declaration, Ex. P.F/3, which is recorded by a Judicial Magistrate, First class and that will have to be critically examined in this case.

9. Learned counsel appearing on behalf of the defence, firstly, pointed out that the written dying declaration did not mention accused No.2 by his name. Even accused No.3, Rajo Devi was referred as '*Bua'.* It was also pleaded that there was another brother named Chandiram and, therefore, the benefit of doubt, on account of this, must go to accused No.2, Puran Chand. The evidence of Dr. Satbir Singh (PW-9), who was the post-mortem doctor and who examined Santosh, has referred to superficial to deep burns on various parts of her body. He has also asserted that the superficial to deep burns were about 90 per cent and they were sufficient to cause her death in the ordinary course of nature. However, Dr. Siri Niwas (PW-14), was the most material witness who examined Santosh and had given a certificate that Santosh was in a fit mental state to give the statement. He had also endorsed at the end of the dying declaration that she was conscious and was in the fit state of mind while giving her statement. He has been cross-examined in details without any breakthrough. Therefore, it cannot be said that Santosh was not in a fit state of mind while making her statement.

10. What impresses us most about the dying declaration is that, firstly, it has been recorded by an independent witness like Shri A.K. Bishnoi who was working as a Judicial Magistrate, First Class, and secondly, before it commenced, the Magistrate had satisfied himself about the ability of Santosh to make a dying declaration. There is an endorsement obtained of Dr. Siri Niwas. The said dying declaration is in the question & answer form and we do not see any suggestive questions having been put excepting question No.4 which is to the effect "*is anyone else responsible for this incident?*". However, it must be said that this question was more with an

idea to seek more information which could have been legitimately put. This is apart from the fact that the Courts below ultimately gave the benefit of doubt to accused No.3, Rajo Devi. What impresses us is that in the dying declaration, Santosh specifically exonerated her mother-in-law and the father-in-law by saying that they treated her well. A feeble argument was raised that the accused was a Tailor, yet, his occupation was stated to be a Teacher by Santosh. There is a simple explanation that usually a tailor is called Tailor Master. It may be that the same expression might have been used by Santosh. Even elsewhere in the record of this case such expression seems to have been used. The confusion might have been created because of the use of the word "*master*". Even at the end of the dying declaration, a further endorsement was made by Dr. Siri Niwas certifying that, firstly, the witness was conscious all through the time when her statement was being recorded and, secondly, that no relatives of her were present at that time, which was also countersigned by the Magistrate who recorded the statement. At the instance of the defence counsel, we have ourselves seen the original dying declaration as also the First Information Report based on the same. In our opinion, the dying declaration was not only voluntary but truthful also and, hence, it could be relied upon as was done by the Trial Court and the Appellate Court.

11. The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. Number of

times, a young girl or a wife who makes the dying declaration could be under the impression that she would lead a peaceful, congenial, happy and blissful married life only with her husband and, therefore, has tendency to implicate the inconvenient parents-in-law or other relatives. Number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the Court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. When there are more than one dying declarations, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocuous dying declarations have to be rejected. Such trend will be extremely dangerous. However, the Courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

12. Again, it is extremely difficult to reject a dying declaration merely because there are few factual errors committed. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The Courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned. We have tested the dying declaration with all these factors in mind and we are satisfied that even the Trial Court and the Appellate Court have fully satisfied themselves in respect of the acceptability of this dying declaration.

13. The law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is

free from any doubts can be the sole basis for convicting the accused. This Court in *Sham Shankar Kankaria v. State of Maharashtra* [(2006) 13 SCC 165] has taken stock of the following cases where the principles governing dying declaration have been laid down:

(i) *Paniben v. State of Gujarat* [(1992) 2 SCC 474;

(ii) *Munnu Raja v. State of M.P.* [(1976) 3 SCC 104;

(iii) *State of U.P. v. Ram Sagar* Yadav [1985] 1 SCC 552;

(iv) *Ramawati Devi v. State of Bihar* [(1983) 1 SCC 211

(v) *K. Ramachandra Reddy v. Public Prosecutor* [(1976) 3 SCC 618]

(vi) *Rasheed Beg v. State of M.P.* [(1974) 4 SCC 264;

(vii) *Kake Singh v. State of M.P.* [(1981) supp. SCC 25;

(viii) *Ram Manorath v. State of U.P*. [(1981) 2 SCC 654;

(ix) *State of Maharashtra vs. Krishnamurti Laxmipati Naidu* [(1980) Supp. SCC 455;

(x) *Surajdeo Ojha v. State of Bihar* [(1980) Supp SCC 769]

(xi) *Nanhau Ram v. State of M.P.* [(1988) Supp. SCC 152

(xii) *State of U.P. v. Madan Mohan* [(1989) 3 SCC 390;

(xiii) *Mohanlal Gangaram Gehani v. State of Maharashtra* [(1982) 1 SCC 700]

In para 12 of the abovesaid judgment, this Court has held that dying declaration is the only piece of untested evidence and must like any other evidence, satisfy the court that what is stated

therein is the unalloyed truth and that it is absolutely safe to act upon it. This Court has further reiterated that if after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it a basis of conviction, even if there is no corroboration. In that behalf, this Court has referred the reported cases of *Gangotri Singh v. State of U.P.* [(1993) Supp (1) SCC 327]; *Goverdhan Raoji Ghyare v. State of Maharashtra* [(1993) Supp (4) SCC 316]; *Meesala Ramakrishan v. State of A.P.* [(1994) 4 SCC 182]; and *State of Rajasthan v. Kishore* [(1996) 8 SCC 217]. We are in respectful agreement with the law laid down and would hasten to add that in the present case the dying declaration of Santosh passes all the tests referred to by us above.

14. Lastly, a point was raised by the learned defence counsel that on the half burnt clothes of Santosh, there were no traces of kerosene and, therefore, the whole story of burning her by pouring kerosene on her body has to be disbelieved. It is to be seen that the seizure of these clothes was proved by Mam Chand (PW-8). He spoke about the seizure of an empty can, smelling of kerosene oil, a match box with 4 or 5 burnt match sticks, a quilted bed (probably meaning 'mattress'), smelling of kerosene from it which was semi burnt and some sample of soil. According to him, they were packed in the parcels separately and sealed. On this backdrop, when the recovery memo is seen, it mentions one empty tin box, match box, two burnt match sticks, earth which was put in plastic *Dibbi,* clothing of the deceased Santosh of light blue colour, bed sheet (*Bichhona*) with marks of fresh burns. The witness, however, has not referred in his Examination-in-Chief to the cloth parcel (Exhibit 4) with some partially burnt pieces of clothes. The FSL report suggests that kerosene residues were detected in Exhibit 5, which was a plastic bag containing a partially burnt coloured check cotton *gadda*, It clearly suggests that no kerosene residues could be detected on Exhibits 1, 2, 3, 4 or

6. From this, the learned counsel urged that particularly, the parcel Nos. 1, 3 and 4 were bound to carry kerosene residues if the prosecution story was truthful. However, it is to be seen that the mattress did have kerosene residues. While this incident has taken place on 15.12.1997, parcels seems to have been sent only on 29.12.1997 i.e. after about 14 days of the incident, which reached the FSL Laboratory on 31.12.1997. The FSL report bears a date 5.6.1998. There is thus the possibility of the articles losing the kerosene residues due to the long interval of time, yet it has to be noted that the mattress which undoubtedly a thick material, did have the kerosene residues. Ordinarily, there was no reason for the mattress having the kerosene residues unless kerosene was poured on the same. It is again to be noted that even the plastic container, containing kerosene, was also found not having any kerosene traces. Therefore, this circumstance will not help the accused as some kerosene traces have been found on the mattress where Santosh was sleeping. Even if we ignore this circumstance, the fact of the matter is that the dying declaration has been found by us to be voluntarily truthful and unblemished. That would clinch the issue against the accused.

15. The appreciation by the Trial Court and the Appellate Court on the overall circumstances and their finding of conviction is correct. The appeal has no merits and it deserves to be dismissed. It is accordingly dismissed.

B.B.B. Appeal dismissed.

S.P. GUPTA

v.

ASHUTOSH GUPTA

(Special Leave Petition (Crl.) No. 1953 of 2008)

MAY 13, 2010

[ALTAMAS KABIR AND ANIL R. DAVE, JJ.]

Code of Criminal Procedure, 1973:

s.482 – Quashing of complaint – Complaint filed under s.420 r.w. s.120-B IPC – Assertions made in the complaint regarding misrepresentation made by petitioner as regards the property in dispute – Summons issued against petitioner – Petition for quashing the complaint – High Court dismissing the same – Justification of – Held: Justified as prima facie case was made out in the complaint for trial of petitioner – The complaint gave rise to triable issues which could only be determined by leading evidence at the trial – Penal Code, 1860 – ss.415, 120-B.

A complaint was filed against the petitioner and the other co-accused by the father of respondent under Section 420 r.w. Section 120B IPC. The trial court issued summons on the petitioner, and the accused no.1 and 4. The revisionary court refused to interfere with the order of trial court. Petitioner moved application under Section 482 Cr.P.C. before the High Court for quashing of the complaint. High Court dismissed the said application holding that a *prima facie* case was made out in the complaint against the petitioner for the alleged offences. The High Court noted that the petitioner was integral to all the transactions that took place between the complainant and the accused No.1 as he was the constituted attorney of the said accused and therefore whether he acted with dishonest intentions or whether

he himself gave assurance as to the title of the accused no.1 at the time of execution of the agreement for sale were matters that raised triable issues and could only be determined by leading evidence at the trial. Aggrieved petitioner filed the special leave petition.

Dismissing the special leave petition, the Court

HELD: A *prima facie* case was made out in the complaint to go to trial. There was a positive assertion in the complaint that an assurance was given by the petitioner to the complainant that the property in question was free from all encumbrances and that the accused No.1 was the sole owner of the property. It was mentioned in the complaint that had such a representation been not made relating to the status of ownership of the property in question, the complainant would have not entered into the transaction at all. Whether or not the petitioner was truly mistaken with regard to the information given by him is a question of utmost importance in answering a charge of the nature indicated in the complaint. Merely because the petitioner had received part payment of the consideration amount and had made over the same to the accused no.1 and merely because possession of the land was handed over by him to the complainant, cannot form the basis of a presumption that he had no knowledge that there was a dispute regarding the ownership of the property, as to whether the same belongs to a HUF or not. Illustration (g) of Section 415 IPC clearly indicates that if at the very initiation of the negotiations, it is evident that there was no intention to cheat, the dispute would be of a civil nature. But such a conclusion would depend on the evidence to be led at the time of trial. In the instant case, the complaint does not make out a *prima facie* case to go to trial. The petitioner may have discharged his functions as a constituted attorney for the accused No.1 by acting as a liaison between the accused No.1 and the father of

the respondent, but that would not in itself indicate that he did not have any knowledge of the status of ownership of the land forming the subject matter of the transaction. Hence the order of High Court is not interfered with. [Para 13] [44-D-H; 45-A-E]

Nageshwar Prasad Singh v. Narayan Singh **(1998) 5 SCC 694, referred to.**

Case Law Reference:

(1998) 5 SCC 694	**referred to**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 1953 of 2008.

From the Judgment & Order dated 19.02.2008 of the High Court of Delhi at New Delhi in CRLMC No. 847 of 2005.

Aman Lekhi, Meenakshi Lekhi, Sachin Jain, Vishal and Sunil Kumar Verma for the Petitioner.

Ashok Gurnani, S.K. Chaturvedi and K.V. Mohan for the Respndent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. In this Special Leave Petition, the Petitioner, S.P. Gupta, has challenged the order dated 19th February, 2008, passed by the learned Single Judge of the Delhi High Court in Crl.M.C. No.847 of 2005, dismissing the Petitioner's application under Section 482 Cr.P.C. for quashing of the Criminal Complaint No.932 of 1992, instituted against the Petitioner and the other co-accused by the Complainant (father of the Respondent) under Section 420 read with Section 120-B of the Indian Penal Code.

2. By an order dated 7th April, 1992, the learned Metropolitan Magistrate, New Delhi, issued summons to the Petitioner, Accused No.1 Smt. Motian Devi Lamba and

Accused No.4 Shri G.R. Singhal under Section 420 read with Section 34 IPC. The Revision Petition filed against the said order issuing summons having been dismissed by the Additional Sessions Judge, New Delhi, on 8th February, 2005, the Petitioner moved the Application under Section 482 Cr.P.C. before the High Court.

3. Having regard to the allegations in the complaint, the learned Single Judge of the High Court dismissed the said application upon holding that upon reading the complaint, it was not possible to conclude that not even a prima facie case had been made out against the Petitioner for the offence under Section 420 read with Section 34 IPC. The High Court took note of the fact that having regard to the role attributed to each of the accused which had been noticed by the learned Magistrate, summons had been issued to only three of them and that as far as the Petitioner was concerned, the narration in the complaint showed that he was integral to all the transactions that had taken place between the complainant and the Accused No.1 as he was the constituted attorney of the said accused. The learned Single Judge also observed that whether the Petitioner had acted with dishonest intentions or as to whether he was unaware of the dishonest intentions of the Accused No.1 or that he himself held out no assurance as to the title of the Accused No.1 at the time the agreement for sale was executed or whether he acted beyond the scope of his authority under the power of attorney, were matters that raised triable issues and could only be determined by leading evidence at the trial.

4. Mr. Aman Lekhi, learned Senior Advocate appearing in support of the Special Leave Petition, urged that all the three Courts below had completely misconstrued the material available for the purpose of taking cognizance on the complaint filed by Chat Ram Gupta, the father of the Respondent Ashutosh Gupta. Mr. Lekhi urged that as the holder of the Power of Attorney for the Accused No.1, the Petitioner had merely

carried out the instructions given to him from time to time by the Accused No.1 which he was required to follow in keeping with the powers vested in him under the Power of Attorney. Mr. Lekhi urged that the Petitioner was merely an agent appointed to carry out certain directions and that he had no personal knowledge of the status of the properties involved in the transaction.

5. Mr. Lekhi submitted that if the Petitioner had no dishonest intention to defraud or cheat the father of the Respondent, he would not have handed over possession of the property in question to the father of the Respondent. In fact, the Petitioner received the consideration amount on behalf of Accused No.1 and made over the same to her while making over possession of the land to the complainant.

6. Mr. Lekhi submitted that the Petitioner was unaware of the manner in which the property had been acquired by the Accused No.1 or that the same belonged to a Hindu Undivided Family (HUF) and had no dishonest intention to either defraud or cheat the father of the Respondent and accordingly, at best a suit of a civil nature could have been filed on account of the transaction and the issuance of summons on the complaint filed by the complainant (father of the Respondent) was not justified in the facts of the case.

7. Mr. Lekhi submitted that the facts, as disclosed, do not bring the actions of the Petitioner within the ambit of the expression “misrepresentation” as defined in Section 18 of the Indian Contract Act, 1872, since neither did he has any intention to deceive the father of the Respondent, nor did he gain any advantage in acting as the agent of the Accused No.1 for the sole purpose of receiving the consideration money and making over possession of the land to the father of the Respondent, it could not be said that he had committed any offence, as alleged, and the summons issued on the said complaint under Section 482 read with Section 34 IPC were liable to be quashed.

8. In support of his submissions, Mr. Lekhi referred to a Three-Judge Bench decision of this Court in *Nageshwar Prasad Singh vs. Narayan Singh [*(1998) 5 SCC 694], in which a similar question fell for consideration and relying on Illustration (g) of Section 415 of the Indian Penal Code, it was held that an agreement for sale of land and the earnest money paid to the owner as part consideration and possession of the land having been transferred to the purchasers/complainants and the subsequent unwillingness of the owner to complete the same, gave rise to a liability of a civil nature and the criminal complaint was, therefore, not competent.

9. Mr. Lekhi submitted that in the facts of the present case, which are almost identical to the facts of the aforesaid case, the summons issued to the Petitioner was liable to be quashed.

10. Opposing Mr. Lekhi's submissions, Mr. Ashok Gurnani, Advocate for the Respondent, contended that as had been indicated by the High Court, the question as to whether the Petitioner had any dishonest and/or fraudulent intention or whether he had deliberately misrepresented the facts relating to the status of ownership of the land would become clear once evidence had been led in regard to the circumstances in which he had represented to the father of the Respondent that the land was free from all encumbrances and that the Accused No.1 was the sole owner of the property. Mr. Gurnani submitted that had the Petitioner not made such a representation to the father of the Respondent, he may not have proceeded with the transaction. It was urged that it was too early for an assumption to be drawn that the Petitioner had no dishonest intention in representing to the father of the Respondent that the property was free from all encumbrances and that the Accused No.1 was the sole owner of the property.

11. Referring to the submissions made by Mr. Lekhi on Section 18 of the Indian Contract Act, 1872, Mr. Gurnani urged that Sub-Section (1) of Section 18 was quite clear as to what constituted misrepresentation.

12. As far as the decision in *Nageshwar Prasad Singh's* case (supra) was concerned, Mr. Gurnani submitted that the facts of the said case and the present case, though similar, could be distinguished having particular regard to Illustration (g) of Section 415 IPC. It was submitted that if no dishonest intention could be shown at the very initial stage when the agreement was arrived at, the Court would be justified in holding that there was no misrepresentation and the dispute involving the refusal of one party to complete the transaction would be a dispute of a civil nature, which was not so in the instant case. Mr. Gurnani urged that the order of the High Court or that of the other fora below did not warrant any interference and the Special Leave Petition was liable to be dismissed.

13. Having carefully considered the submissions made on behalf of the respective parties and the complaint filed by the father of the Respondent, we are inclined to agree with the views expressed by the High Court that a prima facie case had been made out to go to trial. There is a positive assertion in the complaint that an assurance had been given by the Petitioner to the complainant that the property in question was free from all encumbrances and that the Accused No.1 was the sole owner of the property. It has been mentioned in the complaint that had not such a representation been made relating to the status of ownership of the property in question, the complainant may not have entered into the transaction at all. Whether or not the Petitioner was truly mistaken with regard to the information given by him is a question of utmost importance in answering a charge of the nature indicated in the complaint. Merely because the Petitioner had received part payment of the consideration amount and had made over the same to the Accused No.1 and merely because possession of the land had been handed over by him to the complainant, cannot form the basis of a presumption that he had no knowledge that there was a dispute regarding the ownership of the property, as to whether the same belongs to a HUF or not. It is true, as pointed out by Mr. Lekhi, that Section 415 IPC,

which defines the offence of cheating, provides in Illustration (g) as follows :

> "(g). A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery, A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

However, the aforesaid provision clearly indicates that if at the very initiation of the negotiations it was evident that there was no intention to cheat, the dispute would be of a civil nature. But such a conclusion would depend on the evidence to be led at the time of trial. In the instant case, the complaint does not make out a prima facie case to go to trial. The Petitioner may have discharged his functions as a constituted attorney for the Accused No.1 by acting as a liaison between the Accused No.1 and the father of the Respondent, but that does not in itself indicate that he did not have any knowledge of the status of ownership of the land forming the subject matter of the transaction.

14. We are not, therefore, inclined to interfere with the order of the High Court impugned in the Special Leave Petition and the same is, accordingly, dismissed.

D.G. Special Leave Petition dismissed.

M/S. SPEEDLINE AGENCIES
v.
M/S. T. STANES & CO. LTD.
(Civil Appeal No. 4481 of 2010)

MAY 14, 2010

[P. SATHASIVAM AND J.M. PANCHAL, JJ.]

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 – s. 10(3)(a)(i), (iii) – Eviction of tenants – Eviction on the ground of its own use and occupation – Grant of, by Rent Controller as also Appellate Authority – Amalgamation of erstwhile landlord with transferee company during pendency of revision petition – Scheme of amalgamation sanctioned by High Court – Benefit of order of eviction to transferee company – Entitlement of – Held: Transferee company entitled to the benefit of order of eviction – When a company stands dissolved due to amalgamation, its rights under the decree for eviction devolves on amalgamated company – Decree constitutes an asset – Asset of erstwhile company devolved on amalgamated company – Business will be continued to be carried by amalgamated company – Purpose of amalgamation would be frustrated, if the amalgamated company is deprived of the same – Companies Act, 1956 – ss. 391 to 394 – Subsequent events.

The landlord-UCS company owned a building with vacant areas. It leased out the said premises with the vacant area to the appellant for use as residence-cum-office for five years on a monthly rent. Meanwhile, the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 came into force. The landlord company was granted exemption from acquisition of vacant lands under the Act. The Rent Controller fixed the fair rent and the Appellate Authority enhanced it. Thereafter, the name of the landlord company was changed to STC company.

The STC company filed petition u/s. 10(3)(a)(i) and (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 for eviction on the ground of its own use and occupation for residential and non-residential purpose. The Rent Controller allowed the petition. The Appellate Authority upheld the order. Aggrieved, appellant filed revision petition before the High Court. During pendency of the petition, by a Scheme of amalgamation, STC company was transferred to TS-respondent company under the Companies Act. The High Court approved the same. The application for amendment of the cause title was allowed. The High Court dismissed the revision petition. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1. The instant case being one where the order of eviction is eminently just, fair and equitable as ordered by two authorities and confirmed by the High Court, there is no valid ground for interference, on the other hand, the conclusion arrived at by the authorities as well as the High Court are concurred with. Taking into consideration the appellant-tenant is continuing in the premises for more than four decades, time is granted for handing over possession till 31.12.2010. [Para 34] [78-D]

2.1. In the instant case, the petition by the landlord for eviction of the tenant was filed on 03.04.1987. The cause of action has no relation to amalgamation, irrespective of whether it is prior or subsequent to filing of the application for eviction. The Rent Controller ordered eviction on 09.04.1992. The appeal of the tenant was disposed of by the Appellate Authority on 10.04.2003. The rights of the landlord are to be determined as on the date of the application for eviction. The order of eviction crystallized the rights of the landlord. The tenant had filed the revision in the High

Court on 18.08.2003. During the pendency of the revision petition, the order for amalgamation under the Companies Act passed by the High Court was made on 26.02.2006 which is a subsequent event. The Revision Petition was disposed of by the High Court on 05.08.2009. Had the revision petition been disposed of before 26.02.2006, this contention would not have arisen at all. The delay in the disposal of the revision petition should not prejudice the vested rights of the landlord under the decree of the Rent Controller confirmed by the Appellate Authority. Further, the amalgamation of the erstwhile landlord with the respondent involved not merely the transfer of the particular leasehold property but the entire business of the erstwhile landlord including the requirement of the leasehold premises for the acquired business. [Paras 15 and 16] [67-F-H; 68-A-D]

2.2. In normal circumstances, after passing of the decree by the trial court, the landlord would have obtained possession of the premises, but for the tenant continuing in occupation of the premises only on account of stay order from the appellate court. In such circumstances, the well known principle that "an act of the court shall prejudice no man" shall come into operation. Therefore, the heirs of the landlord will be fully entitled to defend the appeal preferred by the tenant. When a company stands dissolved (with or without winding up) due to amalgamation, its rights under the decree for eviction devolves on the amalgamated company. [Para 18] [69-D-F]

Shakuntala Bai and Ors. vs. Narayan Das and Ors. **(2004) 5 SCC 772;** *Usha P. Kuvelkar and Ors. vs. Ravindra Subrai Dalvi* **(2008) 1 SCC 330;** *Gaya Prasad vs. Pradeep Srivastava* **(2001) 2 SCC 604, referred to.**

2.3. In matters governed by the Rent Acts to take into

account subsequent events would inflict hardship to landlords, in a case like the instant one. [Para 22] [72-G]

Smt. Phool Rani and Ors. vs. Shri Naubat Rai Ahuluwalia, **(1973) SCC 688;** *Joginder Pal vs. Naval Kishore Behal* **(2002) 5 SCC 397;** *Lachmeshwar Prasad Shukul and Ors.* vs. *Keshwar Lal Chaudhuri and Ors.* **AIR 1941 F.C. 5, referred to.**

2.4. In the instant case, the subsequent event of amalgamation of a company took place during the pendency of the revision in the High Court. In a revision under s. 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, the Court is exercising a restricted jurisdiction and not wide powers of the appellate court. [Paras 24 and 25] [73-E, G]

M/s Sri Raja Lakshmi Dyeing Works and Ors. vs. *Rangaswamy Chettiar* **(1980) 4 SCC 259, referred to.**

2.5. Coming to the expression "for its own use/ occupation", it has to be construed widely and given wide and liberal meaning. When a company wants to expand its business and amalgamates with another company, this would also be a case of "for its own use". If a landlord which is a company cannot advance its interest in the business by amalgamating with another company by putting to use its own property, it would be unjust, unfair and unreasonable. Further, the provisions of Rent Control Act should not be so construed as to frustrate and defeat the legislation. If in a case of landlord requiring the premises for its own use, to amalgamate with another company and expands its business, the rent control legislation may clash with the provisions of the Companies Act. The Companies Act and the Rent Control Act have to be harmoniously interpreted and not to be so interpreted as to result in the one Act destroying a right under the other Act. [Para 27] [74-E-G]

2.6. The death of a landlord after passing the order of eviction does not *ipso facto* destroy the accrued right under the decree. The cases which have taken into account the subsequent event in favour of the tenant are cases where during the pendency of the appeal or revision, the requirement of the landlord had been fully satisfied and met or ceased to exist. In the case on hand, the landlord required it for its own business and for residential purposes of its employees. That requirement continues to exist also for the transferee company since the entire business of the transferor company stood transferred to the transferee company. The requirement of the company has neither been satisfied nor extinguished. The right to evict has already crystallized into a decree to which the company after amalgamation has succeeded by involuntary assignment. As the decree for eviction was under stay, the decree could not be executed. Once the stay is vacated or dissolved, the respondent would be entitled to execute the decree. In the instant case, the amalgamation order has also preserved the said right. [Para 28] [74-H; 75-A-D]

2.7. As per Clause 1.7 of the Scheme of amalgamation, all assets vest in the transferee company. As per Clause 6, any suit, petition, appeal or other proceedings in respect of any matter shall not abate or be discontinued and shall not be prejudicially affected by reason of the transfer of the said assets/liabilities of the Transferor Company or of anything contained in the scheme but the proceedings may be continued, prosecuted and enforced by or against the transferee company in the same manner and to the same extent as it would be or might have been continued prosecuted and enforced by or against the Transferor company as if the scheme has not been made. In view of the same, by virtue of the provisions in the Scheme of Amalgamation and operation of Order 21 rule 16 C.P.C., the decree

holder is deemed to execute the decree. Section 18 of the Act provides that the order of eviction shall be executed by the Controller as if such order is an order of a civil court and for this purpose, the Controller shall have all the powers of the civil court. For the purpose of execution of the order, all the powers of civil court have been invested in the Rent Controller. Therefore, the principle of Order 21 Rule 16 C.P.C. will apply. In any event, the C.P.C. provisions to the extent advance public interest or ensure a just, fair and reasonable procedure and does not conflict with the Act will apply to execution of the order of eviction. [Para 28] [75-D-H; 76-A]

Hasmat Rai and Anr. vs. Raghunath Prasad **(1981) 3 SCC 103;** *Saraswati Industrial Syndicate Ltd. vs. C.I.T.* **1990 (Supp) SCC 675;** *Hindustan Lever and Anr. vs. State of Maharashtra and Anr.* **(2004) 9 SCC 438, held inapplicable.**

General Radio and Appliances Co. Ltd. and Ors. vs. M.A. Khader (dead) by LRs. **(1986) 2 SCC 656;** *Singer India Ltd.* vs. *Chander Mohan Chadha and Ors.* **(2004) 7 SCC 1, referred to.**

2.8. The landlord's entitlement to evict the tenant had merged with the decree. Further, the amalgamation took place long after the decree for eviction and rights had crystallized under the decree for eviction and merged into it. The tenant was in possession of vast extent of property which comprises of a big building with built up area of 5,274 sq. ft. together with appurtenant space i.e. vacant land total measuring 61,872 sq. ft. from the year 1965 for a period of over 45 years. The appellant was initially paying rent of Rs. 400/- for the building and Rs. 300/- for the furniture and fixtures which was raised to Rs. 400/- and Rs. 475/- respectively in 1970's. The Rent Controller fixed the fair rent as Rs. 6,465/- which was enhanced by the appellate authority to Rs. 7,852/- [Para 29] [76-B-D]

2.9. The assets of the erstwhile company had vested in the amalgamated company. A decree constitutes an asset. The said asset of erstwhile company has devolved on the amalgamated company. The eviction was on the ground of its own requirement of the erstwhile company. The said business will be continued to be carried by the amalgamated company. If the amalgamated company is deprived of the said benefit, it will frustrate the very purpose of amalgamation and defeat the order of amalgamation passed by the High Court exercising jurisdiction under the Companies Act. [Para 30] [78-E-G]

2.10. The vacant land which was leased along with the building is the subject matter of the proceedings under the Ceiling Act. The landlord has obtained an order of exemption under s. 21 of the Act. The exemption was expressly for the extension of the industry which is a public purpose. Under s. 21, only when the requirement of public interest is satisfied, the Government has power to grant exemption. When the landlord obtained an order of exemption under s. 21 of the Ceiling Act, the tenant moved the Government for cancellation of exemption and to assign the land in its favour. It also challenged the order of exemption in Writ Petition and Writ Appeal which was dismissed by the High Court. [Para 31] [76-G-H; 77-A-B]

2.11. Section 10, sub-clause 3, first proviso has no application to pending revisions. It applies only to an application made before the Rent Controller. The proviso enjoins that the landlord "is not occupying" the building. Even if the landlord owns other properties but is not in occupation thereof, the proviso will not be attracted. The Rent Act does not deal with the ownership or title, but only with regard to the entitlement to occupation. Even otherwise, this Court will not permit the said new plea to be raised for the first time. In any event, the plea taken in the application for permission to place on record

additional facts and documents that the amalgamated company owns other land, it is not pleaded that it is in occupation of such land, therefore, the proviso to s. 10(3)(iii) is not attracted. [Para 32] [77-D-H]

2.12. The object of the Act is to prevent unreasonable eviction of the tenant in occupation and to control rents. Similarly, when landlord wants the property for its own purpose, it takes into account the fact of the landlord's occupation of other properties and not its ownership of other properties which are not in occupation. The Act permits eviction on reasonable grounds as provided for in the Act. There may be cases where it would be reasonable to evict the tenant, but that requirement may not strictly fall in any one of the provisions of s. 10 of the Act to entitle the landlord to evict the tenant. Section 29 of the Act therefore, enables the Government to grant exemption of the building in such cases so that the landlord may be entitled to evict the tenant under the ordinary remedy of suit. [Para 33] [77-H; 78-A-C]

Case Law Reference:

(1981) 3 SCC 103	**Held inapplicable.**	**Para 13**
1990 (Supp) SCC 675	**Held inapplicable.**	**Para 13**
(2004) 9 SCC 438	**Held inapplicable.**	**Para 13**
(1986) 2 SCC 656	**Referred to.**	**Para 14**
(2004) 7 SCC 1	**Referred to.**	**Para 14**
(2004) 5 SCC 772	**Referred to.**	**Para 17**
(2008) 1 SCC 330	**Referred to.**	**Para 19**
(2001) 2 SCC 604	**Referred to.**	**Para 20**
(1973) 1 SCC 688	**Referred to.**	**Para 21**
(2002) 5 SCC 397	**Referred to.**	**Para 22**

AIR 1941 F.C. 5	**Referred to.**	**Para 23**
(1980) 4 SCC 259	**Referred to.**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4481 of 2010.

From the Judgment & Order dated 05.08.2009 of the High Court of Judicature at Madras in Civil Revision Petition (NPD) No. 1729 of 2003.

K.K. Venugopal, Vuneet Subramani, Liz Mathew for the Appellant.

K. Parasaran, KV Viswanathan, Anil Kaushik, Abhishek Kaushik, Mary Mitzy, Gopal Singh Chauhan, Shiv Prakash Pandey for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 05.08.2009 passed by the High Court of Judicature at Madras in Civil Revision Petition (NPD) No. 1729 of 2003 whereby the High Court dismissed the civil revision filed by the appellant herein.

3. Brief facts in a nutshell are as under:

(a) The appellant took the suit premises in TS No. 1357 (bearing Old No. 6/499 and New No.8/499) on Trichy Road, Coimbatore comprising an area of 1.4 acres, i.e., 61,872 sq. ft. with a building having built up area of 5,274 sq. ft. on lease under lease deed dated 17.11.1965 for use as residence-cum-office from M/s United Coffee Supply Co. Ltd., for a period of five years on a monthly rental of Rs.400/-. On the expiry of the period, the lease was further renewed for a period of five years under lease deed dated 01.10.1970. On failure to renew the lease from 01.10.1975, the appellant instituted a suit in O.S.

No. 209 of 1976 for specific performance of the renewal clause in the lease agreement dated 1.10.1970. In the said suit, a settlement dated 12.04.1978 was arrived at whereby the appellant agreed to pay fair rent of Rs.1200/- w.e.f. 1.10.1975.

(b) In the meantime, Government of Tamil Nadu brought into force the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 (hereinafter referred to as "the Ceiling Act") on 17.05.1978. Under the provisions of the said Act, ceiling was fixed regarding extent of vacant land which may be owned by a person and Government had the right to take possession of the excess land over the ceiling limit. On 13.09.1978, the erstwhile landlord-company applied for exemption from acquisition of excess vacant lands. On 04.11.1981, the erstwhile landlord company was granted partial exemption from acquisition of vacant lands under Section 21(1)(a) of the Ceiling Act on the ground of public interest by way of G.O. Ms. No. 2900. On 25.06.1986, by way of G.O. (Rt) No. 852 issued by the Revenue Department, the partial exemption earlier granted was reviewed and extended to the entire extent of the suit premises under Section 21(1)(a) of the Ceiling Act, i.e. on the ground of public interest.

(c) In 1984, the landlord-company filed RCOP No. 397 of 1984 claiming monthly rental of Rs. 9500/- retrospectively from 01.10.1980. However, the Rent Controller, by order dated 18.10.1994, fixed the fair rent as Rs.6465/- from 1.10.1980. The appellant filed R.C.A. No. 171 of 1994 whereunder the rent was fixed as Rs.7852/- on 19.12.2001 which is currently being paid. On 15.09.1985, the name of the landlord-company, M/s United Coffee Supply Co. Ltd. was changed to Stanes Tea and Coffee Ltd.

(d) Stanes Tea and Coffee Ltd. filed RCOP No. 105 of 1987 on 03.04.1987 under Sections 10(3)(a)(i) and (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as the 'Act') on the ground that it required the building and premises for their own use and

occupation and for providing residential accommodation to its employees and that vacant areas were required for agency, warehouses and research and development building, office quarters and amenities for staff such as garage, cycle stand, staff recreation club, community hall etc. The Rent Controller, by its order, dated 09.04.1992 allowed the petition and directed eviction of the appellant. Aggrieved by the said order, the appellant filed an appeal being RCA No. 42 of 1992 before the Appellate Authority and IInd Additional Subordinate Judge of Coimbatore and the same was dismissed on 10.04.2003. Against the said order, the appellant filed C.R.P. No. 1729 of 2003 before the High Court. During the pendency of the said C.R.P. before the High Court, by a Scheme of Amalgamation, M/s Stanes Tea and Coffee Limited was transferred to M/s T. Stanes & Company Ltd., with effect from 01.04.2005 under Sections 391 to 394 of the Companies Act, 1956 and this was duly approved by the High Court. Thereafter, an application for amendment of the cause title was filed which was also duly allowed by the High Court by order dated 10.07.2009. On 05.08.2009, the High Court dismissed the revision filed by the appellant herein. Aggrieved by the said order, the appellant has preferred the above appeal before this Court by way of special leave petition.

4. Heard Mr. K.K. Venugopal, learned senior counsel for the appellant-tenant and Mr. K. Parasaran, learned senior counsel for the respondent-landlord.

5. Mr. Venugopal, learned senior counsel for the appellant-tenant mainly submitted that upon the amalgamation of the original rent control petitioner with the respondent herein, the new entity was not entitled to continue the eviction proceedings under Section 10(3)(a)(i) and (iii) of the Act since the need of the new entity will be different. In addition to the same, though not seriously raised before the Courts below, he submitted that other residential and non-residential buildings owned by the respondent herein disable the new entity to claim the benefit of order of eviction.

6. On the other hand, Mr. K. Parasaran, learned senior counsel for the respondent-landlord, by taking us through the Scheme of Amalgamation approved by the Company Judge and the relevant provisions in the Act, submitted that after merging of the Company which is the landlord with another Company, there is no forfeiture of any right of the landlord under the provisions of the Rent Control Act or the Transfer of Property Act. He also submitted that the amalgamation of the erstwhile landlord with the respondent herein involved not merely the transfer of the particular leasehold property but the entire business of the erstwhile landlord including their requirement of the leasehold premises for the acquired business. He also submitted that the subsequent events, namely, the merger had taken place during the pendency of the Revision before the High Court, are not matters of automatic cognizance by this Court or a mandate on the Courts below. He elaborately submitted that in the present case, the landlord required the premises for its own business and for residential purposes of its employees and the requirement continues to exist also for the transferee company since the entire business of the transferor company stood transferred to the transferee company.

7. We have considered all the relevant materials and rival contentions.

8. It is not in dispute that Stanes Tea and Coffee Ltd. has approached the Rent Controller by filing a petition under Section 10 (3) (a) (i) and (iii) of the Act for possession and eviction against the tenant with regard to the premises in question for its own use and occupation for residential and non-residential purpose. The relevant provisions are extracted hereunder:

"10. Eviction of tenants.- (1) xxx xxxx

(2) xxxxx

(3) (a) A landlord may, subject to the provisions of clause

(d), apply to the Controller for an order directing the tenant to put the landlord in possession of the building-

(i) in case it is residential building, if the landlord requires it for his own occupation or for the occupation of any member of his family and if he or any member of his family is not occupying a residential building of his own in the city, town or village concerned;

(ii) xxxx

(iii) in case it is any other non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on, a non-residential building in the city, town or village concerned which is own:….."

9. After analyzing the materials the Rent Controller and the Appellate Authority accepting the case of the landlord concurrently found that there is a *bona fide* need and passed an order of eviction against the tenant-appellant herein. It is relevant to note that the rent control petition was filed on 03.04.1987 and the Rent Controller ordered eviction on 09.04.1992. The appeal filed by the tenant came to be dismissed on 10.04.2003 by the Rent Control Appellate Authority. Thereafter, the tenant filed a civil revision petition under Section 25 of the Act on 18.08.2003 before the High Court. During the pendency of the above said civil revision petition before the High Court, the Scheme of Amalgamation was finalized and by order dated 26.06.2006, the Company Court sanctioned the Scheme. Thereafter, an application was filed for amendment of the cause title in the civil revision petition was filed by the tenant and the same was also allowed.

10. The Scheme of Amalgamation, filed in the appeal paper-book, contains various definitions and clauses. Clause 1.1 defines "Transferor Company" and Clause 1.2 defines

"Transferee Company". Among other clauses, we are concerned with Clauses 1.5 and 6, which read thus:

> "1.5. The *"Effective date"* shall mean the date on which the certified copy of the order of the High Court of Madras sanctioning the scheme vesting the assets, properties, liabilities, rights, duties, obligations and the line of the Transferor Company in the Transferee Company are filed with Registrar of Companies of Tamil Nadu after obtaining the consents, approvals, permissions, resolutions agreements, sanctions and orders necessary thereof."
>
> "6. *Legal Proceedings* - With effect from the effective date, if any suit, petition, appeal, revision or other proceedings of whatever nature (hereinafter called "the proceedings) by or agents the Transferor Company under any statute whether pending on the Transfer Date or which may be instituted in future (whether before or after the effective date) in respect of any matter arising before the effective date and relating to the Transferred undertaking as agreed between the Transferor Company and the Transferee Company shall not abate be discontinued or be in any way prejudicially affected by reason of the transfer of the said assets/liabilities of the Transferor Company or of anything contained in the scheme but the proceedings may be continued, prosecuted and enforced by or against the Transferee Company in the same manner and to the same extent as it would be or might have been continued prosecuted and enforced by or against the Transferor Company as if the Scheme had not been made."

Clause 15 makes it clear that the Transferor Company shall be dissolved without winding up as and from the effective date or such other date as the High Court of Madras may direct.

11. As mentioned earlier, after analyzing the Company Petition filed for sanctioning the Scheme of Amalgamation under Sections 391 to 394 read with Section 79 of the

Companies Act, 1956 and after satisfying all aspects, by order dated 26.06.2006, the High Court sanctioned the Scheme with effect from the transfer dated 01.04.2005 and allowed the petitions accordingly.

12. After getting the order from the Company Court, the Transferee Company filed a petition in the pending civil revision petition filed by the tenant for amendment of the cause title and it is not in dispute that the same was ordered by the learned single Judge subject to objection by the tenant. In the light of the above factual position, let us consider whether after amalgamation of the original landlord with the Transferee Company, the Transferee Company is entitled to avail the benefit of the order of eviction granted under Section 10 (3) (a) (i) and (iii) as passed by the Rent Controller, approved by the Appellate Authority and the High Court.

13. Mr. Venugopal, learned senior counsel submitted that the eviction was ordered on the ground of personal requirement and such requirement must continue to exist till final determination of the case. In view of the same, according to him, the Appellate/Revisional Court must take cognizance of subsequent events taking into account that the requirement of the landlord is still continuing. In support of the above proposition, he relied on the following three judgments:-

(i) In *Hasmat Rai & Anr. vs. Raghunath Prasad* (1981) 3 SCC 103, this Court held:-

> "14……..If a landlord bona fide requires possession of a premises let for residential purpose for his own use, he can sue and obtain possession. He is equally entitled to obtain possession of the premises let for non-residential purposes if he wants to continue or start his business. If he commences the proceedings for eviction on the ground of personal requirement he must be able to allege and show the requirement on the date of initiation of action in the court which would be his cause of action. But that is

not sufficient. This requirement must continue throughout the progress of the litigation and must exist on the date of the decree and when we say decree we mean the decree of the final court. Any other view would defeat the beneficial provisions of a welfare legislation like the Rent Restriction Act. If the landlord is able to show his requirement when the action is commenced and the requirement continued till the date of the decree of the trial court and thereafter during the pendency of the appeal by the tenant if the landlord comes in possession of the premises sufficient to satisfy his requirement, on the view taken by the High Court, the tenant should be able to show that the subsequent events disentitled the plaintiff, on the only ground that here is tenant against whom a decree or order for eviction has been passed and no additional evidence was admissible to take note of subsequent events. When a statutory right of appeal is conferred against the decree or the order and once in exercise of the right an appeal is preferred the decree or order ceases to be final. What the definition of "tenant" excludes from its operation is the person against whom the decree or order for eviction is made and the decree or order has become final in the sense that it is not open to further adjudication by a court or hierarchy of courts. An appeal is a continuation of suit. Therefore a tenant against whom a decree for eviction is passed by trial court does not lose protection if he files the appeal because if appeal is allowed the umbrella of statutory protection shields him. Therefore it is indisputable that the decree or order for eviction referred to in the definition of tenant must mean final decree or final order of eviction. Once an appeal against decree or order of eviction is preferred, the appeal being a continuation of suit, the landlord's need must be shown to continue to exist at appellate stage. If the tenant is in a position to show that the need or requirement no more exists because of subsequent events, it would be open to him to point out such events and the court including the appellate court has

to examine, evaluate and adjudicate the same. Otherwise the landlord would derive an unfair advantage. An illustration would clarify what we want to convey. A landlord was in a position to show that he needed possession of demised premises on the date of the suit as well as on the date of the decree of the trial court. When the matter was pending in appeal at the instance of the tenant, the landlord built a house or bungalow which would fully satisfy his requirement. If this subsequent event is taken into consideration, the landlord would have to be non-suited. Can the court shut its eyes and evict the tenant? Such is neither the spirit nor intendment of Rent Restriction Act which was enacted to fetter the unfettered right of re-entry. Therefore when an action is brought by the landlord under Rent Restriction Act for eviction on the ground of personal requirement, his need must not only be shown to exist at the date of the suit, but must exist on the date of the appellate decree, or the date when a higher court deals with the matter. During the progress and passage of proceeding from court to court if subsequent events occur which if noticed would non-suit the plaintiff, the court has to examine and evaluate the same and mould the decree accordingly. This position is no more in controversy in view of a decision of this Court in *Pasupuleti Venkateswarlu* where Justice Krishna Iyer speaking for the court observed as under: (SCC p. 772, para 4)

> We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the Rules of fairness to both sides are scrupulously obeyed……..
>
> …….Therefore, it is now incontrovertible that where possession is sought for personal requirement it would be

correct to say that the requirement pleaded by the landlord must not only exist on the date of the action but must subsist till the final decree or an order for eviction is made. If in the meantime events have cropped up which would show that the landlord's requirement is wholly satisfied then in that case his action must fail and in such a situation it is incorrect to say that as decree or order for eviction is passed against the tenant he cannot invite the court to take into consideration subsequent events. He can be precluded from so contending when the decree or order for eviction has become final. In view of the decision in *Pasupuleti case* the decision of the Madhya Pradesh High Court in *Taramal case* must be taken to have been overruled and it could not be distinguished only on the ground that the definition of "tenant" in the Madhya Pradesh Act is different from the one in Andhra Pradesh Act. Therefore, the High Court was in error in declining to take this subsequent event which was admittedly put forth in the plaint itself into consideration……."

In the present case, Clause 6 (Legal proceedings) of the Scheme of Amalgamation makes it clear that with effect from the effective date i.e. 01.04.2005 all proceedings in which Transferor Company was a party be continued, prosecuted and enforced by or against the Transferee Company in the same manner and to the same extent as it would be or might have been continued, prosecuted and enforced by or against the Transferor Company as if the Scheme had not been made. In view of the above specific clause coupled with other clauses of the Scheme and taking note of the fact that the Transferor Company in its entirety merged with the Transferee Company, the above decision is not directly applicable to the case on hand.

(ii) The next decision relied on by him is *Saraswati Industrial Syndicate Ltd. vs. C.I.T.* 1990 (Supp) SCC 675. In that case, the question was whether on the amalgamation of

the Indian Sugar Company with the appellant-Company i.e. Saraswati Industrial Syndicate Ltd., the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41 (1) of Income Tax Act, 1961. This Court held as under:-

> **"5.** Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: *Halsbury's Laws of England* (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity.
>
> 6. In *General Radio and Appliances Co. Ltd.* v. *M.A. Khader* the effect of amalgamation of two companies was considered. M/s General Radio and Appliances Co. Ltd. was tenant of a premises under an agreement providing

that the tenant shall not sub-let the premises or any portion thereof to anyone without the consent of the landlord. M/s General Radio and Appliances Co. Ltd. was amalgamated with M/s National Ekco Radio and Engineering Co. Ltd. under a scheme of amalgamation and order of the High Court under Sections 391 and 394 of Companies Act, 1956. Under the amalgamation scheme, the transferee company, namely, M/s National Ekco Radio and Engineering Company had acquired all the interest, rights including leasehold and tenancy rights of the transferor company and the same vested in the transferee company. Pursuant to the amalgamation scheme the transferee company continued to occupy the premises which had been let out to the transferor company. The landlord initiated proceedings for the eviction on the ground of unauthorised sub-letting of the premises by the transferor company. The transferee company set up a defence that by amalgamation of the two companies under the order of the Bombay High Court all interest, rights including leasehold and tenancy rights held by the transferor company blended with the transferee company, therefore the transferee company was legal tenant and there was no question of any sub-letting. The Rent Controller and the High Court both decreed the landlord's suit. This Court in appeal held that under the order of amalgamation made on the basis of the High Court's order, the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes. This decision lays down that after the amalgamation of the two companies the transferor company ceased to have any entity and the amalgamated company acquired a new status and it was not possible to treat the two companies as partners or jointly liable in respect of their liabilities and assets. …….

……The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there cannot be any doubt that when two companies

amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."

This case deals with reference to liability to pay income tax by Transferor Company after amalgamation and hence not applicable to the case on hand.

(iii) The third decision heavily relied on by Mr. Venugopal is *Hindustan Lever & Anr. vs. State of Maharashtra & Anr.* (2004) 9 SCC 438. In that case, Tata Oil Mills Co. Ltd. (transferor Company) was incorporated on 10.12.1917 under the Companies Act, 1913. Hindustan Lever Ltd. (transferee Company) was incorporated under the same Act on 17.10.1933. The scheme of amalgamation of the transferor Company with the transferee Company was formulated and approved by the Board of Directors of the respective companies on 19.03.1993. On 03.03.1994 the scheme of amalgamation of the transferor Company with the transferee Company was sanctioned with certain modifications by a learned single Judge of the High Court. Appeal filed against the judgment and order of the learned single Judge was rejected by the Division Bench on 18.05.1994. The special leave petition against the above judgment of the Division Bench was dismissed by this Court on 24.10.1994. The drawn-up order of amalgamation of the transferor Company with the transferee Company was approved by the High Court on 24.11.1994. On presentation of the certified copy of the Court's order, the Registrar of Companies, Maharashtra issued a certificate amalgamating the two companies. In view of the stamp duty sought to be levied on the order of amalgamation passed under Section 394 of the Companies Act, 1956 the appellant-Hindustan Lever filed writ petition in the Bombay High Court challenging the constitutional validity of the provisions of Section

2 (g)(iv) of the Bombay Stamp Act, 1958. The Division Bench upheld the validity and dismissed the writ petition. This decision mainly deals with payment of stamp duty levied on the order of amalgamation and not helpful to the case on hand.

14. With reference to the submissions made by Mr. Venugopal and the above mentioned decisions relied on, amalgamation of a company with another company under Sections 391 to 394 of the Companies Act has different legal consequences on the rights of the Company in a case where it is a tenant of a building entitled to the benefits of the Act and in a case where company which amalgamates with another company is a landlord of the building. When a company which is a tenant amalgamates with another company, the amalgamating company (Transferor Company) loses its identity. It would, in law, amount to the amalgamating company *inter alia* transferring its right under the lease even if it be considered as an involuntary transfer. Such amalgamation would fall within the mischief of Section 10(2)(ii)(a) of the Act when it is without the written consent of the landlord and would result in forfeiture of the tenancy [vide *General Radio and Appliances Co. Ltd. & Ors. vs. M.A. Khader (dead) by LRs. (1986) 2 SCC 656 and Singer India Ltd. vs. Chander Mohan Chadha and Ors.* (2004) 7 SCC 1.] As in the present case, the company which is the landlord merges with another company, there is no forfeiture of any right of the landlord under the provisions of the Act or under the Transfer of Property Act.

15. In a case where a company is a tenant, amalgamation is the cause of action for the landlord to sue the tenant company for eviction on the ground of subletting without the consent of the landlord. In the present case, the petition by the landlord for eviction of the tenant was filed on 03.04.1987. The cause of action has no relation to amalgamation, irrespective of whether it is prior or subsequent to filing of the application for eviction. The Rent Controller ordered eviction on 09.04.1992. The appeal of the tenant was disposed of by the Appellate

Authority on 10.04.2003. The rights of the landlord are to be determined as on the date of the application for eviction. The order of eviction crystallized the rights of the landlord. The tenant had filed the revision in the High Court on 18.08.2003. During the pendency of the revision petition, the order for amalgamation under the Companies Act passed by the High Court was made on 26.02.2006 which is a subsequent event. Revision Petition was disposed of by the High Court on 05.08.2009. As rightly pointed out by Mr. Parasaran, learned senior counsel, had the revision petition been disposed of before 26.02.2006, this contention would not have arisen at all. The delay in the disposal of the revision petition should not prejudice the vested rights of the landlord under the decree of the Rent Controller confirmed by the Appellate Authority.

16. Further, the amalgamation of the erstwhile landlord with the respondent herein involved not merely the transfer of the particular leasehold property but the entire business of the erstwhile landlord including the requirement of the leasehold premises for the acquired business. In view of the factual details including various clauses in the Scheme of Amalgamation which was approved by the High Court, while there is no quarrel about the proposition in the decision relied on by Mr. Venugopal, they are not applicable to the case on hand.

17. As far as the appellant's prayer before this Court to take note of the subsequent event of amalgamation, it is at the outset submitted that subsequent events are not matters of automatic cognizance by this Court or a mandate on the courts below. A subsequent event is one which may be taken into account in certain circumstances and deserves to be eschewed and kept out of the purview of judicial consideration in certain other cases. Mr. Parasaran, learned senior counsel pointed out that in cases under Rent Acts there are two lines of cases. One has taken into account subsequent events and moulded the relief and the other refused to take into account subsequent events. According to him, the present case falls within the line

of cases where subsequent event was not taken into account. In the present case, he submitted that the subsequent events do not have a fundamental impact on the order of eviction based on the requirement of the landlord for its own occupation and/or for purpose of its business. According to him, the subsequent event is therefore not to be taken into account. In *Shakuntala Bai and Ors. vs. Narayan Das & Ors.* (2004) 5 SCC 772, it was held that with regard to the category of cases where a decree for eviction is passed and the landlord died during the pendency of the appeal, the estate is entitled to the benefit which, under a decree, has accrued in favour of the landlord and the legal representatives are entitled to defend further proceedings like an appeal which is challenged to the benefit under the decree.

18. We agree with Mr. Parasaran that, in normal circumstances, after passing of the decree by the trial Court, the landlord would have obtained possession of the premises, but for the tenant continuing in occupation of the premises only on account of stay order from the appellate court. In such circumstances, the well known principle that "an act of the court shall prejudice no man" shall come into operation. Therefore, the heirs of the landlord will be fully entitled to defend the appeal preferred by the tenant. When a company stands dissolved (with or without winding up) due to amalgamation, its rights under the decree for eviction devolves on the amalgamated company.

19. Further in *Usha P. Kuvelkar & Ors. vs. Ravindra Subrai Dalvi,* (2008) 1 SCC 330, this Court clearly brought out the distinction between the cases where death occurred after the decree and death occurring during the decree. It was held in para 14 that:-

> "……In the same decision a contrary note expressed by this Court in *P.V. Papanna* v. *K. Padmanabhaiah* was held to be in the nature of an obiter. This Court in

> *Shakuntala Bai* referred to the decision in *Shantilal Thakordas* v. *Chimanlal Maganlal Telwala* and specifically observed that the view expressed in *Shantilal Thakordas case* did not, in any manner, affect the view expressed in *Phool Rani* v. *Naubat Rai Ahluwalia* to the effect that where the death of landlord occurs after the decree for possession has been passed in his favour, his legal heirs are entitled to defend the further proceedings like an appeal and the benefit accrued to them under the decree. Here in this case also it is obvious that the original landlord, Prabhakar Govind Sinai Kuvelkar had expired only after the eviction order passed by the Additional Rent Controller. This is apart from the fact that the landlord had sought the possession not only for himself but also for his family members. There is a clear reference in Section 23(1)(*a*)(*i*) of the Act regarding occupation of the family members of the landlord. In that view the contention raised by the learned counsel for the respondent must be rejected."

20. As to subsequent events, this Court in *Gaya Prasad vs. Pradeep Srivastava* (2001) 2 SCC 604 at 609 para 10 observed as under:

> "10**.** We have no doubt that the crucial date for deciding as to the bona fides of the requirement of the landlord is the date of his application for eviction. The antecedent days may perhaps have utility for him to reach the said crucial date of consideration. If every subsequent development during the post-petition period is to be taken into account for judging the bona fides of the requirement pleaded by the landlord there would perhaps be no end so long as the unfortunate situation in our litigative slow-process system subsists. During 23 years, after the landlord moved for eviction on the ground that his son needed the building, neither the landlord nor his son is expected to remain idle without doing any work, lest, joining

any new assignment or starting any new work would be at the peril of forfeiting his requirement to occupy the building. It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch a new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent developments during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to erase the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an applicant just on the eve of his reaching the finale, after passing through all the previous levels of the litigation, merely on the ground that certain developments occurred pendente lite, because the opposite party succeeded in prolonging the matter for such unduly long period."

It was further held in para 15 that:-

"15**.** The judicial tardiness, for which unfortunately our system has acquired notoriety, causes the lis to creep through the line for long long years from the start to the ultimate termini, is a malady afflicting the system. During this long interval many many events are bound to take place which might happen in relation to the parties as well as the subject-matter of the lis. If the cause of action is to be submerged in such subsequent events on account of the malady of the system it shatters the confidence of the litigant, despite the impairment already caused."

It would inflict great injustice in many cases if subsequent events are taken into account when long years have passed unless there are very compelling circumstances to take into account the subsequent events.

21. In *Smt. Phool Rani & Ors. vs. Shri Naubat Rai Ahuluwalia,* (1973) 1 SCC 688, at page 693, this Court, after discussing the issue in paras 9, 10, 11 and 12 held in para 13 and 14 as under:-

"13. Several decisions were cited before us but those falling within the following categories are to be distinguished—

(*i*) cases in which the death of the plaintiff occurred after a decree for possession was passed in his favour; say, during the pendency of an appeal filed by the unsuccessful tenant;

(*ii*) cases in which the death of the decree-holder landlord was pleaded as a defence in execution proceedings; and

(*iii*) cases in which, not the plaintiff but the defendant — tenant died during the pendency of the proceedings and the tenant's heirs took the plea that the ejectment proceedings cannot be continued against them.

14. Cases of the first category are distinguishable because the decisions therein are explicable on the basis, though not always so expressed, that the estate is entitled to the benefit which, under a decree, has accrued in favour of the plaintiff and therefore the legal representatives are entitled to defend further proceedings, like an appeal which constitute a challenge to that benefit."

22. Particularly in matters governed by the Rent Acts to take into account subsequent events would inflict hardship to landlords, in a case like the present one. In this context, it was held in para 9 of *Joginder Pal vs. Naval Kishore Behal* (2002) 5 SCC 397 that:-

"9. The rent control legislations are heavily loaded in favour of the tenants treating them as weaker sections of the

society requiring legislative protection against exploitation and unscrupulous devices of greedy landlords. The legislative intent has to be respected by the courts while interpreting the laws. But it is being uncharitable to legislatures if they are attributed with an intention that they lean only in favour of the tenants and while being fair to the tenants, go to the extent of being unfair to the landlords. The legislature is fair to the tenants and to the landlords — both……"

23. It is pointed out by Mr. Parasaran, learned senior counsel that the tenant, in the present case, is an affluent company and is not a tenant falling under the category of weaker sections of tenants of small properties. He further submitted that the principle of taking into consideration subsequent event is to be confined only to appeals on the principle that an appeal is a continuation of the proceedings and the appellate court exercises all the powers of the trial Court. [Vide *Lachmeshwar Prasad Shukul and Ors. vs. Keshwar Lal Chaudhuri & Ors.* AIR 1941 F.C. 5 at page 13.]

24. In the present case, subsequent event of amalgamation of a company took place during the pendency of the revision in the High Court. Though, subsequent events which have occurred during the pendency of a revision petition in the High Court or the matter was pending before this Court, have been taken into consideration by this Court in some cases, the question as to the difference between the exercise of jurisdiction in appeal and revision was not argued or decided in those cases.

25. In a revision under Section 25 of the Act, the Court is exercising a restricted jurisdiction and not wide powers of the appellate court. In *M/s Sri Raja Lakshmi Dyeing Works and Ors. vs. Rangaswamy Chettiar* (1980) 4 SCC 259 at page 262 it was held:-

"……Therefore, despite the wide language employed in

Section 25, the High Court quite obviously should not interfere with findings of fact merely because it does not agree with the finding of the subordinate authority. The power conferred on the High Court under Section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act may not be as narrow as the revisional power of the High Court under Section 115 of the Code of Civil Procedure but in the words of Untwalia, J., in *Dattonpant Gopalvarao Devakate* v. *Vithalrao Maruthirao Janagaval*[1]; "it is not wide enough to make the High Court a second Court of first appeal".

26. Mr. Parasaran reiterated that the High Court having only the power of limited jurisdiction and not powers of appellate court, the subsequent event which occurred during the pendency of the revision petition is not to be taken into account, the High Court will decide only as to the legality of the order under revision.

27. Coming to the expression "for its own use/occupation", it has to be construed widely and given wide and liberal meaning. When a company wants to expand its business and amalgamates with another company, this would also be a case of "for its own use". If a landlord which is a company cannot advance its interest in the business by amalgamating with another company by putting to use its own property, it would be unjust, unfair and unreasonable. Further, the provisions of Rent Control Act should not be so construed as to frustrate and defeat the legislation. If in a case of landlord requiring the premises for its own use, to amalgamate with another company and expands its business, the rent control legislation may clash with the provisions of the Companies Act. The Companies Act and the Rent Control Act have to be harmoniously interpreted and not to be so interpreted as to result in the one Act destroying a right under the other Act.

28. As stated earlier, death of a landlord after passing the order of eviction does not *ipso facto* destroy the accrued right

under the decree. The cases which have taken into account the subsequent event in favour of the tenant are cases where during the pendency of the appeal or revision, the requirement of the landlord had been fully satisfied and met or ceased to exist. In the case on hand, the landlord required it for its own business and for residential purposes of its employees. That requirement continues to exist also for the transferee company since the entire business of the transferor company stood transferred to the transferee company. The requirement of the company has neither been satisfied nor extinguished. The right to evict has already crystallized into a decree to which the company after amalgamation has succeeded by involuntary assignment. As the decree for eviction was under stay, the decree could not be executed. Once the stay is vacated or dissolved, the respondent would be entitled to execute the decree. In the present case, the amalgamation order has also preserved the said right. As per Clause 1.7 of the Scheme, all assets vest in the transferee company. As per Clause 6, any suit, petition, appeal or other proceedings in respect of any matter shall not abate or be discontinued and shall not be prejudicially affected by reason of the transfer of the said assets/liabilities of the Transferor Company or of anything contained in the scheme but the proceedings may be continued, prosecuted and enforced by or against the transferee company in the same manner and to the same extent as it would be or might have been continued prosecuted and enforced by or against the Transferor company as if the scheme has not been made. In view of the same, by virtue of the provisions in the Scheme of Amalgamation and operation of Order 21 rule 16 of C.P.C., the decree holder is deemed to execute the decree. Section 18 of the Act provides that the order of eviction shall be executed by the Controller as if such order is an order of a civil court and for this purpose, the Controller shall have all the powers of the civil court. For the purpose of execution of the order, all the powers of civil court have been invested in the Rent Controller. Therefore, the principle of Order 21 Rule 16 of the C.P.C. will apply. In any event, as rightly pointed out by learned senior counsel for the

respondent that the C.P.C. provisions to the extent advance public interest or ensure a just, fair and reasonable procedure and does not conflict with the Act will apply to execution of the order of eviction.

29. The landlord's entitlement to evict the tenant had merged with the decree. Further, the amalgamation took place long after the decree for eviction and rights had crystallized under the decree for eviction and merged into it. The tenant has been in possession of vast extent of property which comprises of a big building with built up area of 5,274 sq. ft. together with appurtenant space i.e. vacant land total measuring 61,872 sq. ft. from the year 1965 for a period of over 45 years. The appellant was initially paying rent of Rs. 400/- for the building and Rs. 300/- for the furniture and fixtures which was raised to Rs. 400/- and Rs. 475/- respectively in 1970's. The Rent Controller fixed the fair rent as Rs. 6,465/- by order dated 18.10.1994 which was enhanced by the appellate authority in an appeal filed by the appellants to Rs. 7,852/- by order dated 19.12.2001.

30. The assets of the erstwhile company had vested in the amalgamated company. A decree constitutes an asset. The said asset of erstwhile company has devolved on the amalgamated company. The eviction was on the ground of its own requirement of the erstwhile company. The said business will be continued to be carried by the amalgamated company. If the amalgamated company is deprived of the said benefit, it will frustrate the very purpose of amalgamation and defeat the order of amalgamation passed by the High Court exercising jurisdiction under the Companies Act.

31. Further, the vacant land which was leased along with the building is the subject matter of the proceedings under the Ceiling Act. The landlord has obtained an order of exemption under Section 21 of the Act vide G.O. Rt. No. 2900 dated 04.11.1981 and the order G.O. Rt. No. 852 dated 25.06.1986. The exemption was expressly for the extension of the industry

which is a public purpose. It is relevant to mention that under Section 21, only when the requirement of public interest is satisfied, the Government has power to grant exemption. It is also pointed out the conduct of the tenant when the landlord obtained an order of exemption under Section 21 of the Ceiling Act, the tenant moved the Government for cancellation of exemption and to assign the land in its favour. It also challenged the order of exemption before the High Court in Writ Petition No. 6434 of 1987 which was dismissed by the High Court by order dated 18.04.1991 and Writ Appeal No. 1177 of 1992 which was dismissed by the Division Bench of the High Court by order dated 12.07.1993.

32. The reliance placed on behalf of the tenant, Section 10, sub-clause 3, first proviso, is a new plea. The said proviso reads as under:-

> "Provided that a person who becomes a landlord after the commencement of the tenancy by an instrument inter vivos shall not be entitled to apply under this clause before the expiry of three months from the date on which the instrument was registered."

It has no application to pending revisions. On the other hand, it applies only to an application made before the Rent Controller. The proviso enjoins that the landlord "is not occupying" the building. Even if the landlord owns other properties but is not in occupation thereof, the proviso will not be attracted. The Rent Act does not deal with the ownership or title, but only with regard to the entitlement to occupation. Even otherwise, this Court will not permit this new plea to be raised for the first time. In any event, it is pointed out that the plea taken in the application for permission to place on record additional facts and documents that the amalgamated company owns other land, it is not pleaded that it is in occupation of such land, therefore, the proviso to Section 10(3)(iii) is not attracted.

33. The object of the Act is to prevent unreasonable

eviction of the tenant in occupation and to control rents. Similarly, when landlord wants the property for its own purpose, it takes into account the fact of the landlord's occupation of other properties and not its ownership of other properties which does not in occupation. The Act permits eviction on reasonable grounds as provided for in the Act. It may be that there may be cases where it would be reasonable to evict the tenant, but that requirement may not strictly fall in any one of the provisions of Section 10 of the Act to entitle the landlord to evict the tenant. Section 29 of the Act therefore, enables the Government to grant exemption of the building in such cases so that the landlord may be entitled to evict the tenant under the ordinary remedy of suit.

34. The present case being one where the order of eviction is eminently just, fair and equitable as ordered by two authorities and confirmed by the High Court, we do not find any valid ground for interference, on the other hand, we are in agreement with the conclusion arrived at by the authorities as well as the High Court. Taking into consideration the appellant-tenant is continuing in the premises for more than four decades, we grant time for handing over possession till 31.12.2010 on usual condition of filing an undertaking within a period of four weeks. With the above observation, the appeal fails and the same is dismissed. No order as to costs.

N.J. Appeal dismissed.

ADALAT PANDIT & ANR.

v.

STATE OF BIHAR

(Criminal Appeal No. 716-717 of 2008)

MAY 14, 2010

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

Penal Code, 1860 – ss. 147, 148, 302, 302 r/w s. 34, 109 and 149 – Murder – Enmity between the parties as regard ownership and possession of mango orchard – Quarrel over plucking of mangoes – Eleven accused persons formed unlawful assembly and attacked complainant and his two sons – Gun shots fired at sons, brutally attacked by spears and body dragged to a certain distance resulting in instant death – Conviction of 11 accused u/ss. 147, 148, 302, 302 r/w s. 34, 109 and 149 and s. 27 of Arms Act by trial court – Conviction of 9 accused persons upheld by High Court – On appeal, held: Prosecution failed to prove that A-1, A-5 and A-9 had common intention to commit the murder – Thus, given benefit of doubt and are acquitted – A-2, A-3, A-4, A-6, A-7 and A-10 were members of unlawful assembly – There was active participation by them – A-4 had actually fired guns – Specific overt acts attributed to A4, A-7 and A-10 by all the witnesses – Evidence of eye-witnesses, though were partisan, is to be accepted – Plea of alibi of A 3 and A-10 rightly rejected by courts below – Thus, conviction of A-2, A-3, A-4, A-6, A-7 and A-10 upheld – Arms Act, 1959 – s. 27.

According to the prosecution case, there was a fierce enmity between the accused persons and the complainant on account of ownership and possession of the mango orchard. On the fateful day, the accused persons formed an unlawful assembly and committed the murder of SN and his brother PN in pursuance of their

common object. Eleven accused persons went to the mango orchard of the complainant for forcibly plucking mango fruits. When the complainant alongwith his two sons-SN and PN, protested against the act of accused persons in plucking the mangoes, accused persons attacked the three persons using fire arms and spear, resulting in the death of SN and PN. The accused persons were convicted for various offences punishable under ss. 147, 148, 302, 302 rw s 34 as also rw s. 109 and 149 IPC and s. 27 of the Arms Act. A 4 died during the trial itself and A 8 was acquitted by the High Court giving him benefit of the Juvenile Justice Act. Hence these appeals by the nine accused persons.

Allowing the appeals of A-1, A-5 and A-9 and dismissing that of A-2, A-3, A-4, A-6, A-7 and A-10, the Court

HELD: 1.1 After appreciating the evidence of PW-2, PW-4, PW-5, PW-7 and PW-8, the High Court recorded a finding that the genesis of the incident lied only in the fact that when the accused persons insisted on plucking the mangoes, the same was objected to by the complainant and his sons. The High Court is correct in recording the finding that it is on that point of time when the exchange of words took place between the parties that the seeds of the further incident were sown. Ultimately, the High Court recorded the finding that the identity of the accused persons was fully established by the prosecution witnesses and that all the appellants had gone to the place of occurrence alongwith their respective arms as members of an unlawful assembly with a common object of asserting right of harvesting the mango crops in the orchard of the informant and were prepared for meeting any resistance with the help of arms carried by the accused persons and that was the common object behind the firing on the two deceased, who met their instantaneous death. It was on this basis

that the High Court proceeded to convict the accused persons against whom there was specific evidence. [Para 7] [91-G-H; 92-A-D]

1.2 It cannot be said that A-1, A-5 and A-9 had the intentions to commit the murder and they cannot be said to be the members of the unlawful assembly on account of their mere presence at the place of occurrence and cannot be convicted of the offence u/s. 302/149 IPC. The evidence of the witnesses is seen closely. These three accused persons were undoubtedly referred to and all that has been stated by PW-2 is that A-5 was carrying a *lathi*. The witness has not referred to even A-1 and A-9 having any arms. As regards PW-4, he attributed A-1 and A-5 carrying a lathi while A-9 carrying a bhala (spear). However, did not refer to any overt act on part of these accused persons or use of the same by them. PW-5 mentioned about A-1 and A-2 having *lathi*. He made a general statement that all other accused persons were holding a bhala. However, PW 5 did not refer to any overt act on the part of A-1, A-5 and A-9. PW-6 turned hostile. PW-7 also stated that A-1, A-5 and A-9 were carrying *lathi*. The story is no different in respect of PW-8. His evidence is extremely general. Some of the witnesses did not refer to the exhortation given by the dead accused. At least insofar as the present accused persons are concerned, the role played by A-1, A-5 and A-9 appears to be that of the bystanders. There was a dispute between the parties on account of the possession of the field. Even the court litigation was on between the parties. Therefore, merely because the accused persons went to the field carrying lathis and arms, at least till such time when the exchange of words started and the shot was fired, it cannot be said that the whole assembly had become unlawful. The assembly would become unlawful when the dead accused allegedly gave the firing orders to A-4 and who in pursuance of that, fired on SN. Undoubtedly, these A-

1, A-5 and A-9 acted as mere mute bystanders, as there is no evidence also that they took part in the exchange of words. Under such circumstances, it would be difficult to attribute a common object to A-1, A-5 and A-9 on account of their presence even if they were armed with *lathis*. There is no evidence about A-5 carrying a spear. Under such circumstances, benefit of doubt must go to these three accused persons. They would be entitled to acquittal as the prosecution failed to prove that they had a common intention to commit murder. [Para 8] [92-E-H; 93-A-G]

1.3 A-2 and A-6 had only dragged the body of PN. That would certainly amount to the active participation of these two accused persons. Their continuance even after the firing in doing overt act of dragging the body from the field would certainly make them the part of the unlawful assembly, which had the common object of eliminating SN and PN. The part played by these two accused persons of dragging the body of PN is clearly referred to by the witnesses. Thus, it cannot be said that A-2 and A-6 would also be entitled to be acquitted for the same reasons as A-1, A-5 and A-9 have been acquitted for. They were the members of the unlawful assembly. Similar is the case as regards A-4 who had actually fired the guns, A-7 and A-10. The evidence is against them as accepted by both the Courts below. They were certainly the members of the unlawful assembly and specific overt acts have been attributed to them by almost all the witnesses. As regards A-4, all the witnesses are unanimous that he was the one who had fired. [Paras 9 and 10] [94-A-F]

1.4 A-7 and A-10 took active part in assaulting PN while the body of PN was dragged by A-2 and A-6. The witnesses specifically attributed the overt acts regarding assaulting of PN to these accused persons. The evidence led on behalf of the prosecution in respect of these

accused persons, which has been accepted by both the Courts below is satisfactory and there is no reason to disbelieve the witnesses who have attributed specific overt acts as regards the assault on PN to these accused persons. Insofar as A-10 is concerned, the plea was that of *alibi*, which plea has been rejected by the trial court and the High Court. Very heavy reliance was placed on the evidence of DW-20, DW-21, DW-22, DW-25 and DW-26 for his alibi. The plea of alibi by A-10 cannot be accepted and has to be disbelieved as has been done by the trial court and the appellate Court. The evidence of the prosecution witnesses, more particularly the eye-witnesses, who had specifically attributed an active role to this accused person is accepted. The appeals of A-7 and A-10 are dismissed holding that they were members of the unlawful assembly. Therefore, the judgments of the trial court and the appellate court convicting A-7 and A-10 with the aid of s. 149 IPC is upheld. [Para 11] [94-G-H; 95-A-B; 96-A-C]

1.5 A-3 was mentioned practically by all the witnesses. All the eye-witnesses referred to the specific overt act of A 3 of following SN and hitting him with spear on his back. PW-2 is very specific in his evidence insofar as the said act of the accused was concerned. Some cross-examination was directed to suggest that A-3 would have no reason or motive to take part in the assault. However, the main claim in the evidence of PW-2 regarding the overt act remained unshaken. Similar is the story of PW-4. The cross-examination of PW-4 is also of no consequence insofar as the main incident is concerned. PW-5 also repeated the same story without any substantial challenge to this version in the cross-examination. A typical suggestion was given to all the witnesses as if A-3 had issued a warrant for lagan (tax) on these witnesses. PW-7 also repeated the same story and there is very little or no cross-examination on the

main incident. In the cross-examination of PW 7 itself, the same stereotyped suggestion was given that A-3 had issued a lagaan against the father of PW 7, thereby suggesting an enmity. PW-8 is the only exception, who though referred to the presence of A-3 duly armed, did not refer to the overt act of A-3 of piercing SN with a spear. Much importance will not be attached to the evidence of PW 8 in view of the evidence of the other eye-witnesses. The evidence of the eye-witnesses in respect of the spear injuries on SN and PN is further corroborated by the medical evidence inasmuch as both SN and PN had suffered penetrating wounds and incised wounds in addition to the wounds caused by pellets. The Post Mortem Report was prepared by Dr. S (dead) as proved by Dr. J, who has proved all the injuries which are to be found in the Post Mortem Report. Therefore, there is very little scope for the argument that A-3 was not a part of the unlawful assembly and had not caused the wound to SN with spear after he was fired at. It cannot be said that A-3 was not concerned and has been falsely implicated. [Para 12] [96-D-H; 97-A-E]

1.6 The witnesses-PW 14, DW 1 to 5, RS, DW 7 to 11, DW 16 and DW 17 were all interested witnesses since they were the colleagues of A-3. The distance between the spot where the incident took place and the place where the accused A-3 claimed to have been present is extremely short. Admittedly, it is 3 or 4 kilometers. When all the witnesses claimed that the work of levy began from 6 O' clock in the morning, it is a very difficult claim to be accepted. In the first place, there is nothing proved by way of documentary evidence to show that the levy of wheat was to be collected at the house of DW-7 or that the levy was proposed to be held at village DP on that day. It cannot be said that there would be no documentary evidence, particularly if it was an exercise of levy. There is bound to be some records somewhere.

The receipts, which have been filed by the witnesses are not impressing because there is nothing on those receipts as to when they were actually prepared. In fact, the evidence of PW-14 could not be demolished when he said that he had reached the place where the levy work was going on and it was at about 1 O' clock that A-3 arrived there alongwith others. The trial court thoroughly discussed this evidence and held it not to be reliable. In view of the very short distance of 4 kilometers between the two places i.e. the place of incident M and the village DP, the evidence appears to be extremely doubtful. The evidence of DW-1, Deputy Superintendent of Police is not impressing as nothing would turn open the so-called report prepared by him in view of the direct evidence led by the prosecution. The trial court and the appellate court were right in rejecting the defence of alibi. [Para 16] [100-D-H; 101-A-B]

1.7 In the instant case, the evidence of the eye-witnesses, though they were somewhat partisan, was liable to be accepted, excepting against the three accused persons A-1, A-5 and A-9. Hence they are acquitted. [Para 17] [102-B-C]

Satbir Singh & Ors. Vs. State of Uttar Pradesh **2009 (13) SCC 790;** *Maranadu & Anr. Vs. State by Inspector of Police, Tamil Nadu* **2008 (16) SCC 529;** *Masalti Vs. State of U.P.* **AIR 1965 SC 202;** *Yunis alias Kariya Vs. State of M.P.* **2003 (1) SCC 425;** *Ramesh & Anr. Vs. State of Uttar Pradesh etc. etc.* **2009 (15) SCC 513;** *Akhtar & Ors. Vs. State of Uttaranchal* **2009 (13) SCC 722;** *Ram Dular Rai & Ors. Vs. State of Bihar* **2003 (12) SCC 352;** *Munshi Prasad & Ors. Vs. State of Bihar* **2002 (1) SCC 351– referred to.**

Case Law Reference:

2009 (13) SCC 790	**Referred to.**	**Para 17**
2008 (16) SCC 529	**Referred to.**	**Para 17**

AIR 1965 SC 202	**Referred to.**	**Para 17**
2003 (1) SCC 425	**Referred to.**	**Para 17**
2009 (15) SCC 513	**Referred to.**	**Para 17**
2009 (13) SCC 722	**Referred to.**	**Para 17**
2003 (12) SCC 352	**Referred to.**	**Para 17**
2002 (1) SCC 351	**Referred to.**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 716-717 of 2008.

From the judgment and order dated 14.11.2007 of the High Court of judicature at Patna in Criminal Appeal No. 296 and 344 of 2001.

WITH

Crl. A. Nos. 119-122 of 2009

Crl. A. No. 833 of 2008 and

Crl. A. No. 1907 of 2009.

Nagendra Rai, S.B. Sanyal, Shantanu Sagar, Smarhar Singh, Abhishek Singh, T. Mahipal, Braj K. Mishra, Abhishek Yadav, Aparna Jha, Tanushree Sinha, M.P. Jha, Ram Ekbal Roy Harshavardhan Jha, Bhattacharjee and Kumud Lata Das (for Gopal Singh) for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This judgment will dispose of Criminal Appeal Nos. 716-717 of 2008, Criminal Appeal Nos. 119-122 of 2009, Criminal Appeal No. 833 of 2008 and Criminal Appeal No. 1907 of 2009. All these appeals are against the common judgment passed by the High Court, whereby the appeals filed by the appellants herein came to be

dismissed. Initially, as many as 10 accused persons came to be tried for the offences punishable under Sections 147, 148, 302, 302 read with Section 34 as also read with Sections 109 and 149 of the Indian Penal Code ("IPC" for short hereinafter) and Section 27 of the Arms Act. The prosecution alleged that on the fateful day, i.e. 5.7.1973, at about 7 a.m., the accused persons formed an unlawful assembly and committed the murder of one Shambhu Nath Singh and his brother Prabhu Nath Singh, both deceased persons, in pursuance of their common object. The First Information Report (FIR) was lodged by one Baijnath Singh and it was alleged therein that one Thakur Ojha (A-4), Patiram Ojha (now dead), Akhilesh Ojha (A-5), Jitendra Singh (A-6), Raj Nath Singh (A-7), Gorakh Nath Singh (A-3), Keshav Singh (A-9), Bachcha Singh (A-8), Adalat Pandit (A-10), Thakur Singh (A-1) and Ram Pravesh Singh (A-2) went to his Mango orchard standing on Plot No. 4905, situated in Mauza – Mohammadpur, P.S. Gorkha, Distt. Saran, which was situated at a distance of about three furlong from village for forcibly plucking mango fruits.

2. It was further stated by Baijnath Singh that he alongwith his two sons namely Shambhu Nath Singh and Prabhu Nath Singh went to his orchard and protested against the act of the accused persons in plucking the mangoes. It was stated that Pati Ram Ojha (the dead accused) ordered Thakur Ojha (A-4) to attack on those three persons, on which Thakur Ojha (A-4) fired two shots aiming at Shambhu Nath Singh, who was injured due to fire and tried to run away towards his house, but fell on the ground at some distance in the nearby orchard of one Arjun Singh. It was then contended that Gorakh Nath Singh (A-3) went after him and gave spear blow on the back of Shambhu Nath Singh while Shambhu Nath Singh was still lying on the ground. In the meantime, Thakur Ojha (A-4) again fired two shots on the elder son of Baijnath namely Prabhu Nath Singh, who also fell on the ground in the orchard of Arjun Singh. After he fell down, Raj Nath Singh (A-7), Bachcha Singh (A-8) and Adalat Pandit (A-10) rushed to Prabhu Nath Singh and indiscriminately

assaulted him by means of spear and his body was dragged by Raj Nath Singh (A-7) and Ram Pravesh Singh (A-2). It was further stated in the FIR that on seeing this, Baijnath Singh asked himself to be killed; however, Patiram Ojha (dead accused) said that it was useless to cause the death of an old person like him and that he should better be left to flee. It was suggested that one Laxman Singh (PW-8), Arjun Singh, Bhrigunath Singh (PW-7), Ram Prasad Singh (PW-4) and others were present on the spot and had seen the entire incident. There was a fierce enmity between the two sides though they were related to each other, on account of ownership and possession of the said orchard and a civil dispute was pending in the Court of 3rd Additional District Judge, Saran.

3. The FIR was recorded by A.S.I. Abdul Malik of Garkha Police Station and the investigation ensued. The Investigating Officer arrested the dead accused Patiram Ojha, Thakur Ojha (A-4), Jitendra Singh (A-6), Raj Nath Singh (A-7), Keshav Singh (A-9), Bachcha Singh (A-8), Thakur Singh (A-1) and Ram Pravesh Singh (A-2) from the house of Raj Nath Singh (A-7). The Investigating Officer effected the search of the house and recovered a double barrel gun kept on the cot under the bed. Two spears were also recovered during the investigation, the blades of which were stained with blood. The seizures were effected and arrests were made. In the meantime, one Shantruhan Singh (PW-15), the Officer-in-charge, Garkha Police Station reached the spot and took charge of the investigation from A.S.I. Abdul Malik. He carried out the further investigation; effected Seizure Memo and Spot Panchnama etc. and recorded the statement of the witnesses. On 21.9.1974, he made over the charge of investigation to one S.D. Ghos, who made over the investigation to one Madhav Kant and it was Madhav Kant who submitted the chargesheet against, in all, 11 accused persons (including the dead accused Patiram Ojha). The accused persons were committed to Sessions Court. The Sessions Court framed the charges. The accused having abjured the guilt, the trial proceeded and after the trial was over,

the accused persons came to be convicted for the various offences i.e. offences punishable under Sections 147, 148, 302, 302 read with Section 34 as also read with Sections 109 and 149 IPC and Section 27 of the Arms Act. Patiram Ojha (the dead accused) was not convicted as he died during the trial itself. Out of all these accused persons, Thakur Singh (A-1) and Ram Pravesh Singh (A-2) were held guilty by the Sessions Court for the offence punishable under Section 147 while the remaining 8 accused persons were held guilty under Section 148 IPC. Thakur Ojha (A-4) and Gorakh Nath Singh (A-3) were convicted for the substantive offence under Section 302 IPC for committing the murder of Shambhu Nath Singh while Thakur Ojha (A-4), Raj Nath Singh (A-7), Bachcha Singh (A-8) and Adalat Pandit (A-10) were convicted for the offence punishable under Section 302 IPC for causing the death of Prabhu Nath Singh. The remaining 5 accused persons namely Akhilesh Ojha (A-5), Jitendra Singh (A-6), Keshav Singh (A-9), Ram Pravesh Singh (A-2) and Thakur Singh (A-1) were booked under Section 302 read with Section 149 IPC. Separate appeals were filed by these accused persons before the High Court. While the appeals of the other accused persons were dismissed, the appeal filed on behalf of Bachcha Singh (A-8) was allowed, giving him the benefit of the provisions of Juvenile Justice Act. The other appeals were dismissed and that is how 9 accused persons have come up before us in the present appeals.

4. It is significant to note that Gorakh Nath Singh (A-3) had raised a plea of alibi and examined as many as 11 defence witnesses in support of that plea. That plea was of course rejected by the Trial Court. There were some defence witnesses examined on behalf of Adalat Pandit (A-10) also, raising the plea of alibi even in his case. But even that contention was rejected by the Trial Court. The other accused persons had merely made a plea of denial and their defence was also rejected. The High Court has taken stock of evidence of all the witnesses in great details. In fact, the evidence of practically

each witness of the prosecution as well as the defence was examined.

5. Shri Nagendra Rai, Learned Senior Counsel has appeared for the appellants Thakur Singh (A-1), Ram Pravesh Singh (A-2), Akhilesh Ojha (A-5), Jitendra Singh (A-6) and Keshav Singh (A-9) in Criminal Appeal Nos. 119-122 of 2009 and addressed on various aspects of the matter. Similarly, Shri S.B. Sanyal, Learned Senior Counsel has appeared for the appellant Gorakh Nath Singh (A-3) in Criminal Appeal No. 833 of 2008 and addressed on various aspects, while Shri M.P. Jha, Shri Ram Ekbal Roy, Shri Harshvardhan Jha and Shri Bhattacharjee, Learned Counsel (acted as Amicus Curiae) addressed on behalf of other appellants/accused persons, namely Thakur Ojha (A-4), Raj Nath Singh (A-7) and Adalat Pandit (A-10). Ms. Kumud Lata Das and Shri Gopal Singh, Learned Counsel have appeared for the State in all the cases and supported the conviction of the accused persons. We will, therefore, consider the matter as per the appeals.

6. Shri Nagendra Rai, learned Senior Counsel, who represented the appellants Thakur Singh (A-1), Ram Pravesh Singh (A-2), Akhilesh Ojha (A-5), Jitendra Singh (A-6) and Keshav Singh (A-9) in Criminal Appeal Nos. 119-122 of 2009, addressed firstly on behalf of Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9). The learned Senior Counsel was at pains to point out that no witness has attributed any overt act to any of these accused persons and that they were mere mute bystanders. Shri Rai invited our attention to the evidence of the eye-witnesses, they being Sukeshwar Singh (PW-2), Ram Prasad Singh (PW-4), Badrinath Singh (PW-5), Bhrigunath Singh (PW-7) and Laxman Singh (PW-8). He was at pains to point out that the High Court has specifically referred to each of these witnesses individually considering their evidence who were almost unanimous that they saw eleven accused persons when they came to the orchard of the informant (Baijnath Singh). The witnesses stated that Baijnath

Singh alongwith his two sons Shambhu Nath Singh and Prabhu Nath Singh had come a little later in the said orchard and the accused persons who wanted to pluck the mangoes, were stopped from doing so by Baijnath and in that the exchange of hot words took place. The witnesses claimed that thereafter, on the orders of Patiram Ojha (the dead accused), Thakur Ojha (A-4) fired two shots with his gun hitting Shambunath Singh who ran towards the West and fell down in the orchard of Arjun Singh. Thereafter, he was assaulted by Gorakh Nath Singh (A-3) on the back with a spear. When Prabhu Nath Singh ran towards Shambhu Nath Singh, Thakur Ojha (A-4) again fired two shots on Prabhu Nath Singh and he also fell down in the orchard of Arjun Singh, whereafter, he was assaulted by Raj Nath Singh (A-7), Bachcha Singh (A-8) and Adalat Pandit (A-10). It is to be seen that beyond this version, nothing more has come in the evidence. It is further to be seen that the witnesses Ram Prasad Singh (PW-4), Badrinath Singh (PW-5), Bhrigunath Singh (PW-7) and Laxman Singh (PW-8) had seen the occurrence. The witnesses then saw the accused persons running away from the spot towards the house of Raj Nath Singh (A-7). Almost same story was repeated by Ram Prasad Singh (PW-4) who claimed that he was present, as he had to cut bamboos from the place which was near the orchard of the informant Baijnath Singh. He also admitted about the litigation between the parties. There was omission about Thakur Ojha (A-4) having ordered for dragging the dead body to the orchard of the informant.

7. Badrinath Singh (PW-5) also claimed that he had accompanied Ram Prasad Singh (PW-4) for cutting bamboos and he has also given almost the same version. Bhrigunath Singh (PW-7) and Laxman Singh (PW-8) also have repeated the same story but without attributing any overt act to the aforementioned three accused persons, namely, Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9). After appreciating the evidence of these witnesses, the High Court recorded a finding in Para 20 of its judgment that the genesis

of the incident lied only in the fact that when the accused persons insisted on plucking the mangoes, the same was objected to by the complainant and his sons. The High Court, undoubtedly, is correct in recording the finding that it is on that point of time when the exchange of words took place between the parties that the seeds of the further incident were sown. Ultimately, the High Court recorded the finding that the identity of the accused persons was fully established by the prosecution witnesses and that all the appellants had gone to the place of occurrence alongwith their respective arms as members of an unlawful assembly with a common object of asserting right of harvesting the mango crops in the orchard of the informant and were prepared for meeting any resistance with the help of arms carried by the accused persons and that was the common object behind the firing on the two deceased, who met their instantaneous death. It was on this basis that the High Court proceeded to convict the accused persons against whom there was specific evidence.

8. In our opinion, at least insofar as the aforementioned three accused persons, namely Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) are concerned, it cannot be said that they had the intentions to commit the murder and they cannot be said to be the members of the unlawful assembly on account of their mere presence at the place of occurrence and cannot be convicted of the offence under Section 302 read with Section 149 IPC. We have closely seen the evidence of the witnesses. These three accused persons were undoubtedly referred to and all that has been stated by Sukeshwar Singh (PW-2) is that Akhilesh Ojha (A-5) was carrying a lathi. The witness has not referred to even Thakur Singh (A-1) and Keshav Singh (A-9) having any arms. As regards Ram Prasad Singh (PW-4), he has attributed Thakur Singh (A-1) and Akhilesh Ojha (A-5) carrying a lathi while Keshav Singh (A-9) carrying a bhala (spear). However, he has not referred to any overt act on part of these accused persons or use of the same by them. Badrinath Singh (PW-5) has mentioned about Thakur

Singh (A-1) and Ram Pravesh Singh (A-2) having lathi. He has made a general statement that all other accused persons were holding a bhala. However, this witness also has not referred to any overt act on the part of the above accused persons, namely Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9). As regards Ram Lakhan Singh (PW-6), he has turned hostile. Bhrigunath Singh (PW-7) has also stated that these three accused persons were carrying lathi. The story is no different in respect of Laxman Singh (PW-8). His evidence is extremely general. Some of the witnesses have also not referred to the exhortation given by Patiram Ojha (the dead accused). At least insofar as the present accused persons are concerned, the role played by these three accused persons, namely Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) appears to be that of the bystanders. There was a dispute between the parties on account of the possession of the field. Even the Court litigation was on between the parties. Therefore, merely because the accused persons went to the field carrying lathis and arms, at least till such time when the exchange of words started and the shot was fired, it cannot be said that the whole assembly had become unlawful. The assembly would become unlawful when Patiram Ojha (the dead accused) allegedly gave the firing orders to Thakur Ojha (A-4) and who in pursuance of that, fired on Shambhu Nath Singh. Undoubtedly, these three accused persons [Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9)] acted as mere mute bystanders, as there is no evidence also that they took part in the exchange of words. Under such circumstances, it would be difficult to attribute a common object to these accused persons on account of their presence even if they were armed with lathis. There is no evidence about Akhilesh Ojha (A-5) carrying a spear. Under such circumstances, benefit of doubt must go to these three accused persons. They would be entitled to acquittal as the prosecution has failed to prove that they had a common intention to commit murder.

9. Insofar as the rest of the accused persons are

concerned, Shri Nagendra Rai, learned Senior Counsel insisted that admittedly Ram Pravesh Singh (A-2) and Jitendra Singh (A-6) had only dragged the body of Prabhu Nath Singh. That would certainly amount to the active participation of these two accused persons. Their continuance even after the firing in doing overt act of dragging the body from the field would certainly make them the part of the unlawful assembly, which had the common object of eliminating Shambhu Nath Singh and Prabhu Nath Singh. The part played by these two accused persons of dragging the body of Prabhu Nath Singh is clearly referred to by the witnesses. We, therefore, reject the contention raised by Shri Rai, learned Senior Counsel that these two accused persons would also be entitled to be acquitted for the same reasons as we have acquitted Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) for. The appeals of these two accused persons would be liable to be dismissed as we are satisfied on the point that they were the members of the unlawful assembly.

10. Similar is the case as regards Thakur Ojha (A-4) who had actually fired the guns, Raj Nath Singh (A-7) and Adalat Pandit (A-10). The evidence is against them as accepted by both the Courts below. They were certainly the members of the unlawful assembly and specific overt acts have been attributed to them by almost all the witnesses. As regards Thakur Ojha (A-4), all the witnesses are unanimous that he was the one who had fired. His appeal will, therefore, have to be dismissed.

11. Insofar as Raj Nath Singh (A-7) and Adalat Pandit (A-10) are concerned, they took active part in assaulting Prabhu Nath Singh while the body of Prabhu Nath Singh was dragged by Ram Pravesh Singh (A-2) and Jitendra Singh (A-6). The witnesses have specifically attributed the overt acts regarding assaulting of Prabhu Nath Singh to these accused persons. We are satisfied with the evidence led on behalf of the prosecution in respect of these accused persons, which has been accepted by both the Courts below and we have no reason to disbelieve

the witnesses who have attributed specific overt acts as regards the assault on Prabhu Nath Singh to these accused persons. Insofar as Adalat Pandit (A-10) is concerned, the plea was that of alibi, which plea has been rejected by the Trial Court and the High Court. Very heavy reliance was placed on the evidence of Rajiv Ranjan Shrivastava (DW-20), Praduman Dubey (DW-21), A.B. Prasad (DW-22), Col. Pritam Singh (DW-25) and Col. Amrik Singh (DW-26) for his alibi. Rajiv Ranjan Shrivastava (DW-20) was a handwriting expert for proving the signatures of Adalat Pandit (A-10) over the postal receipt Exhibit-6. His evidence has rightly been disbelieved on the ground that he had prepared his report on the previous evening after taking fees. Praduman Dubey (DW-21) was a Head Clerk in the Sainik Office, Danapur and he proved the leave register of Adalat Pandit (A-10) as Exhibit O. A.B. Prasad (DW-22) was also an employee in the Pay & Accounts Office, Sainik Office, Danapur. He proved the pay book of Adalat Pandit (A-10) as Exhibit P and his acquittance roll as Exhibit Q. It was suggested that Adalat Pandit (A-10) was on leave from 11.6.1973 till 2.7.1973 and that he received the payment on 26.5.1973 as also on 3.7.1973. The High Court has disbelieved this evidence on the ground that the document did not show the date 3.7.1973. Col. Pritam Singh (DW-25) was a commanding officer of 10, Bihar Regiment at the relevant time and he had admitted that he had no personal knowledge regarding actual presence of Adalat Pandit (A-10) on the said date. Similarly, Col. Amrik Singh (DW-26) had claimed that by an order dated 26.1.1973, the leave of Adalat Pandit (A-10) was extended for 14 days from 6.4.1973 to 19.4.1973 because Adalat Pandit (A-10) did not resume his duty on 6.4.1973. The High Court has rejected his evidence and for good reasons. The assertion of Col. Amrik Singh (DW-26) that Adalat Pandit (A-10) was present in the unit on 3.7.1973 was only on the basis of Exhibits P and Q being the pay book and acquittance roll of Adalat Pandit (A-10) respectively. Exhibits P and Q have rightly been disbelieved by the High Court giving good reasons. The High Court has rightly

held that Exhibits P and Q were casually maintained by the Havildar and a poor attempt had been made to show that Adalat Pandit (A-10) had reported for duty on 3.7.1973. We are convinced that the plea of alibi by Adalat Pandit (A-10) cannot be accepted and has to be disbelieved as has been done by the Trial Court and the appellate Court. We would accept the evidence of the prosecution witnesses, more particularly the eye-witnesses, who had specifically attributed an active role to this accused person. The appeals of Raj Nath Singh (A-7) and Adalat Pandit (A-10) will, therefore, have to be dismissed holding that they were members of the unlawful assembly. We, therefore, confirm the judgments of the Trial Court and the appellate Court convicting Raj Nath Singh (A-7) and Adalat Pandit (A-10) with the aid of Section 149 IPC.

12. That leaves us with the case of Gorakh Nath Singh (A-3). It must be appreciated that Gorakh Nath Singh (A-3) has been mentioned practically by all the witnesses. All the eye-witnesses have also referred to the specific overt act of this accused of following Shambhu and hitting him with spear on his back. Sukeshwar Singh (PW-2) is very specific in his evidence insofar as the said act of the accused was concerned. Some cross-examination was directed to suggest that Gorakh Nath Singh (A-3) would have no reason or motive to take part in the assault. However, the main claim in the evidence of this witness regarding the overt act remained unshaken. Similar is the story of Ram Prasad Singh (PW-4). The cross-examination of Ram Prasad Singh (PW-4) is also of no consequence insofar as the main incident is concerned. Badrinath Singh (PW-5) also repeated the same story without any substantial challenge to this version in the cross-examination. A typical suggestion was given to all the witnesses as if Gorakh Nath Singh had issued a warrant for lagan (tax) on these witnesses. Bhrigunath Singh (PW-7) also repeated the same story and there is very little or no cross-examination on the main incident. In the cross-examination of this witness itself, the same stereotyped suggestion was given that Gorakh Nath had issued

a lagaan against the father of this witness, thereby suggesting an enmity. Laxman Singh (PW-8) is the only exception, who though referred to the presence of this accused duly armed, has not referred to the overt act of this accused of piercing Shambhu with a spear. We will not attach much importance to the evidence of this witness in view of the evidence of the other eye-witnesses. It is again to be seen that the evidence of the eye-witnesses in respect of the spear injuries on Shambhu Nath Singh and Prabhu Nath Singh is further corroborated by the medical evidence inasmuch as both Shambhu Nath Singh and Prabhu Nath Singh had suffered penetrating wounds and incised wounds in addition to the wounds caused by pellets. The Post Mortem Report was prepared by Dr. B.M. Srivastava (dead) as proved by Dr. J.C. Brahmo, who has proved all the injuries which are to be found in the Post Mortem Report (Exhibits 5 and 5/1). Therefore, there is very little scope for the argument that Gorakh Nath Singh (A-3) was not a part of the unlawful assembly and had not caused the wound to Shambhu Nath Singh with spear after he was fired at. The argument of Shri S.B. Sanyal, Learned Senior Counsel, appearing on behalf of the appellant/accused Gorakh Nath Singh (A-3) that this accused was not concerned and has been falsely implicated, cannot, therefore, be accepted. Finding this, the learned Senior Counsel heavily relied on the evidence of defence witnesses, who were examined in support of the plea of alibi of this accused as also the evidence of Sultan Ahmad (PW-14).

13. Sultan Ahmad (PW-14) was a Block Development Officer (BDO) of the said area. He deposed that Gorakh Nath Singh was a Gram Sewak in his block and was working in Devariya Panchpariya village Panchayat. Regarding the fateful day, the witness deposed that he went on that day to Devariya to collect levy of wheat crops and reached Devariya at about 1 o' clock in the afternoon. He stated that Gorakh Nath Singh reached after half an hour later when he reached there. He also suggested that there was a Special Planning for levying wheat in those days. The witness suggested that one Umashankar

was Block Agriculture Officer and he alongwith Gorakh Nath Singh (A-3) and other witnesses like one Kuldeep Singh, Karamchari (DW-8), Ram Sewak, Jan Sewak and Mukhiya and Sarpanch of the Panchyat (DW-7) were levying wheat at that time. Shri Sanyal, learned Senior Counsel, while trying to taking advantage of the evidence of this witness, also asserted that his claim that Gorakh Nath Singh (A-3) reached there at about 1 o' clock, was not correct. The learned Senior Counsel relied on an omission in that behalf. The learned Senior Counsel also heavily relied on the evidence of Kapil Narayan Sinha (DW-1), a Deputy Superintendent of Police, who proved the carbon copy of a report which he had prepared in pursuance of the orders passed by the Superintendent of Police. This was on account of an application having been made by Gorakh Nath Singh (A-3), claiming that he was in fact not present at the spot and was busy in the activity of wheat levy in the other village. The witness also proved the application of Gorakh Nath Singh at Exhibit C. It is to be seen that he had to admit that even after preparing the said so-called report, the Superintendent of Police had ordered to file the chargesheet against Gorakh Nath Singh (A-3).

14. The other witness relied on by the learned Senior Counsel was Kailash Singh (DW-2), who deposed that the levy was being collected from 6 o' clock in the morning at the door of Mukhiya Ram Barai Singh and the payment of the levied wheat was being paid after taking its weight there. According to him, other witness namely Ram Sewak Roy was weighing the wheat. According to him, the weight of his wheat was also taken and the receipt for that was written and signed by Gorakh Nath Singh (A-3) and the payment was also made to him after obtaining his signatures on the receipt. He produced Exhibit D being a receipt written and signed by Gorakh Nath Singh (A-3) on that day. In his cross-examination, however, he was unable to show any notice having been given by BDO to him and had to admit that BDO had never asked for levy to him. Similar was the evidence of Munshilal Roy (DW-3), who spoke

about his reaching the spot at about 6 o' clock in the morning to the house of Ram Barai, Mukhiya with wheat of levy. He also spoke that Ram Sewak Roy was weighing the wheat and Gorakh Nath Singh (A-3) was writing on the receipts (Exhibit D-1) for that. He could not produce the notice which was allegedly given to him by the Department for levy. He did not even know how much levy wheat was required to be given by him. The witness also could not show anything to suggest that the levy was being collected from a particular house. He frankly admitted that he never met BDO.

15. To the same effect was the evidence of Ram Pravesh Singh (DW-4), who generally spoke about the levy activity and asserted that it was Gorakh Nath Singh (A-3) who was writing the receipts and was distributing the amounts on that day and that the levy work was started at 6 o' clock in the morning and Gorakh Nath Singh was with the Group of levy since that time. Similar was the evidence of Fulkan Manjhi (DW-5), who was a Chowkidar at Madhupur, P.S. Gorkha, District Saran. He also spoke about the said activity of levy and the fact that Gorakh Nath Singh (A-3) was present writing the receipt and paying money to the farmers. Ram Barai Singh (DW-7) was Mukhiya of Devariya, Panchpariya Gram Pranchayat, who asserted that it was at his door that the special levy collection was going on, which exercise started at 6 o' clock in the morning. The witness further asserted that Gorakh Nath Singh (A-3) was paying the cost of levy wheat after making receipts of that and he had done this work from 6 o' clock in the morning to 11 o' clock in day time on that day. The witness, however, could not produce any documentary evidence to show that the levy work was done at his place. The evidence of Kuldeep Narayan Singh (DW-8) was to the same effect. He was a Karamchari and said that there was a levy going on on 5.7.1973. He also suggested that Gorakh Nath Singh (A-3) was present for the levy and was continuously working from 6 o' clock in the morning till 12 o' clock in the day time on that day. The evidence of Ram Lal Manjhi (DW-9) was to the same effect, so also the evidence of

the landlord of Gorakh Nath Singh (A-3), namely Vidya Narayan Singh, who as DW-10 claimed that Gorakh Nath Singh (A-3) had taken room in his house and had gone for the levy work at 5.45 a.m. The evidence of Adya Narayan Singh (DW-11), who was a Panchayat Sewak in the Gorkha Block, was also to the same effect. He proved a document as Exhibit DF, which was a carbon copy of the slip (receipt), as also Exhibits 3/2 and 3/3 being the registers bearing the signatures of Gorakh Nath Singh (A-3). Ram Nagina Singh (DW-16) and Sona Lal Sah (DW-17) also asserted about the levy. Both the Courts had chosen to accept the evidence of the eye-witnesses and have rejected the evidence led on behalf of the defence.

16. It is to be noted that these witnesses were all interested witnesses in the sense that they were the colleagues of Gorakh Nath Singh (A-3). Before we venture to appreciate this evidence, it must be noted that the distance between the spot where the incident took place and the place where the accused Gorakh Nath Singh claimed to have been present is extremely short. Admittedly, it is 3 or 4 kilometers. When all the witnesses claimed that the work of levy began from 6 o' clock in the morning, it is a very difficult claim to be accepted. In the first place, there is nothing proved by way of documentary evidence to show that the levy of wheat was to be collected at the house of Ram Barai Singh, Mukhiya (DW-7) or that the levy was proposed to be held at village Devariya Panchpariya on that day. We cannot accept that there would be no documentary evidence, particularly if it was an exercise of levy. There is bound to be some records somewhere. We are not much impressed by the receipts, which have been filed by the witnesses because there is nothing on those receipts as to when they were actually prepared. In fact, the evidence of Sultan Ahmad (PW-14) could not be demolished when he said that he had reached the place where the levy work was going on and it was at about 1 o' clock that Gorakh Nath Singh (A-3) arrived there alongwith others. The Trial Court thoroughly discussed this evidence and held it to be not reliable. In view

of the very short distance of 4 kilometers between the two places i.e. the place of incident Mauza – Mohammadpur and the village Devariya Panchpariya, the evidence appears to be extremely doubtful. We are also not impressed by the evidence of Kapil Narayan Sinha (DW-1), Deputy Superintendent of Police, as nothing would turn open the so-called report prepared by him in view of the direct evidence led by the prosecution. In our opinion, the Trial Court and the appellate Court were right in rejecting the defence of alibi.

17. A few decisions were referred to during the debate, which are as follows:-

(i) *Satbir Singh & Ors. Vs. State of Uttar Pradesh* [2009 (13) SCC 790]. This decision was relied upon to show that the non-examination of the concerned medical officer would affect the prosecution case. This was probably in order to show that the original Doctor (Dr. B.M. Srivastava) who had done the Post Mortem, had expired and the Post Mortem Report had to be proved by another Doctor namely Dr. J.C. Brahmo. We do not find anything wrong with the Report having been proved by the other Doctor.

(ii) *Maranadu & Anr. Vs. State by Inspector of Police, Tamil Nadu* [2008 (16) SCC 529]. This decision is on the question of law under Section 149 IPC. This Court has cautioned against the acceptance of the evidence of the partisan witnesses, particularly in case involving Section 149 IPC. We do not find this case to be of any support to the prosecution. However, while stating the principles of appreciation of evidence, this Court relied on the decision in *Masalti Vs. State of U.P.* [AIR 1965 SC 202], wherein it was observed that:-

"it would be unreasonable to contend that evidence given

by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan, would invariably lead to failure of justice."

We are quite convinced in this case that the evidence of the eye-witnesses, though they were somewhat partisan, was liable to be accepted, excepting against the three accused persons who were acquitted. We have given the reasons for acceptance of that evidence and also for the acquittal of three accused persons, who could not be held to be the part of the unlawful assembly.

(iii) *Yunis alias Kariya Vs. State of M.P.* [2003 (1) SCC 425]. This decision was relied upon to suggest that when eight accused persons armed with deadly weapons, attacked the deceased in broad daylight in a marketplace causing his death and the same was witnessed by several persons, three of whom were eye-witnesses and where the testimony of the eye-witnesses was tallying with each other, the oral testimony of the eye-witnesses as well as the medical and other evidence established the commission of crime. In fact, the decision in this case is completely against the defence. This was also a case under Section 149 IPC, which was held to be established on the basis of evidence and for good reasons.

(iv) *Ramesh & Anr. Vs. State of Uttar Pradesh etc. etc.* [2009 (15) SCC 513]. This is also a decision by this Court on the appreciation of evidence. In this case also, it was held that the minor contradictions, inconsistencies, exaggerations and embellishments in the testimonies of the eye-witnesses were bound to be there, however, they, by themselves, did not decide the credibility of the witness which has to be tested by the Court.

The other decisions referred to are *Akhtar & Ors. Vs. State of Uttaranchal* [2009 (13) SCC 722], *Ram Dular Rai & Ors. Vs. State of Bihar* [2003 (12) SCC 352] and *Munshi Prasad & Ors. Vs. State of Bihar* [2002 (1) SCC 351], which are of no consequence either for the prosecution or the defence.

18. In the result, the appeals of Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) are allowed and that of Ram Pravesh Singh (A-2), Gorakh Nath Singh (A-3), Thakur Ojha (A-4), Jitendra Singh (A-6), Raj Nath Singh (A-7) and Adalat Pandit (A-10) are dismissed for the reasons as stated above. The acquitted appellants/accused shall be released forthwith unless required in any other matter. The bail bonds, if any, shall stand cancelled.

N.J. Appeals disposed of.

DURGA PRASAD AND ANR.
v.
STATE OF M.P.
(Criminal Appeal No. 1081 of 2010)

MAY 14, 2010

[ALTAMAS KABIR AND H.L. GOKHALE, JJ.]

Penal Code, 1860: ss.304-B, 498-A – Necessary ingredients to prove dowry death – Discussed – On facts, no evidence led to prove that deceased was subjected to cruelty and harassment by appellants on account of dowry demand soon before her death – Case not made out for conviction under s.304B and under s.498-A – Appellants entitled to benefit of doubt, hence acquitted – Evidence Act, 1872 – s.113B – Crime against women – Dowry Prohibition Act, 1961.

The question which arose for consideration in the present appeal was whether the courts below were justified in convicting the appellants under Section 498-A and Section 304-B IPC on the basis of the evidence of PW-1, the mother of the deceased and PW-3, the brother of the deceased.

Allowing the appeal, the Court

HELD: The appellants are entitled to the benefit of doubt having particular regard to the fact that except for certain bald statements made by PWs.1 and 3 alleging that the victim was subjected to cruelty and harassment prior to her death, there is no other evidence to prove that the victim committed suicide on account of cruelty and harassment to which she was subjected just prior to her death, which, in fact, are the ingredients of the evidence to be led in respect of Section 113-B of the Indian Evidence Act, 1872, in order to bring home the guilt

against an accused under Section 304-B IPC. In order to hold an accused guilty of an offence under Section 304-B IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called "dowry death" and such husband or relative shall be deemed to have caused the death of the woman concerned. The prosecution in this case has failed to fully satisfy the requirements of both Section 113-B of the Evidence Act, 1872 and Section 304-B of the Indian Penal Code. Moreover, no charges were framed against the Appellants under the provisions of the Dowry Prohibition Act, 1961 and the evidence led in order to prove the same for the purposes of Section 304-B IPC was related to a demand for a fan only. Thus no case was made out for conviction under Sections 498-A and 304-B IPC. [Paras 14-18] [111-B-F; 112-A-C; 111-G]

Biswajit Halder @ Babu Halder & Ors. v. State of W.B. **(2008) 1 SCC 202, relied on.**

Anand Kumar v. State of M.P. **(2009) 3 SCC 799, held inapplicable.**

Shri Gopal & Anr. v. Subhash & Ors. **(2004) 13 SCC 174, referred to.**

Case Law Reference:

(2008) 1 SCC 202	**relied on**	**Para 7**
(2004) 13 SCC 174	**referred to**	**Para 8**
(2009) 3 SCC 799	**held inapplicable**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1081 of 2010.

From the judgment and order dated 28.04.2009 of the High Court of Madhya Pradesh at Jabalpur in CRLA No. 103 of 2003.

R.P. Gupta, M.P. Singh and Rajeev Bansal, for the Appellants.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 28th April, 2009, passed by Jabalpur Bench of the Madhya Pradesh High Court, dismissing Criminal Appeal No.103 of 2000, which had been directed against the judgment of conviction and sentence under Section 498-A and Section 304-B Indian Penal Code. By the said judgment, the learned Sessions Judge had sentenced the Appellants to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo rigorous imprisonment for 3 months under Section 498-A IPC and to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- and in default of payment of such fine, to undergo rigorous imprisonment for a further period of 3 years. Upon consideration of the materials on record, the High Court was of the view that the prosecution had proved its case beyond all reasonable doubts and that the appeal, therefore, deserved to be dismissed.

3. Appearing in support of the appeal, Mr. R.P. Gupta, learned Senior Advocate, contended that both the Courts below had erred in convicting the Appellants on the basis of evidence on record. Mr. Gupta submitted that in the absence of any evidence to prove the charges under Sections 304-B and 498-

A IPC, the trial Court, as also the High Court, had erred in merely relying on the presumption available under Section 304-B regarding the death of a woman by any burn or bodily injury or otherwise than under normal circumstances, within 7 years of her marriage, in coming to a conclusion that there would be a natural inference in such circumstance under Section 113-A and 113-B of the Indian Evidence Act, 1872, that the accused persons had caused the death of Kripa Bai by torturing her physically and mentally so as to drive the deceased to commit suicide. Mr. Gupta submitted that both the Courts below appear to have overlooked the fact that in order to prove a case of dowry death it would have to be shown that in addition to the fact that the death took place otherwise than in normal circumstances within 7 years of marriage, that soon before her death, the wife was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. It was pointed out by Mr. Gupta that in the explanation to Sub-Section (1) of Section 304-B it had been mentioned that for the purpose of the said Sub-Section, "dowry" shall have the same meaning as under Section 2 of the Dowry Prohibition Act, 1961.

4. Mr. Gupta also submitted that the provisions of Section 113-A of the Indian Evidence Act were not applicable in this case since no case for abetment of suicide by the husband or any of the husband's relatives had been alleged. On the other hand, the case sought to be made out is one under Section 113-B relating to presumption as to dowry death. Mr. Gupta submitted that the provisions in Section 113-B relating to presumption as to dowry death are similar to that of Section 304-B IPC. He urged that in order to arrive at the presumption of dowry death, it would have to be shown by the prosecution that soon before her death, such woman had been subjected to cruelty or harassment for, or in connection with, any demand for dowry, which would lead to a presumption that such person caused the dowry death.

5. Mr. Gupta submitted that in the instant case, the Appellants had not been convicted under the provisions of the Dowry Prohibition Act, but under Section 304-B and 498-A IPC. Mr. Gupta submitted that the prosecution had not established that prior to the death of the victim Kripa Bai, she had been either subjected to cruelty or harassment for, or in connection with, any demand for dowry, particularly, when the Appellants had not been convicted under the provisions of the Dowry Prohibition Act, 1961.

6. It was pointed out that the only evidence on which reliance had been placed both by the trial Court, as well as the High Court, for convicting the Appellants, was the evidence of Vimla Bai, PW.1, the mother of the deceased and Radheshyam, PW.3, the brother of the deceased. In fact, the prosecution story was that since no dowry had been received from the family of the victim, she had been beaten and treated with cruelty. There is no other evidence regarding the physical and mental torture which the deceased was alleged to have been subjected to. Mr. Gupta urged that the marriage of the Appellant No.1 with the deceased was performed as part of a community marriage being celebrated on account of the poverty of couples who could not otherwise meet the expenses of marriage and that even the few utensils which were given at the time of such community marriage were given by the persons who had organized such marriages.

7. Mr. Gupta submitted that the evidence in this case was wholly insufficient to even suggest that the victim had been subjected to cruelty or harassment which was sufficient to compel her to commit suicide. In support of his submissions, Mr. Gupta firstly referred to the decision of this Court in *Biswajit Halder @ Babu Halder & Ors. vs. State of W.B.* [(2008) 1 SCC 202], wherein, in facts which were very similar, it was held that there was practically no evidence to show that there was any cruelty or harassment for, or in connection with, the demands of dowry. There was also no finding in that regard. It was further

observed that this deficiency in evidence proved fatal for the prosecution case and even otherwise mere evidence of cruelty and harassment was not sufficient to attract Section 304-B IPC. It had to be shown in addition to that such cruelty or harassment was for, or in connection with, demand of dowry. Mr. Gupta urged that since the Appellants had not been convicted under the provisions of the Dowry Prohibition Act, 1961, the charge under Section 304-B would also fail since the same was linked with the question of cruelty or harassment for, or in connection with, the demand for dowry.

8. Mr. Gupta then urged that even the evidence of PW.3, Radheshyam, and also that of PW.2, Ashok Kumar, were full of omissions as to their statements before the police authorities and their evidence during the trial. Mr. Gupta submitted that such omissions were also fatal to the prosecution case since the same was mere embellishment and improvement of the evidence led by the prosecution. In this regard, Mr. Gupta referred to the decision of this Court in *Shri Gopal & Anr. vs. Subhash & Ors.* [(2004) 13 SCC 174]. In the said decision, while dealing with statements made by prosecution witnesses under Section 162 Cr.P.C. and omissions made during their evidence in Courts, this Court held that the same would amount to contradiction and their evidence on such point would not, therefore, be acceptable.

9. Mr. Gupta urged that both the trial Court, as well as the High Court, did not take into consideration any of the aforesaid matters while convicting the Appellants under Sections 304-B and 498-A IPC. Mr. Gupta urged that in such circumstances, the judgment and order of the trial Court, as well as that of the High Court, affirming the said judgment, are liable to be set aside.

10. Opposing the submissions made by Mr. R.P. Gupta, learned Senior Advocate, Ms. Vibha Datta Makhija, learned Advocate appearing for the State of Madhya Pradesh, submitted that the trial Court had considered the evidence of

Vimla Bai, PW.1, the mother of the deceased and Radheshyam, PW.3, the brother of the deceased, in coming to a finding that their evidence was sufficient to bring home the guilt of the Appellants under Sections 498-A and 304-B IPC.

11. Ms. Makhija also reiterated the submissions which had been made before the trial Court regarding the presumption that was to be drawn both under Section 304-B IPC, as also under Section 113-B of the Indian Evidence Act, 1872, having regard to the fact that Kripa Bai had committed suicide within 7 years of her marriage. Ms. Makhija submitted that once it was found that by their actions the Appellants had driven Kripa Bai to commit suicide, the provisions of Section 304-B IPC were immediately attracted and the Appellants, therefore, had been rightly convicted by the trial Court under Sections 498-A and 304-B IPC. Ms. Makhija urged that the evidence of PWs.1 and 3 were sufficient to meet the requirements of both Sections 113-B of the Indian Evidence Act and Section 304-B IPC.

12. Ms. Makhija then contended that as had been laid down by this Court in the case of *Anand Kumar vs. State of M.P.* [(2009) 3 SCC 799], in order to counter the presumption available under Section 113-B, which is relatable to Section 304-B, a heavy burden has been shifted on to the accused to prove his innocence. Having regard to the language of Section 113-B of the Indian Evidence Act, which indicates that when a question arises as to whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman was subjected to cruelty or harassment by such other person or in connection with any demand for dowry, the Court shall presume that such person had caused such dowry death. Ms. Makhija urged that the aforesaid wording of Section 113-B of Evidence Act and the use of the expression “shall” would clearly indicate that the Court shall presume such death as dowry death provided the conditions in Section 113-B were satisfied and it would then be for the accused to prove otherwise.

13. Ms. Makhija, thereupon, urged that the order of conviction passed by the trial Court holding the Appellants guilty under Sections 498-A and 304-B IPC, confirmed by the High Court, did not warrant any interference by this Court.

14. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to allow the benefit of doubt to the Appellants having particular regard to the fact that except for certain bald statements made by PWs.1 and 3 alleging that the victim had been subjected to cruelty and harassment prior to her death, there is no other evidence to prove that the victim committed suicide on account of cruelty and harassment to which she was subjected just prior to her death, which, in fact, are the ingredients of the evidence to be led in respect of Section 113-B of the Indian Evidence Act, 1872, in order to bring home the guilt against an accused under Section 304-B IPC.

15. As has been mentioned hereinbefore, in order to hold an accused guilty of an offence under Section 304-B IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called "dowry death" and such husband or relative shall be deemed to have caused the death of the woman concerned.

16. In this case, one other aspect has to be kept in mind, namely, that no charges were framed against the Appellants under the provisions of the Dowry Prohibition Act, 1961 and the evidence led in order to prove the same for the purposes of Section 304-B IPC was related to a demand for a fan only.

17. The decision cited by Mr. R.P. Gupta, learned Senior Advocate, in *Biswajit Halder's* case (supra) was rendered in

almost similar circumstances. In order to bring home a conviction under Section 304-B IPC, it will not be sufficient to only lead evidence showing that cruelty or harassment had been meted out to the victim, but that such treatment was in connection with the demand for dowry. In our view, the prosecution in this case has failed to fully satisfy the requirements of both Section 113-B of the Evidence Act, 1872 and Section 304-B of the Indian Penal Code.

18. Accordingly, we are unable to agree with the views expressed both by the trial Court, as well as the High Court, and we are of the view that no case can be made out on the ground of insufficient evidence against the Appellants for conviction under Sections 498-A and 304-B IPC. The decision cited by Ms. Makhija in *Anand Kumar's* case (supra) deals with the proposition of shifting of onus of the burden of proof relating to the presumption which the Court is to draw under Section 113-B of the Evidence Act and does not help the case of the State in a situation where there is no material to presume that an offence under Section 304-B IPC had been committed.

19. In that view of the matter, we allow the Appeal and set aside the judgment of the trial Court convicting and sentencing the Appellants of offences alleged to have been committed under Sections 498-A and 304-B IPC. The judgment of the High Court impugned in the instant Appeal is also set aside. In the event, the Appellants are on bail, they shall be discharged from their bail bonds, and, in the event they are in custody, they should be released forthwith.

D.G. Appeal allowed.

NIRANJAN PANJA
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 564 of 2005)

MAY 14, 2010

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

Penal Code, 1860 – s. 302 – Murder – Circumstantial evidence – Motive alleged – Conviction by courts below relying on circumstances of the case including discovery of the weapon of offence and applying the theory of 'last seen together' – On appeal, held: Conviction not justified – The circumstances relied on for passing conviction order are inconsequential – Discovery of weapon of offence cannot be relied upon as the same was not produced before the court – Motive which is an important circumstance, not proved – Conviction cannot be based on theory of 'last seen together' as the prosecution failed to establish the time of death.

Appellant-accused, alongwith co-accused was prosecuted u/s. 302 r/w. s. 201 IPC for having caused death of one person. The prosecution case was based on circumstantial evidence. Trial court convicted the appellant-accused u/s. 302 IPC while acquitting the co-accused. High Court confirmed the conviction.

In appeal to this court appellant-accused contended that majority of the circumstances, on the basis of which conviction order was passed, could not be viewed as incriminating circumstances; that despite the discovery of the weapon of offence, the same was never produced before the court, nor was it identified by the witnesses.

The State contended that there was motive for commission of the offence in asmuch as there was

enemity between the accused and the deceased; and that it was the accused who was last seen together with the deceased.

Allowing the appeal, the Court

HELD: 1. There is hardly any evidence in this case much less a clinching one to believe the theory that the accused had committed the murder. Both, the judgment of the trial court as well as the appellate court are incorrect judgments. In this case, the prosecution has utterly failed to prove that the accused has committed the murder of the deceased. The circumstances relied on by the High Court for convicting the accused are inconsequential. The circumstances were totally innocuous and suspicious. [Paras 9, 16 and 17] [123-G; 127-D-E]

2. The High Court has accepted the evidence on the recovery of the so-called weapon. The said discovery cannot at all be relied upon in the absence of the weapon being produced before the court. Again, the High Court has also commented upon the medical evidence of the Medical Officer (PW-11) when he spoke about the injuries upon the dead body being possible by *Siuli Katari*. In the absence of *Siuli Katari* being seen by the doctor in the court, this evidence should have been discarded. It seems that the so-called weapon of the offence was lost. The High Court had also expressed its displeasure and directed that the circumstances under which the said weapon was lost should be informed to the court and also as to who was responsible for the loss of the material weapon. There are no traces about the same. [Para 8] [123-B-E]

3. The question of motive has not been considered by the High Court at all. The so-called motive as deposed by PW-1 was that the accused used to speak against the deceased after the deceased stopped looking after his

litigation. It appears that the deceased used to look after the litigation of number of persons and that was probably his profession. It cannot be said that merely because the deceased had stopped looking after the litigation of the accused, the accused had any strong motive much less to commit murder of the deceased. Motive is an important circumstance in the prosecution which is based on circumstantial evidence. However, there is no such strong motive on the part of the appellant. [Para 10] [123-G-H; 124-A-B]

4. PW-1 had suggested in his evidence that on the fateful day in the evening he saw his father (the deceased) at a tea-stall along with the accused and the three other persons. Most of these witnesses, barring PW-3 have not been examined in this case. Again, it will be very inconsequential even if the accused was in the company of the deceased as there were number of other persons also who were having tea. PW-1 then said that he learnt from PW-3 that, thereafter, all of them went to the liquor shop and took liquor. This evidence could not have been allowed to be recorded because it is clearly inadmissible. The claim of PW-1 that the accused had come to his house, and advised him to lodge a complaint against two persons, was also extremely suspicious as there was hardly any corroboration to this claim. The witness also identified the blood-stained clothes. [Para 11] [124-C-G]

5. There is hardly anything in the evidence of PW-2 which is incriminating except that he had seized clothes from the dead-body. PW-3 spoke about the deceased, himself and the accused being there and their consuming liquor at liquor shop. His evidence shows that he was also in the company of the deceased till 9 p.m. He had not stated about their taking liquor in his police statement which he had accepted. The evidence of this witness would be of no consequence, particularly, because the

prosecution in this case has not fixed the time of death and no evidence is led to that effect. Where the prosecution depends upon the theory of 'last seen together', it is always necessary that the prosecution should establish the time of death, which the prosecution has failed to do in the present case. The evidence of PW-4 also is of no consequence. [Para 12] [124-G-H; 125-A-E]

6. For effecting a discovery, a statement has to be recorded on the part of the accused showing his readiness to produce the material object and it is only that part of the statement which is not incriminating and leads to discovery which becomes admissible. The evidence of PW-5, a witness of discovery, does not inspire confidence and it is of no use, more particularly, because the so-called weapon of offence allegedly produced by the accused never saw the light of the day nor had the witness identified the same and the prosecution had also not given any explanation whatsoever about the disappearance of this weapon. The evidence of PWs 6, 8, 9, 11 and 12 also does not inspire any confidence. [Paras 13 and 14] [126-C-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 564 of 2005.

From the Judgment and order dated 21.11.2003 of the High Court of Calcutta in CRA No. 229 of 1995.

Ranjana Narayan for the Appellant.

Avijit Bhattacharjee for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. The appellant by this appeal challenges his conviction ordered by the Trial Court and confirmed by the High Court. He was tried for offence under Section 302, Indian Penal Code on the allegation that he had

committed the murder of one Haripada Samanta on the night between 12-13th December, 1988 at Village Ghagra, Police Station Mahisadal at Sarberia. Charges were framed under Section 302 read with Section 201, IPC against Niranjan Panja and one Narayani Parua. Eventually, the second accused was acquitted of the offence under Section 302 read with Section 201, Indian Penal Code. However, accused Niranjan Panja alone came to be convicted by the Trial Court under Section 302, Indian Penal Code and his appeal having failed, he is before us.

2. A report came to be filed before the concerned Police Station by one Tapan Kumar Samanta, who was the son of the victim, Haripada Samanta, that his father was killed and his body was lying in the narrow Khal. He reported that he found number of injuries caused by a heavy sharp cutting instrument on various parts of his body including head and neck. It was stated that in the morning of 13.12.1988 at about 7 a.m. he got the information about his father's dead body lying in a narrow Khal. He stated that on the previous day in the morning his father had gone to Midnapore to look after the case of one Narayan Adhikari of their village and in the evening on that day he himself had talked to his father at Mahisadal. At that time, Niranjan Panja, Narayan Adhikari, Sudhir Maity and Nirode Kanta Bera were with him. It was claimed that he came to know that on the previous night at about 9 p.m. his father consumed liquor with accused Niranjan Panja and Narayan Adhikari in the liquor shop of one Bholanath Pal and, thereafter, the said three persons came through the village pathway and while Narayan Adhikari went towards his house, his father and Niranjan Panja went back to their homes. However, Haripad Samanta did not return home. On the basis of this complaint, investigation was taken up by the In-charge of the said Police Station, Shri T.K. Tas, Sub-Inspector of Police.

3. The police also came to know during the investigation that there was some rivalry between the deceased and the

accused Niranjan Panja as the deceased had stopped looking after the cases of Niranjan Panja for the last 5-6 months on which Niranjan Panja used to speak against the deceased. The prosecution case is that it was on account of this that the accused had committed the murder. The prosecution examined number of witnesses including the complainant son. They were Ram Chand Bar (PW-2), Narayan Das Adhikari (PW-3), Ranjit Samanta (PW-4), Sunil Kumar Samanta (PW-5), Kanai Lal Das (PW-6), Paresh Das Adhikari (PW-7), Smt. Sita Samanta (PW-8), Rabindra Rana (PW-9), Amarendra Seth (PW-10), Dr. Ardhendu Bikas (PW-11) the medical officer, Hare Krishna Pramanik (PW-12) and Shri Tarun Kumar Das (PW-13). The case proceeded only on the circumstantial evidence as there was no eye witness. The defence was that of denial. The defence pointed out that there were major discrepancies in the prosecution evidence like the so-called weapon Siuli Katari was never produced before the Court and the necessary witnesses were also not examined.

4. Ms. Ranjana Narayan, the Amicus Curiae pointed out that the evidence in this case was extremely brittle. She invited our attention to the findings of the High Court where the High Court had culled out ten circumstances. She pointed out that out of these ten so-called circumstances, majority of them could not be viewed as incriminating circumstances. By reference to the evidence of the witnesses, she pointed out that the most substantial circumstance was that the deceased was last seen in the company of the accused. She pointed out that, that circumstance was also not established and could not be viewed as an incriminating circumstance inspite of the so-called discovery of the weapon of murder which was neither produced before the Court nor was identified by any of the witnesses. She also pointed out that the so-called blood stained Siuli Katari was not discovered by the accused. Learned Counsel urged that non-existing circumstances were taken into consideration, for example, the report of the Serologist showed that the Katari was blood stained but the origin of that blood

could not be detected nor was that weapon ever produced before the Court.

5. As against this, Shri Avijit Bhattacharjee supported the judgment by saying that there was motive inasmuch as there was enmity between the accused and the deceased and it was the accused who was in the company of the deceased on the last day of his life i.e. on 12.12.1988 and that there was clinching evidence to suggest that it was the accused alone who accompanied the deceased back to his home and, therefore, the accused was bound to explain on the basis of 'last seen together' theory.

6. We shall consider each of the circumstance relied upon by the High Court. The High Court has quoted the following ten circumstances:-

"A. PW-1 the son of deceased Haripada Babu came to know that his father has been murdered on the previous night (12.12.88) and his body was lying on a small canal in Sarberia. He informed his mother (PW-8), who in turn informed PW-4, Ranjit Samanta his uncle and some neighbours and was also called by the village Chaukidar (PW-2) and on reaching the spot he identified the dead body of his father and PW-3 the Officer-in-Charge of the local Police Station. He signed on the Inquest Report (Ext.1) and was also witness to the Seizure List (Ext.2) in respect of the wearing apparels and penned down the complaint (Ext.3).

B. PW-1 learned from PW-3 Sudhir Maity (notexamined) and others that the Appellant used to speak against his father since he has stopped tadbirs of his cases.

C. On 12.12.88 morning the father of PW-1 along withPW-3 had gone to Midnapore in connection with a case instituted by the latter and in the evening he found in the tea stall of one Gautam Manna (not examined) near Sahid

Minar at Mahisadal bazaar that his father along with PW-3 and the appellant, Sudhir Maity (not examined), Nirode Kanta Bera (not examined) were taking tea. There he met his father and on his advice he returned home after marketing.

D. After the murder of his father he (PW-1) heard from PW-3 that after they were taking tea, PW-3, the appellant and the deceased went to the liquor shop of Bholanath Pal (not examined) at Garkamalpur and took liquor and afterwards left that shop leaving beside Haripada Babu and the appellant together.

E. PW-7 who was returning home in the night at about 9.30 in evening found that Haripada Babu, father of PW-1 was standing and on his query told him that he was waiting since the appellant had gone to the house of his uncle (PW-6).

F. The appellant came to the house of PW-1 after he returned home witnessing the dead body of his father lying by the side of the canal and advised him to lodge a complaint against one Haripada Panja and Abinash Panja, which we find corroborated from the evidence of PW-10 also.

G. The discovery of the dead body of deceased Haripada Babu by the side of the canal and the Ext.6 the post-mortem report, prepared by PW-11 show that death was due to shock and haemorrhage which was homicidal and ante-mortem in nature.

H. The arrest of the appellant on the very next date of the incident followed by the statement made by him before PW-13 which led to the recovery of the blood stained Siuli Katari under a Seizure List (Ext.4) and a green coloured chadar and a white coloured dhoti under a Seizure List (Ext.5) in presence of PW-5.

I. The evidence of PW-9 the village blacksmith, who deposed that the appellant came to his shop and got a Hansua sharpened by him and the day after he had sharpened the said weapon he heard that a man was murdered and his body was lying on the side of the small canal of Sarberia. In answer to the Court PW-9 the village blacksmith said-

"Siuli Katari and Hansua are same thing."

J. The Report of the Serologist (Ext.8) shows blood was detected in the Katari. However, since it was disintegrated the origin could not be determined."

7. The first circumstance 'A' that Tapan Kumar Samanta (PW-1) came to know about the death of his father and that his dead body was lying near the small canal in Sarberia can hardly be said to be an incriminating circumstance vis-'-vis the accused. The second circumstance 'B' too cannot be considered as an incriminating circumstance as Tapan Kumar Samanta (PW-1) had never heard the appellant speaking against his father and he claimed that he came to know about that from Narayan Adhikari (PW-3) and Sudhir Maity (who was not even examined). Therefore, that circumstance too would go out of consideration. Insofar as the third circumstance to the effect that the accused was seen in the company of the deceased at Midnapore can hardly be said to be a circumstance worth the name. It is alleged that the accused was seen taking tea with the deceased at Mahisadal bazar in the company of Sudhir Maity and Nirode Kanta Bera and these persons have not been examined at all. Therefore, even if it is presumed that the deceased was taking tea with them in the evening, that would be of no consequence. Insofar as the fourth circumstance 'D' is concerned, again, it is based on the hearsay evidence of Tapan Kumar Samanta (PW-1) that he heard it from Narayan Das Adhikari (PW-3) that afterwards the appellant and the deceased went to the liquor shop of Bholanath

Pal at Garkamalpur and took liquor and afterwards left the shop leaving Haripada Samanta and the appellant together. This circumstance, in our opinion, could be somewhat relevant as it established the presence of the accused along with the deceased in the evening and the fact that he was in the company of the deceased. However, we must point out here that the said liquor shop owner Bholanath Pal was never examined. The circumstance 'E' is also of no consequence as Paresh Das Adhikari (PW-7) merely saw the deceased standing alone by the side of courtyard in front of his house at about 9.30 p.m. in the evening. On his inquiry as to why he was standing there, the deceased is supposed to have answered him that he was waiting for Niranjan Panja since he had gone to the house of his uncle, Kanai Lal Das (PW-6). In fact, Kanai Lal Das (PW-6) denied this fact that the accused had come to his place. Therefore, even that circumstance is extremely suspicious. As regards the sixth circumstance 'F', that the accused had gone to the house of Tapan Kumar Samant (PW-1) on 13.12.1988 and told him about his father lying by the side of canal and advising him to lodge a complaint against one against Haripada Panja and Abinash Panja, we willconsider this circumstance later on when we examine the evidence in detail. The circumstance at 'G' is the discovery of the dead body by the side of the canal. That cannot be viewed against the accused unless the accused is connected with the death. The next circumstance 'H' is that the accused was arrested on the next day and his arrest led to the recovery and blood stained Siuli Katari under a Seizure List (Ext.4) along with two other clothes, namely, a green coloured chadar and a white coloured dhoti. Unfortunately, for the prosecution this Siuli Katari was never brought before the Court. It is said to have been lost and has never seen the light of the day before the Court. This is apart from the fact that the proof of discoveries itself is doubtful. The circumstance at 'I' is extremely strange. Under that Rabindra Rana (PW-9), the village blacksmith is said to have seen the accused sharpening a Hansua on the earlier day of the incident. Neither that Hansua nor the said Siuli Katari had

been presented before the Court. This witness also did not even see or identify the same. The last circumstance 'J' is about the report of the Serologist showing that the Siuli Katari was having blood. However, it is clear that the report does not say that it was human blood. On the other hand, it was reported that the blood was disintegrated and the origin of the same could not be determined. Therefore, even this circumstance has to go out of consideration.

8. The High Court has accepted the evidence on the recovery of the so-called weapon. We fail to follow as to how the said discovery could at all be relied upon in the absence of the weapon being produced before the Court. Again, the High Court has also commented upon the medical evidence of Dr. Ardhendu Bikash Das, the Medical Officer (PW-11) when he spoke about the injuries upon the dead body being possible by Siuli Katari. In the absence of Siuli Katari being seen by the doctor in the Court, this evidence should have been discarded. It seems that the so-called weapon of the offence was lost. The High Court had also expressed its displeasure and directed that the circumstance under which the said weapon was lost should be informed to the Court and also as to who was responsible for the loss of the material weapon. We do not see any traces about the same. Therefore, the High Court has merely relied upon the said discovery made in the absence of Siuli Katari and recorded under Section 27, Indian Evidence Act and the theory of 'last seen together'. From this, the High Court has proceeded to hold that the chain of circumstances was complete against the accused and the only unmistakable inference of the same was in favour of the culpability of the accused.

9. We have already pointed out as to how the so-called circumstances were totally innocuous or suspicious.

10. On this backdrop, we will first go to the question of motive which has not been considered by the High Court at all. The so-called motive as deposed by, PW-1, Tapan Kumar was

that the accused Niranjan Panja used to speak against his father after his father stopped looking after his litigation. It appears that the deceased used to look after the litigation of number of persons and that was probably his profession. We do not think that merely because the deceased had stopped looking after the litigation of the accused, the accused had any strong motive much less to commit murder of the deceased. Motive is an important circumstance in the prosecution which is based on circumstantial evidence. However, we do not see any such strong motive on the part of the appellant. We, therefore, reject the theory that there was any motive much less any strong motive on the part of the accused so as to commit the murder of the deceased.

11. In his evidence, PW-1, Tapan Kumar had suggested that on the fateful day in the evening he saw his father at the tea stall of one Gautam Manna along with Niranjan Panja (accused), Narayan Adhikari, Sudhir Maity and Nirode Kanta Bera etc. Most of these witnesses, barring Narayan Adhikari, have not been examined in this case. Again, it will be very inconsequential even if the accused was in the company of the deceased as there were number of other persons also who were having tea. Tapan Kumar Samanta (PW-1) then said that he learnt from Narayan Adhikari that, thereafter, all of them went to the liquor shop and took liquor. We do not know as to how this evidence was allowed to be recorded because it is clearly inadmissible. The claim of Tapan Kumar Samanta that accused Niranjan Panja had come to his house, and advised him to lodge a complaint against Haripada Panja and Abinash Panja was also extremely suspicious as there was hardly any corroboration to this claim. This witness also identified the blood stained dhoti and gangi baniyan.

12. The second witness was Ram Chand Bar (PW-2) who was a gate keeper in the Gram Panchayat. There is hardly anything in his evidence which is incriminating except that he had seized clothes from the dead body. PW-3, Naryan Das

Adhikari spoke about the deceased, himself and the accused being there and their consuming liquor at Bholanath Pal's liquor shop. He, however, claimed that at about 9 p.m. he parted way and proceeded towards left and Haripada and Niranjan proceeded towards right i.e. towards Sarberia. It means that he was also in the company of the deceased till 9 p.m. He had not stated about their taking liquor in his police statement which he had accepted. He admitted that he and Haripada got down from the bus at Mahisadal on return from Midnapore. He also admitted that nobody had witnessed that he had parted company from Haripada and Niranjan at 9 p.m. on 12.12.1988. He could not even tell as to how far Haripada and Niranjan went together. He admitted that he parted way at a spot in Ghagra Mouza. He further stated that the house of the deceased was barely five minutes walk away from that spot while the accused's house was about half a mile. It was also in the vicinity of the village itself. The evidence of this witness would be of no consequence, particularly, because the prosecution in this case has not fixed the time of death and there is no evidence led to that effect. Where the prosecution depends upon the theory of 'last seen together', it is always necessary that the prosecution should establish the time of death, which the prosecution has failed to do in this case. The evidence of Ranjit Samanta (PW-4) also is of no consequence.

13. Sunil Kumar Samanta (PW-5), however, was a witness of discovery. He claimed that he went to the house of Niranjan Panja along with the Panchayat member, Harekrishna Pramanick, where the seizure of a chadar, a cloth and a side bag made of cotton was made. Accused Niranjan Panja had himself brought out those clothes and then accused led them to the stack of loose earth under the Banana tree by the side of canal and a Hansua was recovered where it was kept concealed. He had then claimed that a lady had brought out the weapon and the villagers informed them that she was the second daughter of Niranjan Panja. He did not even identify that lady. In his cross-examination, it was suggested that two articles,

namely, the clothes were seized from the house of accused Niranjan Panja. He admitted that he had gone to Thana for his personal business at about 8-9 p.m. and, there he met the Investigating Officer. The accused Niranjan Panja was also there. Then he along with the Investigating Officer and accused Niranjan went to the house of Niranjan. He admitted that there was no other member of the public in the jeep. He had to admit in his cross-examination that he had not said to the Investigating Officer that as per the showing of the Niranjan, Hansua was recovered from beneath loose earth under the Banana tree. Therefore, this can hardly be an evidence of discovery. For effecting a discovery, a statement has to be recorded on the part of the accused showing his readiness to produce the material object and it is only the part of the statement which is not incriminating and leads to discovery which becomes admissible. The evidence of this witness does not inspire confidence and it is of no use, more particularly, because the so-called Hansua allegedly produced by the accused never saw the light of the day nor had the witness identified the same and the prosecution had also not given any explanation whatsoever about the disappearance of this weapon.

14. PW-6, Kanai Lal Das was declared hostile. Paresh Das Adhikari (PW-7) stated that he saw the deceased standing under a tree just by the side of the courtyard in front of his house and on being asked as to why he was standing there, the deceased said that the accused Niranjan had gone to Kanai Lal Das's house and since he was not on talking terms with Kanai Lal, he did not go along with the accused. He claimed that, thereafter, he went for answering the nature's call and when he returned, he did not find Haripada there. The evidence of this witness does not inspire any confidence. Kanai Lal Das himself said that the accused did not go to meet him and nothing of this sort had ever happened. This witness was declared hostile.

15. The evidence of Smt. Sita Samanta (PW-8) is of no consequence because she did not know anything. However, the

evidence of Rabindra Rana (PW-9) is very interesting. He had seen the accused sharpening the Hansua on the previous day. This could hardly be a circumstance to be viewed against the accused as the said Hansua has not seen the light of the day. Dr. Ardhendu Bikas Das (PW-11) was the doctor who had neither seen the Siuli Katari nor had fixed the time of death in the post-mortem report. Hare Krishna Pramanik (PW-12) refused that anything was seized by police from the house of Niranjan Panja in his presence. He was not even declared hostile. The Investigating Officer's evidence too is of no consequence, particularly, because the so-called theory of discovery has been disbelieved by us. He had not even executed the spot Panchnama from where the so called Siuli Katari was allegedly procured by the accused.

16. In short, there is hardly any evidence in this case much less a clinching one to believe the theory that the accused had committed the murder.

17. We are convinced that both the judgments of the Trial Court as well as the Appellate Court are incorrect judgments. In this case, the prosecution has utterly failed to prove that the accused had committed the murder of the deceased, Haripada Samanta. We, therefore, allow this appeal and set aside the conviction of the accused. The accused shall be released forthwith unless required in any other offence.

K.K.T. Appeal allowed.

JEFFREY J. DIERMEIER AND ANR.

v.

STATE OF WEST BENGAL & ANR.

(Criminal Appeal No. 1079 of 2010)

MAY 14, 2010

[D.K. JAIN AND H. L. DATTU, JJ.]

Penal Code, 1860:

s.499 – Defamation – Meaning and Ingredients of – Held: The offence of defamation is the harm caused to reputation of a person – To constitute "defamation", there must be an imputation and such imputation must have been made with the intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made.

s.499, Tenth Exception – Charges of defamation – Ambit and scope of – Held: For invoking the aid of Tenth Exception to s.499 IPC, both "good faith" and "public good" have to be established by the accused – However, no rigid test for deciding whether the accused acted in "good faith" and for "public good" under the said Exception can be laid down – The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom imputation is allegedly made – On facts, case for quashing the complaint u/s. 482 Cr.P.C. not made out – Code of Criminal Procedure, 1973 – s. 482.

Code of Criminal Procedure, 1973 – s.482 – Inherent powers of the High Court – Scope and ambit of – Discussed.

The Chartered Financial Analysts Institute (CFA

Institute) is a non stock corporation, incorporated under the laws of the State of Virginia, United States, which confers the designation of Chief Financial Analyst (CFA) upon its members who fulfil a minimum professional criterion.

Appellant no.1 is the President and Chief Executive Officer of the CFA Institute, while appellant no.2 is the President of the Indian Association of Investment Professionals and a member of the CFA Institute.

In the year 1985, on being approached by respondent no.2- Institute of Chartered Financial Analysts of India (ICFAI), the CFA Institute had entered into a licence agreement with them to conduct its CFA program in India. The agreed arrangement continued for quite some time, whereafter the CFA Institute decided to wean off its arrangement with respondent No.2 as it felt that the latter was not adhering to the required standards and quality in the said program; and issued a notice of termination of its licence.

Subsequently, in the year 2004, the CFA Institute filed a civil suit in the High Court of Delhi for permanent injunction restraining respondent No.2 from using the trade marks, services, service marks or trade name CFA, Chartered Financial Analyst, The Institute of Chartered Financial Analysts of India, ICFA and ICFAI or any other name or mark identical or deceptively similar to these marks and passing off CFA Institute Programs or business as that of CFA Institute. The High Court granted interim injunction against respondent no.2. However, respondent No.2, through its sponsored University in Tripura, issued advertisement inviting applications for fresh enrolments for award of "CFA" certification.

According to the CFA Institute, since the programmes which were continuing at the time of

passing of the order of interim injunction by the High Court of Delhi had come to an end, the invitation for fresh enrolment in terms of the said advertisement was for subsequent programmes, which were not in existence at the time of the interim injunction order and, therefore, it was in breach of the said interim injunction. Accordingly, the CFA Institute issued a public notice under the caption "A Word of Caution to the Indian Investment Community".

Alleging that the said public notice was defamatory within the meaning of s.499 IPC, respondent No.2 filed a private complaint against the appellants for offence under s.500 r/w s.34 of IPC. The gravamen of the allegations made in the complaint was that the CFA Institute, through appellant no.1, issued the offending "Word of Caution" wherein they: (1) deliberately and consciously did not publish the full text of the interim injunction order granted by the High Court against respondent No.2; they did not mention that order was with a rider that it will not come into effect till the end of the current academic session of CFA programme run by respondent no.2 and that the defamatory advertisement portrays that the designation given by CFA Institute is the only valid designation and the CFA certificate given by respondent no.2 is not valid. According to the respondent no.2, this was a malicious act on the part of appellant No.1, with the intention to harm its reputation in the estimation of the public in general and its present and past students in particular and, therefore, the appellants are liable to be punished under s.500 r/w s.34 IPC.

The trial court took cognizance of the complaint and issued summons to the appellants. The appellants filed petition under s.482 CrPC seeking quashing of the complaint. The High Court dismissed the petition.

Before this Court, the question which arose for consideration was whether the allegations projected in the complaint against the appellants, did not constitute an offence of "defamation" as defined in s.499 IPC and hence did not attract the penal consequences envisaged in s.500 IPC, and therefore, it was a fit case where the High Court in exercise of its jurisdiction under s.482 CrPC should have quashed the complaint.

Dismissing the appeal, the Court

HELD: 1. Section 482, CrPC envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the CrPC; (ii) to prevent abuse of process of Court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. The power possessed by the High Court under the said provision is very wide but is not unlimited. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. However, the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice. [Para 16] [143-E-G; 144-A-B]

R.P. Kapur v. State of Punjab **AIR 1960 SC 866;** *Dinesh Dutt Joshi v. State of Rajasthan* **(2001) 8 SCC 570 and** *Som Mittal v. Government of Karnataka* **(2008) 3 SCC 753, relied on.**

2.1. To constitute "defamation" under s.499 IPC, there must be an imputation and such imputation must have been made with intention of harming or knowing or having reason to believe that it will harm the reputation

of the person about whom it is made. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged. However, as per Explanation 4 to the Section, no imputation is said to harm a person's reputation, unless that imputation directly or indirectly lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, in the estimation of others or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. [Paras 24 and 25] [149-C-F]

2.2. As regards the argument of the appellants that since the "Word of Caution" was issued in "good faith" for the benefit of those who were planning to acquire CFA Certificate, and the same being for the "public good", the case falls within the ambit of Tenth Exception to s.499 IPC and, therefore, the appellants cannot be held liable for defamation, it is plain that in order to bring a case within the scope of the Tenth Exception, it must be proved that statement/publication was intended in "good faith" to convey a caution to one person against another; that such caution was intended for the good of the person to whom it was conveyed, or of such person in whom that person was interested, or for the "public good". The appellants issued the offending "Word of Caution" ostensibly in order to warn those who were either planning to hire an investment professional or to obtain a CFA designation that there was an interim injunction against respondent No.2 from using their afore-noted trademarks. However, it cannot be denied that while the

publication refers to the interim order passed by the High Court, it omits to mention that the said injunction will not come into effect till the end of current academic session of the CFA programme, and that the order would not mean expression of final opinion on the matter. [Paras 26, 28 and 31] [149-G; 150-C; 151-B-F]

2.3. It is trite that where to the charge of defamation under s.500 IPC, the accused invokes the aid of Tenth Exception to s.499 IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with a degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the said Exception. The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom imputation is allegedly made. These and a host of other considerations would be relevant and required to be considered for deciding appellants' plea of "good faith" and "public interest". However, all these are questions of fact and matters for evidence. [Para 32] [151-G-H; 152-A-E]

2.4. In the instant case, the stage for recording of evidence had not reached and, therefore, in the absence of any evidence on record, it is difficult to return a finding whether or not the appellants have satisfied the requirements of "good faith" and "public good" so as to fall within the ambit of the Tenth Exception to s.499 IPC. Similarly, it will neither be possible nor appropriate for this Court to comment on the allegations levelled by respondent No.2 and record a final opinion whether these allegations do constitute defamation. Reading the complaint as a whole, it is difficult to hold that a case for quashing of the complaint under s.482 CrPC has been made out. For the afore-going reasons, the High Court was right in refusing to quash the complaint under s.500 IPC. [Paras 33 and 34] [152-G-H; 153-A]

State of Haryana v. Bhajan Lal **1992 Supp. (1) SCC 335;** *Shatrughna Prasad Sinha v. Rajbhau Surajmal Rathi & Ors.* **(1996) 6 SCC 263;** *Rajendra Kumar Sitaram Pande & Ors. v. Uttam & Anr.* **(1999) 3 SCC 134;** *Sewakram Sobhani v. R.K. Karanjia, Chief Editor, Weekly Blitz & Ors.* **(1981) 3 SCC 208;** *M.N. Damani v. S.K. Sinha & Ors.* **(2001) 5 SCC 156;** *Shriram Refrigeration Industries v. Hon'ble Addl. Industrial Tribunal-Cum-Addl. Labour Court, Hyderabad & Ors.* **(2002) 9 SCC 708;** *Chand Dhawan (Smt) v. Jawahar Lal & Ors.* **(1992) 3 SCC 317;** *Jagir Kaur & Anr. v. Jaswant Singh* **[1964] 2 S.C.R. 73;** *State of Bihar & Ors. v. Shyam Yadav & Ors.* **(1997) 2 SCC 507 and** *D.S. Parvathamma v. A. Srinivasan* **(2003) 4 SCC 705, referred to.**

Case Law Reference:

1992 Supp. (1) SCC 335	**referred to**	**Para 9**
(1996) 6 SCC 263	**referred to**	**Para 9**
(1999) 3 SCC 134	**referred to**	**Para 9**
(1981) 3 SCC 208	**referred to**	**Para 10**

(2001) 5 SCC 156	**referred to**	**Para 10**
(2002) 9 SCC 708	**referred to**	**Para 10**
(1992) 3 SCC 317	**referred to**	**Para 12**
(2008) 3 SCC 753	**relied on**	**Para 12**
[1964] 2 S.C.R. 73	**referred to**	**Para 14**
(1997) 2 SCC 507	**referred to**	**Para 14**
(2003) 4 SCC 705	**referred to**	**Para 14**
AIR 1960 SC 866	**relied on**	**Para 17**
(2001) 8 SCC 570	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1079 of 2010.

From the Judgment & Order dated 18.11.2008 of the High Court of Calcutta in C.R.R. No. 523 of 2008.

Shanti Bhushan, Rajendra Kr, Nitya Ramakrishnan, Sanjai Kumar Pathaak, Priya Rao, for the Appellants.

K.K. Venugopal, Y.Raja Gopala Rao, Y. Ramesh, Y. Vismai Rao, Pooja Dhir, H.K. Puri for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. This appeal, by special leave, arises from the judgment dated 18th November 2008 rendered by a learned Single Judge of the High Court of Calcutta in C.R.R. No. 523 of 2008. By the impugned judgment, the learned Judge has dismissed the petition preferred by the appellants under Section 482 of the of the Code of Criminal Procedure, 1973 (for short "the Code") seeking quashing of a private complaint filed by respondent No.2 in this appeal, for an offence under Section 500 read with Section 34 of the Indian Penal Code, 1860 (for short "the IPC").

3. The facts, material for the purpose of disposal of this appeal, may be stated thus:

Appellant No.1 is the President and Chief Executive Officer of the Chartered Financial Analysts Institute (hereinafter referred to as "CFA Institute"), incorporated under the laws of the State of Virginia, United States. Appellant No.2 is the President of the Indian Association of Investment Professionals, who is a member of the society of CFA Institute. CFA Institute is a non stock corporation and confers the designation of Chief Financial Analyst ("CFA" for short) upon its members who fulfil a minimum professional criterion. CFA certification is considered to be a definitive standard for professional competence.

4. In the year 1985, on being approached by the Institute of Chartered Financial Analysts of India (for short "ICFAI"), respondent No.2 herein, a registered society, having its office at Kolkata, CFA Institute entered into a licence agreement with them to conduct its CFA program in India. The agreed arrangement continued for quite some time. However, realising that respondent No.2 was not adhering to the required standards and quality in the said program, CFA Institute decided to wean off its arrangement with ICFAI - respondent No.2. Since, in the meanwhile, respondent No.2 was attempting to get the trademarks of CFA Institute registered in India, in the year 1997, CFA Institute issued a notice of termination of its licence with the said respondent. On receipt of the said notice, respondent No.2 filed a declaratory suit before the District Courts in Hyderabad, seeking a declaration regarding the change of their name "ICFAI" and their use of the designation "CFA". However, they did not succeed in getting any interim or final relief in the said suit. In the year 2004, CFA Institute filed a Civil Suit [C.S.(OS) No.210 of 2004] in the High Court of Delhi for permanent injunction restraining respondent No.2 from

using the trade marks, services, service marks or trade name CFA, Chartered Financial Analyst, The Institute of Chartered Financial Analysts of India, ICFA and ICFAI or any other name or mark which may be identical or deceptively similar to these marks and passing off CFA Institute Programs or business as that of CFA Institute. Vide Order dated 4th August 2006, the High Court passed the following order by way of interim relief:

> "30. In view of the above, I allow the application under Order XXXIX Rules 1 & 2 CPC and restrain the defendants, during the pendency of the suit from using any of the trademarks or service marks CFA, Chartered Financial Analyst, The Institute of Chartered Financial Analysts of India, ICFA and ICFAI or any other name or mark which may be identical or deceptively similar to these marks and from passing off their programmes or business as that of the plaintiffs. *However, this order of injunction will not come into effect till the end of current academic session of the CFA Programme run by the defendants.* Nor will anything said herein will mean final expression of opinion of this Court."
>
> [Emphasis supplied]

5. On 30th January 2007, respondent No.2, through its sponsored University in Tripura – The Institute of Chartered Financial Analysts of India University, Tripura (hereinafter referred to as "the University"), issued an advertisement inviting applications for fresh enrolments for award of "CFA" certification. According to CFA Institute, since the programmes which were current at the time of passing of the order of interim injunction by the High Court of Delhi on 4th August 2006 had come to an end in January 2007, the invitation for fresh enrolment in terms of the advertisement issued on 30th January 2007 was for subsequent programmes, which were not current at the time of the interim injunction order and, therefore, it was in breach of the said interim injunction. Accordingly, on 12th

February 2007, CFA Institute issued a public notice under the caption "A Word of Caution to the Indian Investment Community", (hereinafter referred to as "Word of Caution"). The relevant extract of the said publication reads thus:

> "There is confusion over the "CFA" name in India, and you deserve to know the facts. The Chartered Financial Analyst (CFA(R)) designation from CFA Institute is the only globally recognized CFA designation for financial professionals.
>
> However, the Institute of Chartered Financial Analysts of India (Icfai) offers an educational program specializing in finance, which they term the "CFA Program", and awards a title called the "CFA".
>
> On 4th August 2006, the Delhi High Court recognized that CFA Institute owns the exclusive rights to the CFA trademarks and that continued use by Icfai causes irreparable harm. The court ordered an interim injunction requiring Icfai to stop using the "Chartered Financial Analyst" and "CFA" brands and to change its corporate and "CFA" title names. *Unfortunately, Icfai has continued its unauthorized use of our trademarks by running advertisements from an Icfai-sponsored university.*
>
> .....
>
> *If you are planning to either hire an investment professional or obtain a designation, you need to make informed decision that benefit your future.* Visit www.cfainstitute.org/India for more information about enrolling in the CFA Program, Scholarships, joining the IAIP, and the latest updates about our efforts to end this confusion and support the Indian Investment Community."
>
> (Emphasis added by us)

6. Alleging that the said public notice was defamatory

within the meaning of Section 499 of the IPC, respondent No.2 filed a private complaint against the appellants. The trial court took cognizance of the complaint and issued summons to the appellants. Feeling aggrieved by the summoning order, the appellants preferred the afore-noted petition before the High Court of Calcutta. As already stated, by the impugned judgment, the High Court has dismissed the said petition. Hence, the present appeal by the accused.

7. Shri Shanti Bhushan, learned senior counsel appearing on behalf of the appellants strenuously urged that the High Court gravely erred in declining to exercise its jurisdiction under Section 482 of the Code in a case where the complaint *ex facie* lacks basic ingredients of Section 499 of the IPC. Learned counsel submitted that by offering a prospectus for a new session beginning in the year 2007, which would be of 12-18 months duration, the University, a sponsored University of ICFAI had violated the injunction order issued by the High Court of Delhi on 4th August 2006 and, therefore, in the wake of a misleading advertisement, the appellants were compelled to issue a "Word of Caution".

8. Learned counsel contended that from the provisions of the Institute of Chartered Financial Analysts of India University, Tripura Act, 2004 (for short "the Act"), it was clear that the University was nothing but an alter ego of respondent No.2. In support of the contention, learned counsel referred to certain provisions of the Act showing that it is respondent No.2 who appoints the Chancellor of the University and in turn the Chancellor appoints the Vice-Chancellor; under Section 20 of the Act, the Board of Governors consists of Chancellor, Vice-Chancellor and three other persons nominated by respondent No.2; under Section 21 of the Act, the Board of Management consists of 9 persons of whom as many as 7 persons are to be the nominees of respondent No.2. It was, thus, submitted that all the acts of the University were really the acts of respondent No.2 itself and, therefore, the advertisement issued

for fresh admission by the University was clearly in breach of the order passed by the Delhi High Court. According to the learned counsel, the effect of the advertisement dated 30th January 2007 would have been to induce prospective students to believe that joining the new course offered by the University in the year 2007 would entitle them to get CFA designation from CFA Institute. It was argued that it was in these circumstances and keeping in mind the public interest that the appellants had issued a "Word of Caution" to the students who wished to obtain CFA certification. Learned counsel asserted that the prosecution of the appellants on account of publication of the said "Word of Caution" is an abuse of the process of the Court inasmuch as the said "Word of Caution" published by them was a public duty and thus, a legitimate expression. It was also absolutely necessary and in public interest and was singularly covered by the Tenth Exception to Section 499 of IPC.

9. It was also the assertion of the learned counsel that the contents of the "Word of Caution" did not in any way lower or cast a reflection on the moral or intellectual character of respondent No.2 and, therefore, Explanation 4 to Section 499 of the IPC, which imposes restrictions in the law of defamation, is clearly attracted in favour of the appellants. It was thus, pleaded that in the light of Explanation 4 as well as Tenth Exception to Section 499 IPC, the allegations in the complaint did not constitute an offence of defamation punishable under Section 500 IPC and, therefore, the High Court ought to have quashed the complaint. In support of the proposition, learned counsel placed reliance on the decisions of this Court in the case of *State of Haryana Vs. Bhajan Lal*[1] and *Shatrughna Prasad Sinha Vs. Rajbhau Surajmal Rathi & Ors.*[2]. Relying on *Rajendra Kumar Sitaram Pande & Ors. Vs. Uttam & Anr.*[3], learned counsel argued that under the given circumstances,

1. 1992 Supp. (1) SCC 335.
2. (1996) 6 SCC 263.
3. (1999) 3 SCC 134.

requiring the appellants to undergo trial would be travesty of justice.

10. *Per contra,* Shri K.K. Venugopal, learned senior counsel appearing on behalf of respondent No.2 supported the impugned judgment and submitted that all the grounds urged on behalf of the appellants for quashing the complaint involve determination of disputed questions of fact for which the matter has to go to trial and, therefore, the High Court was justified in not analyzing and returning a finding on the truthfulness or otherwise of the allegations in the complaint. Heavily relying on the majority view expressed by a Bench of three Judges in *Sewakram Sobhani Vs. R.K. Karanjia, Chief Editor, Weekly Blitz & Ors.*[4], learned counsel argued that answers to the questions whether the appellants were entitled to protection under Explanation 4 or that the advertisement was issued in "good faith" and for "public good" as contemplated in the Tenth Exception are questions of fact and matters for evidence and, therefore, trial in the complaint must continue. In this behalf, reliance was also placed on the decisions of this Court in *M.N. Damani Vs. S.K. Sinha & Ors.*[5] and *Shriram Refrigeration Industries Vs. Hon'ble Addl. Industrial Tribunal-Cum-Addl. Labour Court, Hyderabad & Ors.*[6]

11. Learned counsel argued that a reading of the offending publication as a whole would show that omission of the sentence "However, this order of injunction will not come into effect till the end of current academic session of CFA programme run by the defendants nor will anything said herein will mean final expression of opinion of this Court" was a conscious and deliberate suppression intended to portray ICFAI as a wrong doer, which has violated an injunction order passed by the High Court and in the process is in contempt of the said order. According to the learned counsel, suppression of the fact

4. (1981) 3 SCC 208.

5. (2001) 5 SCC 156.

6. (2002) 9 SCC 708.

that the interim injunction did not apply to the "current academic session of the CFA Programme", which was to conclude only in May 2009; had subjected the students who were undergoing the three year course to fear and anxiety that three years of their lives would be wasted, giving the impression that respondent No.2 had cheated them. It was contended that the conscious and deliberate omission of the last sentence of the order of interim injunction was with the sole objective to deter the students from enrolling in the CFA Programme offered by the four Universities in the State of Uttarakhand, Meghalaya, Tripura and Mizoram by creating a fear psychosis amongst the aspirants and, therefore, the offending publication was not in "good faith" and "public interest" as is being pleaded by learned counsel for the appellants.

12. Placing reliance on the decision of this Court in *Chand Dhawan (Smt) Vs. Jawahar Lal & Ors.*[7], learned counsel submitted that since the High Court had observed that the allegations in the complaint *prima facie* constituted an offence under Section 499 IPC, it did not err in refusing to interfere in the matter. Reliance was also placed on the decisions of this Court in *Som Mittal Vs. Government of Karnataka*[8] and *Som Mittal Vs. Government of Karnataka*[9] to contend that power to quash criminal proceedings is to be exercised in the rarest of rare cases.

13. Shri Venugopal also contended that the University at Tripura, not being a party to the suit at the time of passing of the order by the High Court was not bound by the said order, yet the statement in the advertisement that the continued unauthorized use of appellant's trademark through the sponsored Universities is *per se* defamatory and has caused immense harm to the image and reputation of respondent No.2 in the eyes of the Indian Investment Community as also the

7. (1992) 3 SCC 317.

8. (2008) 3 SCC 574.

9. (2008) 3 SCC 753.

student community at large.

14. Learned senior counsel strenuously urged that since the stand of the appellants before the High Court was that they were entitled to the protection of Fourth and Fifth Exceptions to Section 499 IPC, they cannot now be permitted to rely upon Explanation 4 and Tenth Exception to Section 499 IPC so as to build up a totally new case before this Court. In support of the proposition that a new plea, which is essentially a plea of fact, cannot be allowed to be urged for the first time at the hearing of appeal under Article 136 of the Constitution before this Court, learned counsel placed reliance on the decisions of this Court in *Jagir Kaur & Anr. Vs. Jaswant Singh*[10], *State of Bihar & Ors. Vs. Shyam Yadav & Ors.* and *D.S. Parvathamma Vs. A. Srinivasan*[11].

15. Thus, the question for consideration is whether or not in the light of the allegations as projected in the complaint against the appellants, it was a fit case where the High Court in exercise of its jurisdiction under Section 482 of the Code should have quashed the complaint against the appellants?

16. Before addressing the contentions advanced on behalf of the parties, it will be useful to notice the scope and ambit of inherent powers of the High Court under Section 482 of the Code. The Section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code; (ii) to prevent abuse of process of Court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but is not unlimited. It has to be exercised sparingly,

10. [1964] 2 S.C.R. 73.

11. (1997) 2 SCC 507.

12. (2003) 4 SCC 705.

carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

17. In one of the earlier cases, in *R.P. Kapur Vs. State of Punjab*[13] this Court had summarized some of the categories of cases where inherent power under Section 482 of the Code could be exercised by the High Court to quash criminal proceedings against the accused. These are:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings e.g. want of sanction;

(ii) where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

18. In *Dinesh Dutt Joshi Vs. State of Rajasthan*[18], while dealing with the inherent powers of the High Court, this Court has observed thus:

> *"….*The principle embodied in the section is based upon the maxim: *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable.

13. AIR 1960 SC 866.

18. (2001) 8 SCC 570

The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."

19. The purport of the expression "rarest of rare cases", to which reference was made by Shri Venugopal, has been explained recently in *Som Mittal Vs. Government of Karnataka* (supra). Speaking for a bench of three Judges, Hon'ble the Chief Justice said:

"When the words 'rarest of rare cases' are used after the words 'sparingly and with circumspection' while describing the scope of Section 482, those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash the FIR or criminal proceedings should be used sparingly and with circumspection."

20. Bearing in mind the afore-stated legal position in regard to the scope and width of the power of the High Court under Section 482 of the Code, we shall now advert to the facts at hand.

21. As noted above, the gravamen of the allegations made

against the appellants in the complaint under Section 500 of the IPC is that when on 30th January 2007, respondent No.2 through its sponsored University at Tripura issued advertisement for fresh enrolments for award of CFA Certification, CFA Institute, through its President and CEO, appellant No.1, in this appeal, issued the offending "Word of Caution" wherein they: (1) deliberately and consciously did not publish the full text of the interim injunction granted by the High Court against respondent No.2 vide order dated 4th August 2006. They did not mention that order dated 4th August 2006 was with a rider that the said order will not come into effect till the end of the current academic session of CFA programme run by the society and (2) the defamatory advertisement portrays that the designation given by CFA Institute is the only valid designation and the CFA certificate given by the society is not valid. According to the complainant, all this was a malicious act on the part of appellant No.1, with the intention to harm their reputation in the estimation of the public in general and its present and past students in particular and, therefore, they are liable to be punished under Section 500 read with Section 34 of the IPC. For the sake of ready reference, the relevant portion of the complaint is extracted below:

"That in the defamatory advertisement, the accused persons have stated inter alia as follows—

"The Chartered Financial Analyst (CFA) designation from CFA Institute is the only globally recognized CFA designation for financial professional. However, the Institute of Chartered Financial Analysts of India (Icfai) offers an educational programme specializing in finance, which they term the 'CFA Programme' and awards a title called the CFA".

That in the aforesaid advertisement, the American Association has falsely claimed sole global recognition of its 'CFA' designation even though the same is not recognized by any Government and/or Statutory authority

either in USA or in any other country including India. The sole purpose of using the word 'Charter' by the accused is purely with an intention to defraud and/or mislead the public to convey statutory recognition. The said advertisement does not disclose that unlike the "CFA' degree granted by the Society, the so called "CFA Charter is not recognized by any University in India or outside and the students who obtain such "Charter" cannot pursue further studies based on the "CFA Charter" so awarded by the CFA Institute. The tenor of the above statements in the defamatory advertisement portrays an image that the designation, given by the CFA Institute, is the only valid designation and the 'CFA' degree given by the Society is not a valid one. However, the situation is to the contrary and the Society is a body recognized by the various statutory authorities of India to be entitled to grant the "CFA" degree. The sole purpose is to defame and scandalize and thereby lower the image of the Society in the eyes of the general public as also in the eyes of its present students as also potential students and thereby harm the image of the Society, so that the organization of the accused persons can benefit therefrom.

That in the defamatory advertisement dated 12.02.2007, the accused persons have further stated as follows:-

"On 4th August, 2006, the Delhi High Court recognized that CFA Institute owns the exclusive rights to the CFA trademarks and that continued use by ICFAI causes irreparable harm. The court ordered an interim injunction requiring Icfai to stop using the "Chartered Financial Analyst" and "CFA" brands and to change its corporate and "CFA" titles names. Unfortunately, Icfai has continued its unauthorized use of our trademarks by running advertisements from an Icfai-sponsored university".

The said statements are patently false and

defamatory in nature. *The accused persons deliberately, wilfully and with malafide intention have not mentioned in the advertisement that the order dated 4.8.2006 passed by the Hon'ble High Court of Delhi, granting temporary injunction, has been made with a rider that the said "order of injunction will not come into effect till the end of the current academic session of the CFA program run by the Society." It is well within the knowledge of the accused that the current academic session of the CFA programme of the Society has not come to an end and as such it cannot be said that there has been unauthorized use of the alleged trade marks of the CFA Institute.* Continuance of the current academic session from a University, sponsored by the Society, cannot be said to be in violation of the order of injunction passed by the Hon'ble High Court of Delhi. *Moreover, the defamatory advertisement does not mention the fact (which is within the knowledge of the accused) that against the above interim order of injunction, an appeal is pending in the Hon'ble High Court of Delhi. The tenor of the said defamatory statement makes it clear that the accused, with malafide intent to injure and harm the Society, had misquoted the order passed by the Hon'ble High Court of Delhi on 4.8.2006."*

(Emphasis added)

22. Since the factum of publication of the "Word of Caution" is not in dispute, the question for determination is whether the afore-extracted allegations in the complaint constitute an offence of "defamation" as defined in Section 499 of the IPC and would attract the penal consequences envisaged in Section 500 of the IPC?

23. "Defamation" is defined under Section 499 of the IPC. It reads as under:

"499. Defamation.—Whoever, by words either spoken or

intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

24. To constitute "defamation" under Section 499 of the IPC, there must be an imputation and such imputation must have been made with intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged.

25. However, as per Explanation 4 to the Section, no imputation is said to harm a person's reputation, unless that imputation directly or indirectly lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, in the estimation of others or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

26. As stated above, the thrust of the argument of learned counsel for the appellants was that since the "Word of Caution" was issued in "good faith" for the benefit of those who were planning to acquire CFA Certificate, and the same being for the "public good", the case falls within the ambit of Tenth Exception to Section 499 of the IPC and, therefore, the appellants cannot be held liable for defamation.

27. Tenth Exception to Section 499 of the IPC reads as follows:

"*Tenth Exception.*—Caution intended for good of person to whom conveyed or for public good.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good."

28. It is plain that in order to bring a case within the scope of the Tenth Exception, it must be proved that statement/publication was intended in "good faith" to convey a caution to one person against another; that such caution was intended for the good of the person to whom it was conveyed, or of such person in whom that person was interested, or for the "public good".

29. Before dealing with the question whether or not the Tenth Exception would be attracted in the instant case, it would be appropriate at this juncture, to deal with the objection raised by learned senior counsel appearing for respondent No.2, that no plea regarding applicability of the Tenth Exception having been urged before the High Court, the appellants are estopped from raising such a plea at this stage. Ground IV in the petition before the High Court was in the following terms:

"Ground IV – For that the publication dated February 12, 2007 was essential and in public interest and thus made to protect the interest of the general public who might otherwise have been induced to join the course offered by the complainant/opposite party no.2 in the belief that it was entitled to conduct the same. The language of the publication is a fact and there is no question of there being any defamation involved in the same."

30. It is clear from the above that in their defence, the appellants had pressed into service the Tenth Exception to Section 499 of the IPC. It was their case that the publication in question was in public interest as it was made to protect the

interests of those who were planning to join the CFA course announced by the University. In our view, the appellants are not seeking to raise a new ground and, therefore, respondents' objection on that account deserves to be rejected.

31. Now, reverting back to the main issue, as afore-stated, the appellants issued the offending "Word of Caution" ostensibly in order to warn those who were either planning to hire an investment professional or to obtain a CFA designation that there was an interim injunction against respondent No.2 from using their afore-noted trademarks. It is claimed by the appellants that the said notice was aimed at that group of people who were interested in acquiring a definitive standard for professional competence or for those who wanted to hire such professionals and not for the general public as such. According to them, this is clear from the text of the "Word of Caution", which says that "If you are planning to either hire an investment professional or obtain a designation, you need to make informed decisions that benefit your future." However, it cannot be denied that while the publication refers to the interim order passed by the Delhi High Court, it omits to mention that the said injunction will not come into effect till the end of current academic session of the CFA programme, which, according to respondent No.2, was to conclude in May 2009, and that the order would not mean expression of final opinion on the matter. According to respondent No.2, the omission of last two sentences of the interim order was a conscious and deliberate suppression to somehow project ICFAI in a bad light in order to harm its reputation in the eyes of the professional community and, therefore, the offending publication was neither in "good faith" nor in "public interest".

32. It is trite that where to the charge of defamation under Section 500 IPC, the accused invokes the aid of Tenth Exception to Section 499 IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith"

is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with a degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the said Exception. The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom imputation is allegedly made. These and a host of other considerations would be relevant and required to be considered for deciding appellants' plea of "good faith" and "public interest". Unfortunately, all these are questions of fact and matters for evidence.

33. In the instant case, the stage for recording of evidence had not reached and, therefore, in the absence of any evidence on record, we find it difficult to return a finding whether or not the appellants have satisfied the requirements of "good faith" and "public good" so as to fall within the ambit of the Tenth Exception to Section 499 IPC. Similarly, it will neither be possible nor appropriate for this Court to comment on the allegations levelled by respondent No.2 and record a final opinion whether these allegations do constitute defamation. Reading the complaint as a whole, we find it difficult to hold that a case for quashing of the complaint under Section 482 of the Code has been made out. At this juncture, we say no more lest it may cause prejudice to either of the parties.

34. For the afore-going reasons, we are of the opinion that the High Court was right in refusing to quash the complaint under Section 500 IPC. The appeal, being devoid of any merit, is dismissed accordingly. Nothing said by the High Court or by us hereinabove shall be construed as expression of final opinion on the merits of the complaint.

B.B.B. Appeal dismissed.

BHARATHA MATHA & ANR.
v.
R. VIJAYA RENGANATHAN & ORS.
(Civil Appeal No. 7108 of 2003)

MAY 17, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Code of Civil Procedure, 1908

s.100 – Second appeal – Scope of – High Court setting aside the concurrent finding of fact recorded by both the courts below that in view of the fact that husband of the defendant was alive at the relevant time, marriage between her and the brother of plaintiff could not be presumed – HELD: High Court re-appreciated the documentary evidence, and did not take into consideration the evidence of plaintiff's witnesses which had been relied upon by courts below, but decided on the presumption of marriage only placing reliance on the evidence of DW-1 who had been disbelieved by the courts below for cogent reasons – Such a course is not permissible while deciding a second appeal u/s100 – Judgment of High Court set aside.

Hindu Marriage Act, 1955:

s.5 – Marriage – Presumption of – HELD: If one of the parties of live-in relationship has a spouse living, merely live-in relationship between the said two parties would not lead to presumption of marriage between them.

s.16(2) – Legitimacy of children of void or voidable marriages – HELD: In view of legal fiction contained in s.16, the illegitimate children for all practical purposes, including succession to properties of their parents, have to be treated as legitimate – But, they cannot succeed to the properties of any other relation.

Evidence Act, 1872:

s.112 – Birth during marriage, conclusive proof of legitimacy – Presumption of a child being legitimate can only be displaced by a strong preponderance of evidence and not merely by a balance of probabilities – Proof of non-access between the parties to marriage during the relevant period is the only way to rebut the presumption – In the instant case, the proof of non-access between the parties to the legally subsisting marriage had never been even pleaded – Hindu Marriage Act, 1985 – ss. 5 and 16.

Transfer of Property Act, 1882:

s.52 – Transfer lis pendens – HELD: Owners still being in possession of suit property and their suit for declaration of title having been decreed, purchaser may resort to legal proceedings for recovery of sale consideration from his vendors – Hindu Marriage Act, 1955 – ss. 5 and 16 – Cod of Civil Procedure, 1908 – s.100.

The predecessor-in-interest of the appellants filed a suit against respondent nos. 2 to 5, claiming her share in the suit property left by her brother namely, 'MR', who died intestate and was stated to be unmarried. It was stated that defendant-1 (respondent no.2) was married to one 'AR' who was alive on the date of institution of the suit and her claim of live-in relationship with 'MR' and having two children from him was to be rejected. Defendant no. 1 denied her marriage with 'AR'. The trial court decreed the suit. Respondent no. 1, having purchased the suit property pending first appeal, got himself impleaded as a party in the appeal. The first appellate court affirmed the decree. However, the High Court allowed the second appeal filed by the respondents. Aggrieved, the successors of the plaintiff filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. The High Court, while deciding a second appeal, can interfere with the finding of fact, provided the findings recorded by the courts below are perverse. In the instant case, the trial court as well as the first appellate court have recorded a categorical finding of fact that defendant No.1 was legally wedded wife of 'AR" who was alive on the date of institution of the suit and, therefore, the question of marriage by presumption between defendant no. 1 and 'MR' (brother of the plaintiff) would not arise; and for determining the same all the material on record, including the statement of DW1 along with all other defence witnesses and the documents, particularly, Exts.B14, B18, B19 and B2, was taken into consideration. The courts below placed very heavy reliance upon the witnesses examined by the plaintiff particularly, PWs 2 and 5. The High Court without making any reference to the evidence of the plaintiff's witnesses, particularly, P.Ws .2 and 5, reversed the finding of fact and reached the conclusion that merely live-in-relationship between the said two parties would lead to the presumption of marriage between them. The High Court has decided the issue regarding the factum of marriage between 'AR' and defendant no. 1 placing reliance only upon the statement of DW1, step mother of 'MR', who had been disbelieved by the courts below by giving cogent reasons. Such a course is not permissible while deciding the second appeal u/s 100 CPC. [para 7, 9,13 and 17] [163-B-C; 163-F; 166-G]

H.B. Gandhi, Excise & Taxation Officer-cum- Assessing Authority, Karnal & Ors. Vs. M/s. Gopi Nath & Sons & Ors. **1992 Supp.(2) SCC 312;** *M/s. Triveni Rubber & Plastics Vs. Collector of Central Excise, Cochin* **AIR 1994 SC 1341;** *Kuldeep Singh Vs. Commissioner of Police & Ors*. **(1998) 3 Suppl. SCR 594 = (1999) 2 SCC 10 ;** *Gaya Din (dead) thr.*

Lrs. & Ors. Vs. Hanuman Prasad (dead) thr. Lrs. & Ors. **AIR 2001 SC 386;** *Rajinder Kumar Kindra Vs. Delhi Administration, thr. Secretary (Labour) & Ors.* **(1985) 1 SCR 866 = AIR 1984 SC 1805;** *Sheel Chand Vs. Prakash Chand* **(1998) 1 Suppl. SCR 297 =AIR 1998 SC 3063;** *Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa & Ors*. **AIR 2000 SC 2108;** *Kulwant Kaur & Ors. Vs. Gurdial Singh Mann (dead) by L.Rs*. **(2001) 2 SCR 525 = AIR 2001 SC 1273, relied on.**

1.2. The High Court has also reappreciated the documentary evidence and took a view contrary to that taken by the courts below. It was not appropriate for the High Court to re-appreciate the evidence in second appeal as no substantial question of law involved therein. In view of the fact that the High Court did not even take note of the deposition of the plaintiff's witnesses, findings recorded by the High Court itself become perverse and thus liable to be set aside. [Para 17-18] [166-H; 167-A-C]

2. The High Court erred in not appreciating that the judgments of the courts below could be based on another presumption provided u/s 112 of the Evidence Act, 1872, i.e. the presumption of a child being legitimate and such a presumption can only be displaced by a strong preponderance of evidence and not merely by a balance of probabilities as the law has to live in favour of innocent child from being bastardised. In the instant case, as the proof of non-access between defendant no. 1 and 'AR' had never been pleaded, the matter has not been examined by the High Court in correct perspective. It is settled legal proposition that proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption. [Para 15-16] [166-A-D]

Mohabbat Ali Khan Vs. Muhammad Ibrahim Khan &

Ors. **AIR 1929 PC 135;** *Chilukuri Venkateswarlu Vs. Chilukuri Venkatanarayana* **(1954) SCR 424 =AIR 1954 SC 176;** *Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati* **(1964) SCR 267 = AIR 1965 SC 364;** *Perumal Nadar (Dead) by Lrs. Vs. Ponnuswami Nadar (minor)* **(1971) SCR 49 = AIR 1971 SC 2352;** *Amarjit Kaur Vs. Harbhajan Singh and Anr*. **(2003) 10 SCC 228;** *Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy and Ors*. **(2005) 1 SCR 848 =AIR 2005 SC 800; and** *Shri Banarsi Dass Vs. Teeku Dutta (Mrs.) and Anr.* **(2005) 3 SCR 923 = (2005) 4 SCC 449, relied on.**

3.1. Section 5(1) of the Hindu Marriage Act lays down conditions for a Hindu marriage. It provides that marriage may be solemnized between any two Hindus if neither of them has a spouse living at the time of marriage. Section 11 of the Act provides that any marriage which is in contravention of s. 5(1) would be void. Section 16 as amended by Amendment Act of 1976 intends, as its prime object, to bring about social reforms and conferment of social status of legitimacy on a group of children, otherwise treated as illegitimate.. In view of the legal fiction contained in s.16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents. [para 19-20 and 23] [167-D-E; 168-C-G-H]

S.P.S. Balasubramanyam Vs. Suruttayan @ Andali Padayachi & Ors; **AIR 1992 SC 756;** *S. Khushboo Vs. Kanniammal & Anr*. **JT (2010) 4 SC 478;** *Lata Singh Vs. State of U.P. & Anr.* **(2006) 3 Suppl. SCR 350 = AIR 2006 SC 2522;** *Smt. P.E.K. Kalliani Amma & Ors. Vs. K. Devi & Ors.* **(1996) 2 Suppl. SCR 1 = AIR 1996 SC 1963, referred to.**

Rameshwari Devi Vs. State of Bihar & Ors. **(2000) 1**

SCR 390 = AIR 2000 SC 735; *Jinia Keotin & Ors. Vs. Kumar Sitaram Manjhi & Ors.* **(2002) 5 Suppl. SCR 689 = (2003) 1 SCC 730;** *Neelamma and others Vs. Sarojamma and others* **(2006) 9 SCC 612, referred to.**

3.2. It is evident that a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenery property but is entitled only to claim share in self-acquired properties, if any of his/her parents. In the instant case, the respondents did not plead at any stage that the suit land was a self-acquired property of 'MR'. It is evident from the record that 'MR' did not partition his joint family properties. He died issueless and intestate in 1974. Therefore, the question of inheritance of co-parcenery property by the illegitimate children, who were born out of the live-in-relationship, could not arise. Thus, the judgment of the High Court is liable to be set aside only on this sole ground. [Para 27-28] [171-B-D]

4. It shall be open to R-5 to resort to legal proceedings permissible in law for recovery of the sale consideration from his vendors, as he has purchased the suit property *lis pendens* and the appellants are still in possession thereof. [Para 30] [171-E-F]

Case Law Reference:

(1998) 1 Suppl. SCR 297	**relied on**	**para 10**
AIR 2000 SC 2108	**relied on**	**para 11**
(2001) 2 SCR 525	**relied on**	**para 12**
1992 Supp. (2) SCC 312	**relied on**	**para 14**
AIR 1994 SC 1341	**relied on**	**para 14**
(1998) 3 Suppl. SCR 594	**relied on**	**para 14**
AIR 2001 SC 386	**relied on**	**para 14**

(1985) 1 SCR 866	**relied on**	**para 14**
AIR 1929 PC 135	**relied on**	**para 16**
1954) SCR 424	**relied on**	**para 16**
(1964) SCR 267	**relied on**	**para 16**
(1971) SCR 49	**relied on**	**para 16**
(2003) 10 SCC 228	**relied on**	**para 16**
(2005) 1 SCR 848	**relied on**	**para 16**
(2005) 3 SCR 923	**relied on**	**para 16**
AIR 1992 SC 756	**referred to**	**para 22**
JT (2010) 4 SC 478	**referred to**	**para 22**
(2006) 3 Suppl. SCR 350	**referred to**	**para 22**
(1996) 2 Suppl. SCR 1	**referred to**	**para 23**
(2000) 1 SCR 390	**referred to**	**para 24**
(2002) 5 Suppl. SCR 689	**referred to**	**para 25**
(2006) 9 SCC 612	**referred to**	**para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7108 of 2003.

From the Judgment & Order dated 10.07.2001 of the High Court of Judicature at Madras in S.A. No. 1603 of 1987.

K. Ram Kumar for the Appellants.

Sai Krishna Rajgopal, Hari Shankar, Vikas Singh Jangra, Bharat S. Kumar for the Respondents.

The Order of the Court was delivered by

O R D E R

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the Judgment and Order of the High Court of Judicature at Madras dated 10th July, 2001 allowing the appeal filed by the respondent No.1 against the judgment and decree of the Ist Appellate Court dated 17.9.1986 affirming the judgment and decree of the Trial Court dated 7.3.1977 in O.S. No.269/1975 instituted by the predecessor-in-interest of the present appellants for claiming the property in dispute and denying the share to the respondent Nos. 2 to 5 or their predecessor-in-interest.

2. The facts and circumstances giving rise to the present case are that the predecessor-in-interest of the present appellants, Peria Mariammal instituted a suit, being O.S. No. 269 of 1975 against the respondents and their predecessor-in-interest claiming the share of her brother Muthu Reddiar, on the ground that he died unmarried and intestate and that Smt. Rengammal, the defendant No. 1 in the suit was a legally wedded wife of one Alagarsami Reddiar, who was still alive, therefore, her claim that she had live-in-relationship with plaintiff's brother Muthu Reddiar and had two children from him, had to be ignored. The defendants/respondents contested the suit denying the marriage between defendant No. 1 and the said Alagarsami Reddiar. The Trial Court decreed the suit vide Judgment and decree dated 7th March, 1977 recording the finding that Rengammal, defendant No.1 in the suit was wife of Alagarsami Reddiar who was alive at the time of filing the suit. There had been no legal separation between them. Therefore, the question of live-in-relationship of Smt. Rengammal with Muthu Reddiar could not arise.

3. Being aggrieved, the defendants therein filed the First Appeal. The respondent No. 1 herein, Vijaya Renganathan, purchased the suit property in 1978 i.e. during the pendency of the First Appeal for a sum of about Rs. 10,000/- and got himself impleaded in the appeal as a party. The First Appeal

was dismissed by the Appellate Court vide judgment and decree dated 17th September, 1986. The said purchaser, respondent No.1, alone filed the Second Appeal under Section 100 of Code of Civil Procedure, 1908 (hereinafter called as 'CPC') before the High Court which has been allowed. Hence, this appeal.

4. Learned counsel for the appellants has submitted that Smt. Rengammal, original defendant No.1 was legally wedded wife of Alagarsami and he was still alive. Therefore, the question of presumption of marriage for having live-in-relationship with Muthu Reddiar could not arise. In such eventuality, Muthu Reddiar could be liable for offence of Adultery under Section 497 of Indian Penal Code, 1860 (hereinafter called as 'IPC'). More so, even if live-in-relationship is admitted and it is further admitted that the two children were born due to that live-in-relationship, the said children could not inherit the coparcenery property and in absence of any finding recorded by any Court below that the suit land was self-acquired property of Muthu Reddiar, the judgment of the High Court is liable to be set aside. At the most, the respondent No. 1 herein can claim recovery of the sale consideration from his vendors as the possession is still with the present appellants.

5. On the contrary, learned counsel for the respondent No.1 has vehemently opposed the submission of the learned counsel for the appellants, contending that the High Court after re-appreciating the evidence on record came to the conclusion that the factum of marriage of Smt. Rengammal with Alagarsami Reddiar could not be proved by the appellants herein and because of their live-in-relationship, a presumption of marriage between Muthu Reddiar and Smt. Rengammal could be drawn and, therefore, in view of the provisions of Section 16 of the Hindu Marriage Act, 1955 (hereinafter called as, "the Act"), the two children born out of that live-in-relationship were entitled to inherit the property of Muthu Reddiar and thus, the appeal is liable to be dismissed.

6. We have considered the rival submissions of the learned counsel for the parties and perused the record.

7. The Trial Court as well as the First Appellate Court have recorded a categorical finding of fact that Smt. Rengammal, defendant No.1 had been married to Alagarsami Reddiar who was alive on the date of institution of the suit and, therefore, the question of marriage by presumption between Smt. Rengammal and Muthu Reddiar would not arise and for determining the same all the material on record had been taken into consideration including the statement of Seethammal, DW1 along with all other defence witnesses and the documents, particularly, Exts.B14, B18, B19 and B2.

8. However, the High Court framed two substantial questions of law, namely:

(a) Whether on the admitted long cohabitation of the First defendant and Muthu Reddiar, a legal presumption of a lawful wedlock is not established; and

(b) Whether the specific case of prior and subsisting marriage between defendant and Alagarsami Reddiar set up by Plaintiff is established as required by law and she could have a preferential claim over defendants 1 to 3?

9. While determining the substantial question (b) the High Court only considered the statement of Seethammal, DW1, the step mother of Muthu Reddiar and did not take into consideration the evidence of plaintiff's witnesses which had been relied upon by the courts below, particularly, Kumarasamy PW2 and Kandasamy PW5 and re-appreciated the documentary evidence. Therefore, the question does arise as to whether such a course is permissible while deciding the Second Appeal under Section 100 CPC.

10. In *Sheel Chand vs. Prakash Chand,* AIR 1998 SC 3063, this Court held that question of re-appreciation of

evidence and framing the substantial question as to whether the findings relating to factual matrix by the court below could vitiate due to irrelevant consideration and not under law, being question of fact cannot be framed.

11. In *Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa & Ors.* AIR 2000 SC 2108, this Court held that it is not permissible for the High Court to decide the Second Appeal by re-appreciating the evidence as if it was deciding the First Appeal unless it comes to the conclusion that the findings recorded by the court below were perverse.

12. In *Kulwant Kaur & Ors. Vs. Gurdial Singh Mann (dead) by L.Rs.* AIR 2001 SC 1273, this Court held that the question whether Lower Court's finding is perverse may come within the ambit of substantial question of law. However, there must be a clear finding in the judgment of the High Court as to perversity in order to show compliance with provisions of Section 100 CPC. Thus, this Court rejected the proposition that scrutiny of evidence is totally prohibited in Second Appeal.

13. Thus, it is evident that High Court can interfere with the finding of fact while deciding the Second Appeal provided the findings recorded by the Courts below are perverse.

14. In *H.B. Gandhi, Excise & Taxation Officer-cum-Assessing Authority, Karnal & Ors. Vs. M/s. Gopi Nath & Sons & Ors.* 1992 Supp.(2) SCC 312, this Court held that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in law. In *M/s. Triveni Rubber & Plastics Vs. Collector of Central Excise, Cochin* AIR 1994 SC 1341, this Court held that the order suffers from perversity in case some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration or where it can be said that the findings of the authorities are

based on no evidence or that they are so perverse that no reasonable person would have arrived at those findings. In *Kuldeep Singh Vs. Commissioner of Police & Ors.* (1999) 2 SCC 10, this Court held that if a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which cannot be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with. In *Gaya Din (dead) thr. Lrs. & Ors. Vs. Hanuman Prasad (dead) thr. Lrs. & Ors.* AIR 2001 SC 386, it has been held that order of an authority is perverse in the sense that the order is not supported by the evidence brought on record or it is against the law or it suffers from the vice of procedural irregularity. In *Rajinder Kumar Kindra Vs. Delhi Administration, thr. Secretary (Labour) & Ors.* AIR 1984 SC 1805, this Court while dealing with a case of disciplinary proceedings against an employee considered the issue and held as under:

> "17. It is equally well-settled that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are either his ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated. ….The High Court, in our opinion, was clearly in error in declining to examine the contention that the findings were perverse on the short, specious and wholly untenable ground that the matter depends on appraisal of evidence."

15. In the instant case, the Courts below had appreciated the entire evidence and came to the conclusion that Smt. Rengammal, defendant no.1 was legally wedded wife of Alagarsami Reddiar and thus did not presume her marriage with Muthu Reddiar. The High Court without making any reference to the evidence of the plaintiff's witnesses, particularly, Kumarasamy-P.W.2 and Kandasamy-PW.5

reversed the finding of fact and reached the conclusion that merely live-in-relationship between the said two parties would lead the presumption of marriage between them. The High Court erred in not appreciating that the judgments of the Courts below could be based on another presumption provided under Section 112 of the Evidence Act, 1872 (hereinafter called as the 'Evidence Act').

16. Section 112 of the Evidence Act provides for a presumption of a child being legitimate and such a presumption can only be displaced by a strong preponderance of evidence and not merely by a balance of probabilities as the law has to live in favour of innocent child from being bastardised. In the instant case, as the proof of non-access between Rengammal and Alagarsami had never been pleaded what to talk of proving the same, the matter has not been examined by the High Court in correct perspective. It is settled legal proposition that proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption. [vide *Mohabbat Ali Khan Vs. Muhammad Ibrahim Khan & Ors.* AIR 1929 PC 135; *Chilukuri Venkateswarlu Vs. Chilukuri Venkatanarayana* AIR 1954 SC 176; *Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati* AIR 1965 SC 364; *Perumal Nadar (Dead) by Lrs. Vs. Ponnuswami Nadar (minor)* AIR 1971 SC 2352; *Amarjit Kaur Vs. Harbhajan Singh and Anr.* (2003) 10 SCC 228; *Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy and Ors.* AIR 2005 SC 800; and *Shri Banarsi Dass Vs. Teeku Dutta (Mrs.) and Anr.* (2005) 4 SCC 449]

17. The High Court has decided the issue regarding the factum of marriage between Alagarsami and Rengammal only placing reliance upon the statement of Smt. Seethammal, DW1, step mother of Muthu Reddiar who had been disbelieved by the Courts below by giving cogent reasons and taking note of the fact that she had arranged their marriage spending a sum of Rs.10 only. The High Court has also reappreciated the

documentary evidence and took a view contrary to the view taken by the court's below. It was not appropriate for the High Court to re-appreciate the evidence in Second Appeal as no substantial question of law involved therein. Both the Courts below found that Rengammal was legally wedded wife of Alagarsami. The Courts below had placed very heavy reliance upon the witnesses examined by the appellant/plaintiff particularly, Kumarasamy- PW 2 and Kandasamy- PW 5.

18. In view of the fact that the High Court did not even take note of the deposition of the plaintiff's witnesses, findings recorded by the High Court itself become perverse and thus liable to be set aside.

19. Be that as it may, Section 5(1) of the Act lays down conditions for a Hindu marriage. It provides that marriage may be solemnized between any two Hindus if neither of them is a spouse living at the time of marriage. Section 11 provides that any marriage which is in contravention of Section 5(1) of the Act, would be void. Section 16 of the Act stood amended vide Amendment Act of 1976 and the amended provisions read as under:-

> *"Legitimacy of children of void and voidable marriages* – (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate……..
>
> (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
>
> *(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."* (Emphasis added)

20. Thus, it is evident that Section 16 of the Act intends to bring about social reforms, conferment of social status of legitimacy on a group of children, otherwise treated as illegitimate, as its prime object.

21. In *S.P.S. Balasubramanyam Vs. Suruttayan @ Andali Padayachi & Ors.* AIR 1992 SC 756, this Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.

22. In *S. Khushboo Vs. Kanniammal & Anr.* JT 2010 (4) SC 478, this Court, placing reliance upon its earlier decision in *Lata Singh Vs. State of U.P. & Anr.* AIR 2006 SC 2522, held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex. In case, one of the said persons is married, man may be guilty of offence of adultery and it would amount to an offence under Section 497 IPC.

23. In *Smt. P.E.K. Kalliani Amma & Ors. Vs. K. Devi & Ors.* AIR 1996 SC 1963, this Court held that Section 16 of the Act is not ultra vires of the Constitution of India. In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the

basis of this rule, which in its operation, *is limited to the properties of the parents.*

24. In *Rameshwari Devi Vs. State of Bihar & Ors.* AIR 2000 SC 735, this Court dealt with a case wherein after the death of a Government employee, children born illegitimately by the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retiral benefits along with children born out of a legal wedlock. This Court held that under Section 16 of the Act, children of void marriage are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were entitled to share in the family pension, death-cum-retiral benefits and gratuity.

25. In *Jinia Keotin & Ors. Vs. Kumar Sitaram Manjhi & Ors.* (2003) 1 SCC 730, this Court held that while engrafting a rule of fiction in Section 16 of the Act, the illegitimate children have become entitled to get share only in *self-acquired properties of their parents.* The Court held as under :-

> "4……..Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable

and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only.

5. So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in Sub-section (3) by engrafting a provision with a non-obstante clause stipulating specifically that nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under Section 12, 'any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of this not being the legitimate child of his parents'. In the light of such an express mandate of the legislature itself there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants……."

26. This view has been approved and followed by this Court in *Neelamma and others Vs. Sarojamma and others* (2006) 9 SCC 612.

27. Thus, it is evident that in such a fact-situation, a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenery property but is entitled only to claim share in self acquired properties, if any.

28. In the instant case, respondents had not pleaded at any stage that the Suit land was a self acquired property of Muthu Reddiar. It is evident from the record that Muthu Reddiar did not partition his joint family properties and died issueless and intestate in 1974. Therefore, the question of inheritance of coparcenery property by the illegitimate children, who were born out of the live-in-relationship, could not arise. Thus, the judgment of the High Court is liable to be set aside only on this sole ground.

29. In view of the above, the appeal succeeds and is allowed. The judgment and order of the High Court dated 10th July, 2001 is hereby set aside. No order as to cost.

30. However, it shall be open to R.5 to resort to legal proceedings, permissible in law for recovery of the sale consideration from his vendors as he has purchased the property in lis pendis and the appellants are still in possession of the suit property.

R.P. Appeal allowed.

PUNJAB & HARYANA HIGH COURT AT CHANDIGARH
v.
MEGH RAJ GARG AND ANOTHER
(Civil Appeal No. 1591 of 2006)

MAY 20, 2010

[G.S. SINGHVI AND C.K. PRASAD, JJ.]

Service Law:

Punjab Civil Service Rules:

Vol. I, Chapter II, Annexure-A, Para I (as it stood prior to the 1994 amendment) – Correction of date of birth – HELD: In view of the statutory provision, there being a complete bar to the making of an application by a government servant after two years from the date of his entry into service, the High Court or the State Government did not have the power, jurisdiction or authority to entertain the representation made by the judicial officer concerned after more than twelve years of his entering into the service – Therefore, neither of them committed any illegality by refusing to accept the prayer made by the judicial officer on the basis of the change effected by the University in the date of birth recorded in the matriculation certificate.

The date of birth of respondent no. 1, who joined service as Sub-Judge-cum-Judicial Magistrate, in March 1973, was recorded in the service book as 27.3.1936, in accordance with the matriculation certificate. After ten years of joining the service, he made an application for correcting his date of birth in the matriculation certificate as 27.3.1938. The Syndicate of the University allowed the prayer. Accordingly, necessary changes were made in the certificate. Thereafter, respondent no.1 represented to the State Government for change of his date of birth in the

service record. The State Government in consultation with the High Court rejected the prayer. Respondent no. 1 then filed a suit for declaration that the decision of the State Government and the High Court was illegal, void and ineffective, and for a mandatory injunction directing the defendants to change his date of birth in the service book from 27.3.1936 to 27.3.1938. The suit was decreed. The lower appellate court and the High Court affirmed the decree. Aggrieved, the High Court filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. This Court has time and again cautioned civil courts and the High Courts against entertaining and accepting the claims made by the employees long after entering into service for correction of the recorded date of birth. [para 12] [182-H; 183-A]

Union of India v. Harnam Singh **(1993) 2 SCC 162;** *Secretary and Commissioner, Home Department and others v. R. Kirubakaran* **1994 Supp.(1) SCC 155 and** *Union of India vs. C. Rama Swamy* **(1997) 3 SCR 760, relied on.**

1.2. In view of Para 1 of Annexure-A to Chapter II of the Punjab Civil Service Rules, Volume 1 (as it stood at the time respondent No.1 joined service and also on the date of his making an application for correction of the date of birth recorded in his service book), which has direct bearing on the issue relating to maintainability of the suit, there is a complete bar to the making of an application by the government servant for correction of his recorded age after two years from the date of his entry into government service. In the instant case, respondent No.1, ten years after entering into the service, submitted the application to the University for effecting change in the date of birth recorded in the matriculation certificate. It is thus evident that respondent No.1 applied for change of the date of birth recorded in his service

book much beyond the time limit of two years specified in the rule. Therefore, the High Court or for that reason the State Government did not have the power, jurisdiction or authority to entertain the representation made by respondent No.1. Neither of them committed any illegality by refusing to accept the prayer made by respondent No.1 on the basis of change effected by the University in the date of birth recorded in his matriculation certificate. [para 9-11] [179-G-H; 180-D-H; 181-G]

1.3. The decision taken by the Syndicate of the University to accept the request of respondent no. 1 did not give him any cause for filing application or making representation for change of the date of birth recorded in the service book. It is, therefore, held that the suit filed by respondent No.1 for correction of the date of birth recorded in his service book after twelve years of his joining the service was clearly misconceived and the trial court committed a serious error by passing a decree in favour of respondent No.1 and the lower appellate court and the High Court repeated the same error by refusing to set aside the decree passed by the trial court. [Para 11 and 15] [181-H; 182-A; 187-E-F]

Case Law Reference:

(1993) 2 SCC 162	**relied on**	**para 12**
(1994)Supp.1 SCC 155	**relied on**	**para 13**
(1997) 3 SCR 760	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1591 of 2006.

From the Judgment & Order dated 06.09.2002 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 901 of 1996.

Rajeev Sharma, Abhishek Birthray for the Appellant.

Ajit Kumar, Shikha Roy (for S.K. Sabharwal), Ajay Pal (NP) for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether the decision taken by the Syndicate of the Panjab University to entertain and accept the application made by respondent No.1 Megh Raj Garg for changing the date of birth recorded in his matriculation certificate was binding on the State Government and the High Court of Punjab and Haryana (hereinafter described as 'the appellant') and whether the suit filed by respondent No.1 for ordaining correction of the date of birth recorded in his service book was maintainable are the questions which arise for determination in this appeal filed by the appellant against the judgment of the learned Single Judge of the High Court in Regular Second Appeal No.901 of 1996.

2. Respondent No.1 joined service as Sub Judge-cum-Judicial Magistrate, II Class in March, 1973. His date of birth was recorded in the service book as 27.3.1936 because that was the date mentioned in the matriculation certificate and the application made by him in response to the advertisement issued by the Punjab Public Service Commission. After ten years of joining the service, respondent No.1 submitted an application to the concerned authority of Punjab University for amendment of the date of birth recorded in the matriculation certificate by asserting that his correct date of birth was 27.3.1938 but by mistake the same was recorded as 27.3.1936. In support of this assertion, respondent No.1 relied upon the certificates issued by Government High School, Moonak and Hindu Sabha High School, Sunam. The Date of Birth Committee of the University recommended that the request made by respondent No.1 may be accepted. Thereupon, the Syndicate of the University directed that the

date of birth recorded in the matriculation certificate of respondent No.1 be changed from 27.3.1936 to 27.3.1938. In compliance of the decision taken by the Syndicate, necessary changes were made in the matriculation certificate of respondent No.1.

3. After having succeeded in persuading the University to change the date of birth recorded in his matriculation certificate, respondent No.1 represented to the State Government for making corresponding change in the date of birth recorded in the service book. The State Government, in consultation with the High Court, rejected the prayer of respondent No.1 and he was informed about this vide letter dated 28.1.1993.

4. Respondent No.1 challenged the decision of the State Government in Civil Suit No.417-A of 1993 and prayed for grant of a declaration that the decision of the State Government and the High Court not to correct the date of birth recorded in his service book is illegal, void and ineffective. He also prayed for issue of a mandatory injunction directing the defendants to change the date of birth recorded in the service book from 27.3.1936 to 27.3.1938.

5. In the written statement filed on behalf of defendant No.2 (appellant herein), reliance was placed on Para 1 of Annexure-A to Chapter II of the Punjab Civil Service Rules, Volume 1 and it was pleaded that the application made by respondent No.1 for correction of date of birth recorded in his service book after twelve years of entering into service was rightly rejected. It was further pleaded that correction of the date of birth recorded in the matriculation certificate by the University was not binding on the High Court and the State Government.

6. On the pleadings of the parties, the trial Court framed the following issues:

"(1) Whether the order dated 28.1.1993 is illegal, null and void as alleged? OPP.

(2) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for? OPP.

(3) Whether the suit is not maintainable as it is not within limitation? OPD.

(4) Whether the plaintiff has no cause of action? OPD

(5) Whether the plaintiff is estopped from challenging the date of birth as mentioned in the office record? OPD.

(6) Relief."

7. After considering the pleadings and evidence of the parties, the trial Court decreed the suit and declared that rejection of the representation made by respondent No.1 for correction of his date of birth was illegal and void. The trial Court also issued a mandatory direction for alteration of the date of birth recorded in the service book of respondent No.1 from 27.3.1936 to 27.3.1938. While dealing with the issue of limitation, the learned trial Judge distinguished the judgments of this Court in *Union of India v. Harnam Singh* (1993) 2 SCC 162 and *Secretary and Commissioner, Home Department and others v. R. Kirubakaran* 1994 Supp.(1) SCC 155, by making the following observations:

"In my opinion, these authorities which are based on Rules / Administrative instructions prescribing period of limitation within which the employee can submit his application for correction of date of birth to his employer, have become redundant so far as the present suit is concerned because Punjab University has issued notification No. 11/4/93-5 PP-II/4499, dated 21.6.1994, making Rules to amend the Punjab Civil Services Rules, Volume-I, Part-I, inter alia to the effect that employees of the Punjab Government can apply for the change of date of birth to the Government within a period of two years from the coming into force of the aforesaid Rules. Thus, the aforesaid two rulings of the

Hon'ble Supreme Court do not debar the plaintiff from seeking his remedy in the Civil Court and at least do not make the suit barred by limitation."

8. The lower appellate Court agreed with the trial Court on all the issues and dismissed the appeal preferred by the appellant. The second appeal jointly filed by the appellant and the State of Punjab was dismissed by the learned Single Judge, who held that the decree passed by the trial Court, which was confirmed by the lower appellate Court was legally correct and justified. The issue of limitation was decided by the learned Single Judge in the following words:

"The second contention raised by learned counsel for the appellants that the Punjab Civil Service Rules, which are applicable to the plaintiff-respondent, bar the present suit, as the same was not filed within two years after entry into service, is also not acceptable. Vide notification dated 21.6.1994, an amendment was made in the Punjab Civil Service Rules vide Punjab Civil Service (First Amendment) Rules, Volume-I Part- I, 1994, according to which the employee already in service of the Government of Punjab on the date of coming into force of the amended rules may apply for the change of date of birth within a period of two years from coming into force of these Rules on the basis of documentary evidence, such as Matriculation certificate or Municipal Birth Certificate etc. By this amendment, one chance was given to those employees who did not avail the opportunity to get their date of birth corrected within the stipulated period of two years from entry into the Government service and a fresh period of two years was provided to them which was to start from the date of amendment. The contention of counsel for the appellants, that this amendment was subsequently withdrawn by the State Government vide letter dated 13.12.1995 of the Deputy Secretary (Personnel) of the Department of

Personnel and Administrative Reforms of Government of Punjab, was rightly not accepted by the Courts below in view of Division Bench decision of this Court in Civil Writ Petition No.1476 of 1996, titled as Daljit Singh v. State of Punjab and others, wherein it was held that simply on the basis of the letter dated 13.12.1995, issued by the Deputy Secretary, the operation of the rules cannot come to a stand still. Thus, in view of the said amendment, the suit filed by the plaintiff-respondent cannot be said to be barred by limitation and the contention of the appellants that the date of birth of an employee can only be corrected within two years of entry into service cannot be accepted. The first appellate court has also examined this aspect of the matter and discussed the same in detail in paras 37 to 42 of its judgment. I find no infirmity or illegality in the findings recorded by the Courts below in this regard. Even otherwise, it has been held by a Division Bench of this Court in *Jiwan Dass v. State of Haryana and another,* 1989(2) I.L.R. Punjab 110, that if a Government employee did not get his date of birth altered under the service rules within a stipulated period, then his remedy to get the same altered under the civil law will not be barred because the administrative law do not bar jurisdiction of Civil Court and the decision of the administrative authorities allowing or rejecting the requests for alteration in date of birth is open to judicial scrutiny when challenged before a court of competent jurisdiction."

9. We have heard learned counsel for the parties and carefully scrutinized the records. Para 1 of Annexure-A to Chapter II of the Punjab Civil Service Rules, Volume 1 (as it stood at the time respondent No.1 joined service and also on the date of his making an application for correction of the date of birth recorded in his service book), which has direct bearing on the issue relating to maintainability of the suit filed by respondent No.1 reads as under:

"In regard to the date of birth declaration of age made at the time of or for the purpose of entry into Government service shall, as against the Government employee in question, be deemed to be conclusive unless, he applies for correction of his age recorded within two years from the date of his entry into Government service. The Administrative Department in consultation with the Department of Personnel & Administrative Reforms, however, reserves the right to make a correction in the recorded age of a Government employee at any time against the interests of the Government employee when it is satisfied that the age recorded in his service book or in the history of service of a Gazetted Government employee is incorrect and has been incorrectly recorded with the object that the Government employee may derive some unfair advantage therefrom."

10. An analysis of the above reproduced rule makes it clear that the declaration of age made at the time of or for the purpose of entry into government service is conclusive and binding on the government servant. The only exception to this is that the government servant can make an application for correction of age within two years from the date of entry into service. This necessarily implies that an application made by a government servant for correction of age after two years of his entry into service cannot be entertained by the competent authority. However, the competent authority can, at any time, correct the age recorded in the service book or in the history service of a gazetted government employee if it is satisfied that the age has been so recorded with a view to give undue benefit to the employee / officer like continuance in service beyond the age of superannuation. Of course, while undertaking this exercise, the competent authority is bound to comply with the rule of audi alteram partem and give a reasonable opportunity to the concerned employee/officer to represent his cause against the proposed change in the recorded age/date of birth.

In other words, while there is a complete bar to the making of an application by the government servant for correction of his recorded age after two years from the date of his entry into government service, the competent authority can make correction at any time if it is found that the age recorded in the service book is incorrect and has been so recorded with a view to enable the concerned employee to continue in service beyond the age of superannuation or gain any other advantage.

11. Undisputedly, the date of birth of respondent No.1, who joined service in March 1973 was recorded in his service book as 27.3.1936. This was done keeping in view the declaration made by him in the application form submitted for the purpose of recruitment to the service and his matriculation certificate. Being a law graduate, respondent No.1 must have been aware of the date of birth i.e., 27.3.1936 recorded in his matriculation certificate and this must be the reason why he mentioned that date in the application form submitted to the Public Service Commission. If the correct date of birth of respondent No.1 was 27.3.1938 and this was supported by the certificates issued by the schools in which he had studied before appearing in the matriculation examination, then he would have immediately after joining the service made an application to the University for change of date of birth recorded in the matriculation certificate and persuaded the concerned authority to decide the same so as to enable him to move the State Government and the High Court for making corresponding change in the date of birth recorded in his service book in terms of Para 1 of Annexure-A to Chapter II of the Punjab Civil Service Rules, Volume I. However, respondent No.1 waited for more than ten years after entering into service and submitted an application dated 27.10.1983 to the University for effecting change in the date of birth recorded in the matriculation certificate by citing the school certificates as the basis for his claim. The Syndicate of the University took about one year and three months to decide the matter in favour of respondent No.1 and the date of birth

recorded in the matriculation certificate was changed from 27.3.1936 to 27.3.1938 sometime in January/February 1985. Thereafter, respondent No.1 submitted representation dated 22.2.1985 to the Registrar of the High Court seeking correction in the date of birth recorded in the service book. His plea was finally rejected in January 1993. It is thus evident that respondent No.1 applied for change of the date of birth recorded in his service book much beyond the time limit of two years specified in the rule. The High Court or for that reason the State Government did not have the power, jurisdiction or authority to entertain the representation made by respondent No.1 after more than twelve years of his entering into service. Therefore, neither of them committed any illegality by refusing to accept the prayer made by respondent No.1 on the basis of change effected by the University in the date of birth recorded in his matriculation certificate. Unfortunately, the trial Court, the lower appellate Court and the learned Single Judge of the High Court totally misdirected themselves in appreciating the true scope of the embargo contained in the relevant rule against the entertaining of an application for correction of date of birth after two years of the government servant's entry into service and all of them committed grave error by nullifying the decision taken by the State Government in consultation with the High Court not to accept the representation made by respondent No.1 for change of date of birth recorded in his service book. All the courts overlooked the stark reality that respondent No.1 had made application for change of date of birth recorded in the matriculation certificate after more than ten years of his entry into government service and the decision taken by the Syndicate to accept his request did not give him any cause for filing application or making representation for change of the date of birth recorded in the service book.

12. This Court has time and again cautioned civil courts and the High Courts against entertaining and accepting the claim made by the employees long after entering into service

for correction of the recorded date of birth. In *Union of India v. Harnam Singh* (supra), this Court considered the question whether the employer was justified in declining the respondent's request for correction of date of birth made after thirty five years of his induction into the service and whether the Central Administrative Tribunal was justified in allowing the original application filed by him. While reversing the order of the Tribunal, this Court observed:

> "A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the reason that the right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the courts and tribunals. It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed,

> therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age. Indeed, as held by this Court in *State of Assam v. Daksha Prasad Deka* a public servant may dispute the date of birth as entered in the service record and apply for its correction but till the record is corrected he cannot claim to continue in service on the basis of the date of birth claimed by him. This Court said: (SCC pp. 625-26, para 4)
>
> "... The date of compulsory retirement under F.R. 56(a) must in our judgment, be determined on the basis of the service record, and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistently with the appropriate procedure. A public servant may dispute the date of birth as entered in the service record and may apply for correction of the record. But until the record is corrected, he cannot claim that he has been deprived of the guarantee under Article 311(2) of the Constitution by being compulsorily retired on attaining the age of superannuation on the footing of the date of birth entered in the service record."
>
> (emphasis supplied)

13. In *Secretary and Commissioner, Home Department and others v. R. Kirubakaran* (supra), this Court considered the question whether the Tamil Nadu Administrative Tribunal had the jurisdiction to entertain an application made by the

respondent for correction of his date of birth just before superannuation. While answering the question in negative, the Court observed:

> "An application for correction of the date of birth should not be dealt with by the tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose their promotions for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case, on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible. Before any such direction is issued, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. *If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed within the time, which can be held to be reasonable. The applicant has to produce the evidence*

> *in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their dates of birth in the service books.* By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief for continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and merely caused injustice to his immediate junior."
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> (emphasis supplied)

14. In *Union of India v. C. Rama Swamy* (supra), this Court, after an in depth analysis of Rule 16-A of All India Services (Death-cum-Retirement Benefits) Rules, 1958, reversed the order passed by Hyderabad Bench of the Central Administrative Tribunal which had directed alteration of the date of birth of the respondent and observed:

> "In matters relating to appointment to service various factors are taken into consideration before making a selection or an appointment. One of the relevant circumstances is the age of the person who is sought to be appointed. It may not be possible to conclusively prove that an advantage had been gained by representing a date of birth which is different than that which is later sought to

be incorporated. But it will not be unreasonable to presume that when a candidate, at the first instance, communicates a particular date of birth there is obviously his intention that his age calculated on the basis of that date of birth should be taken into consideration by the appointing authority for adjudging his suitability for a responsible office. In fact, where maturity is a relevant factor to assess suitability, an older person is ordinarily considered to be more mature and, therefore, more suitable. In such a case, it cannot be said that advantage is not obtained by a person because of an earlier date of birth, if he subsequently claims to be younger in age, after taking that advantage. In such a situation, it would be against public policy to permit such a change to enable longer benefit to the person concerned. This being so, we find it difficult to accept the broad proposition that the principle of estoppel would not apply in such a case where the age of a person who is sought to be appointed may be a relevant consideration to assess his suitability."

15. By applying the ratio of the above noted judgments, we hold that the suit filed by respondent No.1 for correction of the date of birth recorded in his service book after twelve years of his joining the service was clearly misconceived and the trial Court committed a serious error by passing a decree in favour of respondent No.1 and the lower appellate Court and the High Court repeated the same error by refusing to set aside the decree passed by the trial Court. The learned lower appellate Court and the High Court also committed an error by relying upon the amendment made in the rule by notification dated 21.6.1994 which enabled the government servant to seek correction of date of birth within next two years. It is neither the pleaded case of respondent No.1 nor it was argued by the learned counsel appearing on his behalf that the amendment made in 1994 was retrospective or that his client had applied for correction of date of birth after 21.6.1994. Rather, in response to the Court's query, the learned counsel candidly

stated that his client had applied for correction of the date of birth recorded in the service book for the first and last time in 1985 after the University entertained and accepted his application for correction of his date of birth recorded in the matriculation certificate.

16. In the result, the appeal is allowed. The impugned judgment is set aside. The judgments and decrees passed by the trial Court and lower appellate Court are also set aside and the suit filed by respondent No.1 is dismissed. Ordinarily, we would have saddled respondent No.1 with costs but keeping in view the fact that he has already retired from service, we have refrained from doing so.

R.P. Appeal allowed.

H.P. PUBLIC SERVICE COMMISSION
v.
MUKESH THAKUR & ANR.
(Civil Appeal No. 907 of 2006)

MAY 25, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Service Law:

Judicial Service:

Appointment – Written examination – Re-evaluation of answer-sheets of writ petitioner – Directed by High Court – After receipt of marks on re-evaluation, High Court directing appointment letter to be issued to writ petitioner – ***Held:*** *Courts can not take upon themselves the task of statutory authorities – Admittedly, the candidate could not secure qualifying marks in the paper concerned – It was not permissible for High Court to itself examine the question paper and answer sheets – Further, in absence of any statutory provision, Court should not generally direct re-evaluation – Judgment of High Court set aside – Himachal Pradesh Judicial Service (Syllabus and Allocation of Marks) Regulations, 2005 – Regulation 6 – Himachal Pradesh Judicial Service Rules, 2004 – Constitution of India, 1950 – Article 226.*

Constitution of India, 1950:

Article 226 – Writ petition – Restraint on the remedy by High Court – In a writ petition filed by a candidate who failed to secure qualifying marks and was not called for interview, High Court passing a general order restraining other aggrieved persons from approaching the Court by filing writ petition on any ground – Held: Such an order not justified, particularly, when the Court has competence to grant

equitable relief to persons even if they are not before the Court, more so, when it has also power to mould the relief in a particular fact-situation – Service Law – Judicial Service.

Respondent No.1, pursuant to the advertisement dated 2.4.2005, appeared in the written examination for selection of Civil Judge (Junior Division) in the State of Himachal Pradesh. Though he secured 50% marks in aggregate, but failed to secure 45% marks in the paper of Civil Law-II and, therefore, was not called for interview. He filed a writ petition and the High Court after examining his answer-sheets directed for re-evaluation thereof. On receipt of the marks consequent upon such re-evaluation, the High Court disposed of the writ petition directing that appointment letter be issued to respondent no.1. It further directed that no other petition on the same or similar grounds would be entertained. Aggrieved, the Himachal Pradesh Public Service Commission filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. It is settled legal proposition that courts cannot take upon themselves the task of the statutory authorities. In the instant case, there is no dispute so far as the process of evaluation of the answer sheets is concerned. Respondent No. 1, admittedly, could not secure qualifying marks in one paper. It was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter-se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent no.1 alone. [Para 11, 14 and 19] [198-D; 197-G-H; 197-D; 199-F-G]

Government of Orissa & Anr. Vs. Hanichal Roy & Anr.

(1998) 6 SCC 626; *Life Insurance Corporation of India Vs. Asha Ramchandra Ambedkar (Mrs.) & Anr.,* **(1994) 2 SCR 163 = AIR 1994 SC 2148;** *A. Umarani Vs. Registrar,Cooperative Societies & Ors.,* **(2004) 7 SCC 112;** *Hindustan Shipyard Ltd. & Ors. Vs. Dr P. Sambasiva Rao & Ors.* **(1996) 7 SCC 499 and** *G. Veerappa Pillai Vs. Raman and Raman Ltd.,* **(1952) SCR 583 = AIR 1952 SC 192, relied on.**

1.2. The issue of re-evaluation of answer book is no more res integra. In the absence of any provision under the statute or statutory rules/regulations, the courts should not generally direct re-evaluation. The Himachal Pradesh Judicial Service (Syllabus and Allocation of Marks) Regulations, 2005 do not contain any provision for re-evaluation. [Paras 11, 24, 27] [201-D; 209-B; 197-C]

Maharashtra State Board of Secondary and Higher Secondary Education & Anr. Vs. Paritosh Bhupesh Kurmarsheth etc.etc. **(1985) 1 SCR 29 = AIR 1984 SC 1543;** *Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission, Patna & Ors,* **AIR 2004 SC 4116;** *Dr. Muneeb Ul Rehman Haroon & Ors. Vs. Government of Jammu & Kashmir State & Ors.* **(1985) 1 SCR 344 = AIR 1984 SC 1585;** *Board of Secondary Education Vs. Pravas Ranjan Panda & Anr.* **(2004) 13 SCC 383;** *President, Board of Secondary Education, Orissa & Anr. Vs. D. Suvankar & Anr.* **(2006) 8 Suppl. SCR 1143 = (2007) 1 SCC 603;** *The Secretary, West Bengal Council of Higher Secondary Education Vs. Ayan Das & Ors.* **(2007) 10 SCR 464 =AIR 2007 SC 3098 and** *Sahiti & Ors. Vs. Chancellor, Dr. N.T.R. University of Health Sciences & Ors*. **(2008) 14 SCR 1032 = (2009) 1 SCC 599, relied on.**

1.3. In the facts and circumstances of the case, the judgment and order passed by the High Court dated 26.12.2005 is set aside. [Para 31] [203-G]

2. The direction not to entertain any petition on similar grounds has been passed by the High Court apparently in view of the fact that fresh selection proceedings had commenced for the subsequent year. Thus, in such circumstances, it could be possible for the court to reject the same on the ground of delay and laches rather than issuing a direction that no such petition shall be filed, particularly, in view of the fact that candidates having roll numbers 1096 and 1476 had also secured 89 marks in the said paper. Candidate having roll number 1096 had secured 462 marks, i.e., more than 50% in aggregate. Therefore, depriving him of the benefit only on the ground that he could not approach the court cannot be justified, particularly, in view of the fact that Court has competence to grant equitable relief to persons even if they are not before the Court. More so, Court has also power to mould the relief in a particular fact situation. [Para 22] [200-C-G]

State of Kerala Vs. Kumari T.P. Roshana & Ors., **(1979) 2 SCR 974 = AIR 1979 SC 765;** *Ajay Hasia etc. Vs. Khalid Mujib Sehravardi & Ors. etc.* **(1981) 2 SCR 79 = AIR 1981 SC 487;** *Punjab Engineering College, Chandigarh Vs. Sanjay Gulati & Ors.*, **AIR 1983 SC 580;** *Thaper Institute of Engineering & Technology, Patiala Vs. Abhinav Taneja & Ors.* **(1990) 2 SCR 394 = (1990) 3 SCC 468;** *Sharwan Kumar & Ors Vs. Director General of Health Services & Ors,* **AIR 1992 SC 2202 and** *K.C. Sharma & Ors. Vs. Union of India & Ors.,* **(1997) 3 Suppl. SCR 87 = AIR 1997 SC 3588, relied on.**

Case Law Reference:

(1996) 7 SCC 499	**relied on**	**Para 15**
(1998) 6 SCC 626	**relied on**	**Para 16**
(1994) 2 SCR 163	**relied on**	**Para 17**
(2004) 7 SCC 112	**relied on**	**Para 17**

(1952) SCR 583	**relied on**	**Para 18**
(1979) 2 SCR 974	**relied on**	**Para 22**
(1981) 2 SCR 79	**relied on**	**Para 22**
AIR 1983 SC 580	**relied on**	**Para 22**
(1990) 2 SCR 394	**relied on**	**Para 22**
AIR 1992 SC 2202	**relied on**	**Para 22**
(1997) 3 Suppl. SCR 87	**relied on**	**Para 22**
(1985) 1 SCR 29	**relied on**	**Para 24**
AIR 2004 SC 4116	**relied on**	**Para 25**
(1985) 1 SCR 344	**relied on**	**Para 26**
(2004) 13 SCC 383	**relied on**	**Para 26**
(2006) 8 Suppl. SCR 1143	**relied on**	**Para 26**
(2007) 10 SCR 464	**relied on**	**Para 26**
(2008) 14 SCR 1032	**relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 907 of 2006.

From the Judgment & Order dated 22.11.2005 of the High Court of Himachal Pradesh at Shimla in C.W.P. No. 1007 of 2005.

WITH

C.A. No. 897 of 2006.

Anil Nag for the Appellant.

L.N. Rao, Binu Tamta, Naresh Kumar Sharma (NP) for the Respondents.

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. Appeal No.907 of 2006 is arising out of the final judgment and order dated 26.12.2005 passed by the High Court of Himachal Pradesh at Shimla in C.W.P. No.1007 of 2005. While Civil Appeal No.897 of 2006 is against the interim order dated 22.11.2005 passed in the said writ petition. As the interim order merges into the final order, Civil Appeal No. 897 of 2006 has lost its efficacy.

2. Facts and circumstances giving rise to these appeals are that the appellant herein, H.P. Public Service Commission (hereinafter called as, "the Commission") advertised 13 vacancies of the Civil Judge (Junior Division) on 2nd April, 2005, providing the eligibility criteria and mode of selection. The respondent No.1 applied in pursuance of the said advertisement along with other candidates. The result of the written papers was declared on 04.09.2005. Respondent No.1 was not found eligible to be called for interview/viva-voce for the reason that he failed to secure 45% marks in the paper of Civil Law – II, though he had secured 50% marks in aggregate. Being aggrieved, the said respondent filed writ petition seeking direction for revaluation of the paper of Civil Law – II and appointment to the said post as a consequential relief. The High Court vide order dated 3rd October, 2005 directed the appellant- Commission to produce his answer sheets before it and the appellant produced the answer sheets of that paper before the High Court on 05.10.2005. The High Court passed an order dated 05.10.2005 directing the appellant to arrange for a special interview for the said respondent in view of the fact that the High Court was of the view that there had been some inconsistency in framing the Question Nos.5 and 8 and in evaluation of the answer to the said questions.

3. However, the operation of the said interim order was stayed by this Court vide order dated 7.11.2005 in SLP (C) 21511 of 2005 and further direction was issued to the High Court to dispose of the writ petition expeditiously.

4. The appellant filed the reply before the High Court submitting that there was no provision of revaluation in the Himachal Pradesh Judicial Service Rules, 2004 (hereinafter called the "Rules 2004") as well as in Himachal Pradesh Judicial Service (Syllabus and Allocation of Marks) Regulations, 2005 (hereinafter called "Regulations 2005") and as the respondent No.1 failed to secure 90, qualifying marks in the said paper, he was not eligible to be called for interview or to be considered for appointment.

5. The High Court, on 22.11.2005, further passed an order to send the answer sheet of the said respondent to another examiner who could be in a rank of a Reader in Law in Himachal Pradesh University for revaluation. In the meanwhile, appellant also challenged the Order dated 22.11.2005 before this Court. The examiner appointed under the said order awarded him 119 marks. Thus, the High Court disposed of the writ petition on 26.12.2005 directing the Commission to issue Letter of Appointment to the respondent No.1. The court further directed that no other petition on the same and similar grounds would be entertained. The said order has also been challenged in Civil Appeal No. 907 of 2006 by the Commission.

6. Before proceeding further, it may be pertinent to mention here that this Court, vide order dated 13th January, 2006, passed an order for fresh re-valuation of the answer sheets of the respondent No.1 in Civil Law-II by the eminent Professor of Law with the consent of the counsel for the parties. In pursuance of the said order, his answer sheet was sent to an eminent Professor, who examined the same and awarded him only 82 marks in the said paper.

7. Shri Anil Nag, learned counsel for the appellant, has submitted that the Rules 2004 and Regulations, 2005 do not provide for revaluation or rechecking of the answer sheets. Comparative merit of the candidates is assessed and if there is some inconsistency in framing of the questions/marking of a particular question, it would be the same in the case of all

the candidates and therefore, it is not permissible for the court to direct revaluation of the answer sheets of a particular candidate. In such an eventuality, the answer sheets of all the candidates should be revalued. The respondent No.1 admittedly failed to secure the qualifying marks in one paper, therefore, the judgment and order of the High Court is liable to be set aside.

8. On the contrary, Mr. L.N. Rao, learned Senior counsel for the respondent has submitted that as the High Court found inconsistency in question Nos.5 and 8, it was justified to direct for revaluation and as the respondent No.1 secured 119 marks, being very high in merit list i.e. at No.2, no fault could be found with the order of the High Court. Thus, appeals are liable to be dismissed.

9. We have considered the rival submissions made on behalf of the counsel for the parties and perused the record.

10. Regulations, 2005 were notified by the Himachal Pradesh High Court providing for selection on the post of Civil Judge (J.D.), providing therein three papers, namely, Civil Law – I, Civil Law – II and Criminal Law and each paper to carry 200 marks. Besides, paper-IV consisted of English Composition (200 marks), Language (100 marks) followed by Viva-Voce (100 marks). Regulation 6 (i) made it mandatory for the candidate to secure at least 45% in each paper and Regulation 6 (ii) further stipulated that the candidate must secure 50% marks in aggregate to qualify the written test. The relevant Regulations 6(i) and 6(ii) are reproduced below :-

"Regulation 6(i) – No candidate shall be credited with any marks in any paper unless he obtains at least 45% in that paper, except Hindi language paper (Paper V) in which candidate should obtain at least 33% marks.

Regulation 6 (ii) – No candidate would be considered to have qualified the written test unless he obtains 50%

marks in aggregate in all paper and at least 33% marks in Language paper i.e. Hindi in Devnagri script."

The advertisement clarified as under :-

"Re-evaluation or Rechecking of the answer books (Scripts) is not permissible nor the Commission enters into correspondence in this behalf."

11. Therefore, there is no dispute so far as the process of evaluation of the answer sheets is concerned under the Regulations, 2005. The Regulations do not contain any provision for revaluation. Respondent No. 1 admittedly could not secure qualifying marks in one paper as required therein.

12. In the facts and circumstances of the aforesaid case, three basic questions arise for consideration of this Court:-

(i) As to whether it is permissible for the court to take the task of Examiner/Selection Board upon itself and examine discrepancies and inconsistencies in the questions paper and valuation thereof.

(ii) Whether Court has the power to pass a general order restraining the persons aggrieved to approach the court by filing a writ petition on any ground and depriving them from their constitutional rights to approach the court, particularly, when some other candidates had secured the same marks, i.e., 89 and stood disqualified for being called for interview but could not approach the court.

(iii) Whether in absence of any statutory provision for revaluation, the court could direct for revaluation.

13. In the instant case, the High Court has dealt with Question Nos.5(a) & (b) and 8(a) & (b) and made the following observations:-

"We perused answer to Question No.5(a) and 5(b) and found that the petitioner has attempted both these answers correctly and the answer to Question No.5(b) was as complete as it could be. Despite the petitioner having attempted a better answer to Question No.5(b) than the answer to Question No.5(a), the petitioner has been awarded 6 marks out of 10 in answer to Question No.5(b) whereas he has been awarded 8 marks in answer to Question No.5(a). Similarly in answer to Question No.8(a) and 8(b) the petitioner has fared better in attempting an answer to Question No.8(b) rather than answer to Question No.8(a) and yet he got 4 marks out of 10 marks in answer to Question No.8(b) whereas he got 5 marks out of 10 marks in answer to Question No.8(a)."

14. It is settled legal proposition that the court cannot take upon itself the task of the Statutory Authorities.

15. In *Hindustan Shipyard Ltd. & Ors. Vs. Dr P. Sambasiva Rao & Ors.,* (1996) 7 SCC 499, this Court held that in a case where the relief of regularisation is sought by employees working for a long time on ad hoc basis, it is not desirable for the Court to issue direction for regularisation straightaway. The proper relief in such cases is the issuance of direction to the authority concerned to constitute a Selection Committee to consider the matter of regularisation of the ad hoc employees as per the Rules for regular appointment for the reason that the regularisation is not automatic, it depends on availability of number of vacancies, suitability and eligibility of the ad hoc appointee and particularly as to whether the ad hoc appointee had an eligibility for appointment on the date of initial as ad hoc and while considering the case of regularisation, the Rules have to be strictly adhered to as dispensing with the Rules is totally impermissible in law. In certain cases, even the consultation with the Public Service Commission may be required, therefore, such a direction cannot be issued.

16. In *Government of Orissa & Anr. Vs. Hanichal Roy &*

Anr., (1998) 6 SCC 626, this Court considered the case wherein the High Court had granted relaxation of service conditions. This Court held that the High Court could not take upon itself the task of the Statutory Authority. The only order which High Court could have passed, was to direct the Government to consider his case for relaxation forming an opinion in view of the statutory provisions as to whether the relaxation was required in the facts and circumstances of the case. Issuing such a direction by the Court was illegal and impermissible.

17. Similar view has been reiterated by this Court in *Life Insurance Corporation of India Vs. Asha Ramchandra Ambekar (Mrs.) & Anr.,* AIR 1994 SC 2148; and *A. Umarani Vs. Registrar, Cooperative Societies & Ors.,* (2004) 7 SCC 112.

18. In *G. Veerappa Pillai Vs. Raman and Raman Ltd.,* AIR 1952 SC 192, the Constitution Bench of this Court while considering the case for grant of permits under the provisions of Motor Vehicles Act, 1939, held that High Court ought to have quashed the proceedings of the Transport Authority, but issuing the direction for grant of permits was clearly in excess of its powers and jurisdiction.

19. In view of the above, it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter-se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent no.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to law. Had it been other subjects like physics, chemistry and mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court.

20. Therefore, we are of the considered opinion that such a course was not permissible to the High Court.

21. So far as the second issue is concerned, the court had issued a direction while disposing of the writ petition observing as under:-

> "Therefore, we direct that in future, under the above referred circumstances no other petition on same and similar grounds shall be entertained by this Court."

22. Such a direction has been passed apparently in view of the fact that fresh selection proceedings had commenced for the subsequent year. Thus, in such circumstances, it could be possible for the court to reject the same on the ground of delay and laches rather than issuing a direction that no such petition shall be filed, particularly, in view of the fact that candidates having roll numbers 1096 and 1476 had also secured 89 marks in the said paper. Candidate having roll number 1096 had secured 462 marks, i.e., more than 50% in aggregate. Therefore, depriving him only on the ground that he could not approach the court cannot be justified, particularly in view of the fact that Court has competence to grant equitable relief to persons even if they are not before the Court. (See *State of Kerala Vs. Kumari T.P. Roshana & Ors.,* AIR 1979 SC 765; *Ajay Hasia etc. Vs. Khalid Mujib Sehravardi & Ors. etc.,* AIR 1981 SC 487; *Punjab Engineering College, Chandigarh Vs. Sanjay Gulati & Ors.,* AIR 1983 SC 580; *Thaper Institute of Engineering & Technology, Patiala Vs. Abhinav Taneja & Ors.;* (1990) 3 SCC 468; *Sharwan Kumar & Ors Vs. Director General of Health Services & Ors,* AIR 1992 SC 2202; and *K.C. Sharma & Ors. Vs. Union of India & Ors.,* AIR 1997 SC 3588). More so, Court has also power to mould the relief in a particular fact-situation.

23. Situation will be entirely different where the court deals with the issue of admission in mid-academic session. This Court has time and again said that it is not permissible for the

Courts to issue direction for admission in mid-academic session. The reason for it has been that admission to a student at a belated stage disturbs other students, who have already been pursuing the course and such a student would not be able to complete the required attendance in theory as well as in practical classes. Quality of education cannot be compromised. The students taking admission at a belated stage may not be able to complete the courses in the limited period. In this connection reference may be made to the decisions of this Court in *Dr. Pramod Kumar Joshi Vs. Medical Council of India & Ors.,* (1991) 2 SCC 179; *State of Uttar Pradesh & Ors. Vs. Dr. Anupam Gupta etc.,* AIR 1992 SC 932; *State of Punjab & Ors. Vs. Renuka Singla & Ors.,* AIR 1994 SC 595; *Medical Council of India Vs. Madhu Singh & Ors.,* (2002) 7 SCC 258; and *Mridul Dhar (Minor) & Anr. Vs. Union of India & Ors.,* (2005) 2 SCC 65.

24. The issue of re-evaluation of answer book is no more *res integr*a. This issue was considered at length by this Court in *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. Vs. Paritosh Bhupesh Kurmarsheth etc.etc.* AIR 1984 SC 1543, wherein this Court rejected the contention that in absence of provision for re-evaluation, a direction to this effect can be issued by the Court. The Court further held that even the policy decision incorporated in the Rules/Regulations not providing for rechecking/verification/re-evaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Court held as under:

"…….It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act…….The Court cannot sit in judgment over the wisdom of the policy

evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any draw-backs in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act……."

25. This view has been approved and relied upon and re-iterated by this Court in *Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission, Patna & Ors,* AIR 2004 SC 4116 observing as under:

> "Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for re-evaluation of his answer-book. There is a provision for scrutiny only wherein the answer-books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and noting them correctly on the first cover page of the answer-book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. *In the absence of any provision for re-evaluation of answer-books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks." (emphasis added)*

26. A similar view has been reiterated in *Dr. Muneeb Ul Rehman Haroon & Ors. Vs. Government of Jammu & Kashmir State & Ors.* AIR 1984 SC 1585; *Board of Secondary Education Vs. Pravas Ranjan Panda & Anr.* (2004) 13 SCC 383; *President, Board of Secondary Education, Orissa & Anr. Vs. D. Suvankar & Anr.* (2007) 1 SCC 603; *The Secretary, West Bengal Council of Higher Secondary Education Vs.*

Ayan Das & Ors. AIR 2007 SC 3098; and *Sahiti & Ors. Vs. Chancellor, Dr. N.T.R. University of Health Sciences & Ors.* (2009) 1 SCC 599.

27. Thus, the law on the subject emerges to the effect that in absence of any provision under the Statute or Statutory Rules/ Regulations, the Court should not generally direct revaluation.

28. In the instant case, undoubtedly, the High Court issued direction for revaluation and the respondent No.1 secured 119 marks in revaluation, making him eligible to be called for interview and further for appointment, in case, he succeeds in interview. But the order of the High Court was kept in abeyance by this Court for having fresh revaluation by an eminent Professor, who had revalued the answer sheets and awarded only 82 marks to the respondent No.1.

29. We have asked Mr. Nag, Ld. Counsel to take instruction from the Commission and apprise the Court as to whether any vacancy advertised in 2005 remained unfilled. After taking instruction, Shri Nag informed us that in that selection only 5 posts could be filled up though 13 vacancies had been advertised. However, remaining vacancies had been carried forward and re-advertised and had been filled in 2006 itself. Subsequent to the selection involved herein, three more selections have been held. Respondent No.1 has appeared in 2 subsequent selections but could not succeed. Now he has become over-aged also.

30. Even on any other ground, the respondent No.1 cannot be offered appointment for want of vacancy.

31. The facts and circumstances of the case, warrant review of the judgment and order of the High Court dated 26.12.2005. The appeals are allowed. Judgment and order dated 26.12.2005 is set aside. No costs.

R.P. Appeals allowed.

MAY GEORGE

v.

SPECIAL TAHSILDAR & ORS.

(Civil Appeal No. 2255 of 2006)

MAY 25, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894:

ss. 4, 6, 11 and 18 – Acquisition for planned development of industrial town – Award made – Possession taken – Thereafter, one of the land-owners filing writ petition challenging the award on the ground that notice u/s. 9(3) not served – Single Judge of High Court dismissing the petition – Division Bench of High Court dismissing writ appeal, but giving liberty to the claimant to move application u/s. 18 – On appeal, held: Once award made and possession taken, land vested in the State and cannot be diversted even if some irregularity found in the acquisition proceedings – On facts, it cannot be presumed that claimant had no knowledge of acquisition – Challenge to the award is belated.

s. 9 – Notice under – Whether mandatory – Held: The provision not mandatory – In view of the scheme of the Act, failure of notice u/s. 9(3) would not adversely affect the subsequent proceedings including the Award and title of the Government in the acquired land.

Interpretation of Statute – Contextual interpretation – Held: In order to decide whether a provision is directory or mandatory, the Court, in addition to the language of the provision, should examine the context in which it is used and the purpose it seeks to achieve, and the legislative intent – In order to declare a provision mandatory the test is whether non-compliance thereof could render the entire proceedings invalid or not .

Appellant filed a writ petition challenging the award made u/s. 11 of Land Acquisition Act, 1894. She claimed that she was never aware of the acquisition proceedings and she was not served with notice u/s. 9(3) of the Act; and that she came to know about the acquisition of her land when she was served with a notice that she was in illegal possession of the land. Single Judge of the High Court dismissed the petition. In writ appeal, Division Bench of High Court confirmed the judgment of Single Judge. However, Division Bench gave liberty to the appellant to move an application for making reference u/s. 18 of the Act.

In appeal to this Court, appellant contended inter-alia that provisions of s. 9 being mandatory in nature, non-compliance thereof would vitiate the Award and all other consequential proceedings.

Respondent contended that notice u/s. 9(3) was served on the appellant by affixing the same on the land of the appellant as she was not available; and that provisions of s. 9(3) are not mandatory; that reference u/s. 18 was time barred and High Court was not competent to enhance the period of limitation.

Dismissing the appeal, the Court

HELD: 1.1. Huge area of land had been acquired for planned development of industrial town, the land of the appellant cannot be exempted on any ground whatsoever. More so, appellant's land was of negligible area in comparison of the total land acquired and therefore, at the behest of only one person, the acquisition proceedings cannot be disturbed. [Para 10] [213-A-B]

1.2. It is not the case of the appellant that Notification u/s. 4 and Declaration u/s. 6 of Land Acquisition Act, 1894 were not published or given publicity as mandatorily

required under the law. Once, Award was made and possession had been taken, land stood vested in the State, free from all encumbrances, it cannot be divested even if some irregularity is found in the Award. [Para 10] [212-G-H; 213-A-B]

1.3. Acquisition proceedings/Award have been challenged at a belated stage after a decade of taking possession of the land in dispute. In the facts and circumstances of the present case, it is difficult to presume that appellant had no knowledge of the acquisition proceedings. The writ court rejected the plea taken by the appellant, after being fully satisfied that the notice u/s. 9(3) was affixed on the part of the land in dispute as the appellant was not available; appellant was not the resident of the area. Though appellant was aware of the proceedings, conveniently chose to remain silent and made use of the notice, asking her removal from the unauthorised occupation as the basis of challenging the Award and land acquisition proceedings after inordinate delay of 10 years and vesting of land in the State itself. The same findings have been affirmed by the appellate court. In case the High Court has considered the matter in detail and recorded the findings on factual question, this Court may not examine that question at all. [Paras 11, 29 and 30] [213-C-D; 220-B-D, E-F]

Swaran Lata etc. vs. State of Haryana and Ors. **JT 2010 (3) SC 602, relied on.**

2.1. While determining whether a provision is mandatory or directory, in addition to the language used therein, the court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is

passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things. In order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the statute provides for a contingency of the non-compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid. [Paras 14 and 24] [214-H; 215-A-B; 218-E-H; 219-A]

State of U.P. and Ors. vs. Babu Ram Upadhya **AIR 1961 SC 751, followed.**

Dattatraya Moreshwar vs. The State of Bombay and Ors. **AIR 1952 SC 181;** *Raza Buland Sugar Co. Ltd. Rampur vs. Municipal Board Rampur* **AIR 1965 SC 895;** *State of Mysore vs. V.K. Kangan* **AIR 1975 SC 2190;** *Sharif-Ud-Din Vs. Abdul Gani Lone* **AIR 1980 SC 303;** *Balwant Singh and Ors. vs. Anand Kumar Sharma and Ors.* **(2003) 3 SCC 433;** *Bhavnagar University vs. Palitana Sugar Mill Pvt. Ltd. and Ors.* **AIR 2003 SC 511;** *Chandrika Prasad Yadav vs. State of Bihar and Ors.* **AIR 2004 SC 2036;** *M/s. Rubber House vs. M/s. Excellsior Needle Industries Pvt. Ltd.* **AIR 1989 SC 1160;** *State of Haryana and Anr. vs. Raghubir Dayal* **(1995) 1 SCC 133, relied on.**

B.S. Khurana and Ors. vs. Municipal Corporation of Delhi and Ors. **(2000) 7 SCC 679;** *Gullipilli Sowria Raj vs. Bandaru Pavani @ Gullipili Pavani* **(2009) 1 SCC 714, referred to.**

2.2. Section 9 of the Act provides for an opportunity to the "person- interested" to file a claim petition with documentary evidence for determining the market value of the land and in case a person does not file a claim u/s. 9 even after receiving the notice, he still has a right to make an application for making a reference u/s. 18 of the Act. Therefore, scheme of the Act is such that it does not cause any prejudicial consequence in case the notice u/s. 9(3) is not served upon the person interested. [Para 13] [214-F-G]

2.3. Failure of issuance of notice u/s. 9(3) would not adversely affect the subsequent proceedings including the Award and title of the Government in the acquired land. So far as the person interested is concerned, he is entitled only to receive the compensation and therefore, there may be a large number of disputes regarding the apportionment of the compensation. In such an eventuality, he may approach the Collector to make a reference to the Court u/s. 30 of the Act. [Para 25] [219-B-C]

Dr. G.H. Grant vs. State of Bihar **AIR 1966 SC 237, relied on.**

2.4. Inspite of the fact that Section 9 notice had not been served upon the person- interested, he could still claim the compensation and ask for making the reference u/s. 18. There is nothing in the Act to show that non-compliance thereof will be fatal or visit any penalty. [Para 27] [219-E-F]

State of Tamil Nadu vs. Mahalakshmi Ammal and Ors. **(1996) 7 SCC 269;** *Nasik Municipal Corporation v.*

Harbanslal Laikwant Rajpal and Ors. **(1997) 4 SCC 199;** *Tika Ram and Ors. vs. State of U.P. and Ors.* **(2009) 10 SCC 689, relied on.**

3. In case the High Court has granted the relief to the appellant to make the application for making a reference u/s. 18 of the Act and further directions have been issued to the Collector to make the reference and further to the Tribunal to decide the same within the stipulated period, instead of approaching this Court in appeal, the appellant ought to have pursued that remedy. [Para 31] [220-G]

Case Law Reference:

JT 2010 (3) SC 602	**Relied on.**	**Para 11**
AIR 1952 SC 181	**Relied on.**	**Para 15**
AIR 1961 SC 751	**Followed.**	**Para 16**
AIR 1965 SC 895	**Relied on.**	**Para 17**
AIR 1975 SC 2190	**Relied on.**	**Para 17**
AIR 1980 SC 303	**Relied on.**	**Para 18**
(2003) 3 SCC 433	**Relied on.**	**Para 19**
AIR 2003 SC 511	**Relied on.**	**Para 19**
AIR 2004 SC 2036	**Relied on.**	**Para 19**
AIR 1989 SC 1160	**Relied on.**	**Para 20**
(2000) 7 SCC 679	**Referred to.**	**Para 21**
(1995) 1 SCC 133	**Relied on.**	**Para 22**
(2009) 1 SCC 714	**Referred to.**	**Para 23**
AIR 1966 SC 237	**Relied on.**	**Para 26**
(1996) 7 SCC 269	**Relied on.**	**Para 28**

(1997) 4 SCC 199	**Relied on.**	**Para 28**
(2009) 10 SCC 689	**Relied on.**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2255 of 2006.

From the Judgment & Order dated 13.09.2004 of the High Court of Judicature at Madras in Writ Appeal No. 1692 of 1997.

Shekhar Naphade, T.V.S. Raghvendra, Nikhil Nayyar for the Appellant.

R. Venkataramani, Soma Sundaram, R. Nedumaran, Pattabhiraman, K.K. Mani, Ankit Swarup for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been filed against the judgment and order dated 13.9.2004 passed by the High Court of Madras dismissing the Writ Appeal No.1692 of 1997 by which the Court has affirmed the judgment and order of the Learned Single Judge dated 4.12.1997 in Writ Petition No.14319 of 1986 wherein the appellant had challenged the Award made under section 11 of the Land Acquisition Act, 1894 (hereinafter called the Act) on the ground that he had not been served with the notice under section 9(3) of the Act.

2. Facts and circumstances giving rise to this case are that Notification under Section 4 of the Act was issued on 7.1.1976 covering the area to the extent of 30.80 acres being part of different survey numbers and belonging to large number of persons in Seevaram Village, Saidapet Taluk, Chingleput District of Tamil Nadu for planned development of Electrical/ Electronics Industrial Estate including appellant's land measuring 33 cents therein in Survey No. 36/1A/1. Considering grave urgency, filing of objections under Section 5A of the Act were dispensed with and provisions of Section 17 of the Act were resorted to. Declaration under Section 6 of the Act was made on 1.10.1976 and Award under Section 11 was made

on 16.11.1979 in respect of entire land covered by the said Notification and Declaration.

3. Appellant claimed that she had purchased the said land on 27.9.1961 and mutation had taken place, thus her name stood recorded in the revenue record. Appellant's grievance has been that she had never been aware of the acquisition proceedings and she was not served with notice under section 9(3) of the Act. She was never dispossessed from the said part of the land. She was granted temporary licence for establishing Small Scale Industries on 24.11.1984 and a permanent certificate for the said purpose on 31.1.1986.

4. She got the information first time that a part of her land had been acquired only on receiving the notice dated 8.12.1986 issued by Respondent-Department to the effect that she was in illegal possession and occupation of the said part of the land and she was directed to demolish the structure put up by her.

5. Appellant, after collecting the required documents, approached the High Court by filing the Writ Petition No.14319/86 challenging the Award dated 16.11.1979 and other subsequent proceedings. The Ld. Single Judge dismissed the petition vide judgment and order dated 4.12.1997.

6. Being aggrieved, appellant preferred the Writ Appeal No.1692 of 1997 which has also been dismissed vide impugned Judgment. However, the Court has given liberty to the appellant to move an application for making reference under section 18 of the Act within a period of two weeks from the date of receipt of the order and further directed the Land Acquisition Collector to make a reference, if such an application is filed within a period of four weeks thereafter, and the Court further directed the Tribunal to decide the reference within a period of three months from the date of its receipt. Hence, this appeal.

7. Shri Shekhar Naphade, Ld. Senior Counsel appearing for the appellant has raised large number of issues and made an attempt to challenge the entire acquisition proceedings though the limited prayer of quashing the Award was made before the High Court. Shri Naphade has submitted that the provisions of Section 9 are mandatory in nature and non-compliance thereof would vitiate the Award and all other consequential proceedings. Appellant had never been aware of issuance of Section 4 Notification or Section 6 Declaration or Award made thereafter. No notice had ever been served upon her in respect of acquisition proceedings. Therefore, the appeal deserves to be allowed.

8. Per contra, Shri R. Venkataramani, Ld. Senior Counsel for the respondents has submitted that the Notification under Section 4 and Declaration under Section 6 of the Act had been given due publicity as per the requirement of law. Section 9(3) notice had been affixed on the land as the appellant was not available. Even otherwise, the provisions of Section 9(3) are not mandatory and therefore, would not vitiate the Award or any other subsequent proceedings. More so, the High Court had given liberty to the appellant to make a reference under Section 18 thus, appellant cannot raise the grievance at all. Reference under Section 18 of the Act would be time barred and the High Court had no competence to enhance the period of limitation. The appeal is devoid of any merit and hence, liable to be dismissed.

9. We have considered the rival submissions made by learned counsel appearing for the parties and perused the record.

10. Land measuring 30.80 acres stood notified and acquired. The land consisted of large survey numbers and belonged to a large number of persons. It is not the case of the appellant that Notification under Section 4 and Declaration under Section 6 were not published or given publicity as

mandatorily required under the law. Once, Award was made and possession had been taken, land stood vested in the State free from all encumbrances, it cannot be divested even if some irregularity is found in the Award. As huge area of land had been acquired for planned development of industrial town, the land of the appellant cannot be exempted on any ground whatsoever. More so, appellant's land was of negligible area in comparison of the total land acquired and therefore, at the behest of only one person, the acquisition proceedings cannot be disturbed.

11. Admittedly, acquisition proceedings/Award have been challenged at a belated stage after a decade of taking possession of the land in dispute. In the facts and circumstances of this case, it is difficult to presume that appellant had no knowledge of the acquisition proceedings. While dealing with a similar case, this Court in *Swaran Lata etc. Vs. State of Haryana & Ors.* JT 2010 (3) SC 602 has held as under:

> "*12. ……the only ground taken in the writ petition has been that substance of the notification under Section 4 and declaration under Section 6 of Act 1894 had been published in the newspapers having no wide circulation. Even if, the submission made by the petitioners is accepted, it cannot be presumed that they could not be aware of acquisition proceedings for the reason that very huge chunk of land belonging to large number of tenure holders had been notified for acquisition. Therefore, it should have been a talk of the town. Thus, it cannot be presumed that petitioners could not have knowledge of the acquisition proceedings."*

In *Swaran Lata* (supra), this Court has held that acquisition proceedings cannot be challenged at a belated stage.

12. The only question remains for our consideration is as to whether the provisions of Section 9(3) are mandatory in

nature and non-compliance thereof, would vitiate the Award and subsequent proceedings under the Act. Section 4 Notification manifests the tentative opinion of the Authority to acquire the land. However, Section 6 Declaration is a conclusive proof thereof. The Land Acquisition Collector acts as Representative of the State, while holding proceedings under the Act, he conducts the proceedings on behalf of the State. Therefore, he determines the pre-existing right which is recognised by the Collector and guided by the findings arrived in determining the objections etc. and he quantifies the amount of compensation to be placed as an offer on behalf of the appropriate government to the person interested. It is for the tenure holder/ person interested to accept it or not. In case, it is not acceptable to him, person interested has a right to ask the Collector to make a reference to the Tribunal.

13. Section 9(3) of the Act reads as under :-

> "The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorized to receive service on their behalf, within the revenue district in which the land is situate"

Section 9 of the Act provides for an opportunity to the "person- interested" to file a claim petition with documentary evidence for determining the market value of the land and in case a person does not file a claim under Section 9 even after receiving the notice, he still has a right to make an application for making a reference under Section 18 of the Act. Therefore, scheme of the Act is such that it does not cause any prejudicial consequence in case the notice under Section 9(3) is not served upon the person interested.

14. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court

has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

15. In *Dattatraya Moreshwar Vs. The State of Bombay & Ors.,* AIR 1952 SC 181, this Court observed that law which creates public duties is directory but if it confers private rights it is mandatory. Relevant passage from this judgment is quoted below:–

> "It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

16. A Constitution Bench of this Court in *State of U.P. & Ors. Vs. Babu Ram Upadhya* AIR 1961 SC 751, decided the issue observing :-

> "For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance,

> namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

17. In *Raza Buland Sugar Co. Ltd., Rampur Vs. Municipal Board, Rampur* AIR 1965 SC 895; and *State of Mysore Vs. V.K. Kangan,* AIR 1975 SC 2190, this Court held that as to whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

18. In *Sharif-Ud-Din Vs. Abdul Gani Lone* AIR 1980 SC 303, this Court held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory.

19. Similar view has been reiterated by this Court in *Balwant Singh & Ors. Vs. Anand Kumar Sharma & Ors.* (2003) 3 SCC 433; *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. & Ors.* AIR 2003 SC 511; and *Chandrika Prasad Yadav Vs. State of Bihar & Ors.,* AIR 2004 SC 2036.

20. In *M/s. Rubber House Vs. M/s. Excellsior Needle Industries Pvt. Ltd.* AIR 1989 SC 1160, this Court considered the provisions of the Haryana (Control of Rent & Eviction) Rules, 1976, which provided for mentioning the amount of arrears of rent in the application and held the provision to be directory though the word "shall" has been used in the statutory provision

for the reason that non-compliance of the rule, i.e. non-mentioning of the quantum of arrears of rent did involve no invalidating consequence and also did not visit any penalty.

21. In *B.S. Khurana & Ors. Vs. Municipal Corporation of Delhi & Ors.* (2000) 7 SCC 679, this Court considered the provisions of the Delhi Municipal Corporation Act, 1957, particularly those dealing with transfer of immovable property owned by the Municipal Corporation. After considering the scheme of the Act for the purpose of transferring the property belonging to the Corporation, the Court held that the Commissioner could alienate the property only on obtaining the prior sanction of the Corporation and this condition was held to be mandatory for the reason that the effect of non-observance of the statutory prescription would vitiate the transfer though no specific power had been conferred upon the Corporation to transfer the property.

22. In *State of Haryana & Anr. Vs. Raghubir Dayal* (1995) 1 SCC 133, this Court has observed as under:–

> "The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word 'shall; as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something

> and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."

23. In *Gullipilli Sowria Raj Vs. Bandaru Pavani @ Gullipili Pavani* (2009) 1 SCC 714, this Court while dealing with a similar issue held as under :

> "…The expression "may" used in the opening words of Section 5 is not directory,as has been sought to be argued, but mandatory and non-fulfilment thereof would not permit a marriage under the Act between two Hindus. Section 7 of the 1955 Act is to be read along with Section 5 in that a Hindu Marriage, as understood under Section 5, could be solemnised according to the ceremonies indicated therein"

24. The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The Court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the Statute provides for a contingency of the non-compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in

breach thereof will be invalid.

25. The instant case is required to be examined in the light of the aforesaid settled legal provision.

In fact, failure of issuance of notice under section 9(3) would not adversely affect the subsequent proceedings including the Award and title of the government in the acquired land. So far as the person interested is concerned, he is entitled only to receive the compensation and therefore, there may be a large number of disputes regarding the apportionment of the compensation. In such an eventuality, he may approach the Collector to make a reference to the Court under section 30 of the Act.

26. In *Dr. G.H. Grant Vs. State of Bihar* AIR 1966 SC 237, this Court has held that if a "person interested" is aggrieved by the fact that some other person has withdrawn the compensation of his land, he may resort to the procedure prescribed under the Act or agitate the dispute in suit for making the recovery of the Award amount from such person.

27. In fact, the land vest in the State free from all encumbrances when possession is taken under section 16 of the Act. Once land is vested in the State, it cannot be divested even if there has been some irregularity in the acquisition proceedings. In spite of the fact that Section 9 Notice had not been served upon the person- interested, he could still claim the compensation and ask for making the reference under section 18 of the Act. There is nothing in the Act to show that non-compliance thereof will be fatal or visit any penalty.

28. The view taken by us hereinabove stands fortified by large number of judgments of this Court wherein it has been held that if there is an irregularity in service of notice under sections 9 and 10, it could be a curable irregularity and on account thereof, Award under Section 11 would not become

invalid (see : *State of Tamil Nadu Vs. Mahalakshmi Ammal & Ors.* (1996) 7 SCC 269; and *Nasik Municipal Corporation v. Harbanslal Laikwant Rajpal and Ors.* (1997) 4 SCC 199).

29. Be that as it may, the Writ Court rejected the contentions raised by the appellant after being fully satisfied that the notice under section 9(3) was affixed on the part of the land in dispute as the appellant was not available; appellant was not the resident of the area; and if instead of Smt. in the notice/ documents, she had been shown as "Thiru", it would be immaterial so far as the merit of the case was concerned. The Court was fully satisfied that notice had been affixed on the land, satisfying the requirement of law and the Award had been made within limitation. Though appellant was aware of the proceedings conveniently, chose to remain silent and made use of the notice, asking her removal from the unauthorised occupation as the basis of challenging the Award and land acquisition proceedings after inordinate delay of 10 years and vesting of land in the State itself.

The same findings have been affirmed by the Appellate Court.

30. In case the High Court has considered the matter in detail and recorded the findings on factual question, this Court may not examine that question at all. [vide *Tika Ram & Ors. Vs. State of U.P. & Ors.* (2009) 10 SCC 689].

31. We also fail to understand that in case the High Court has granted the relief to the appellant to make the application for making a reference under Section 18 of the Act and further directions have been issued to the Collector to make the reference and further to the Tribunal to decide the same within the stipulated period, instead of approaching this Court in appeal, the appellant ought to have pursued that remedy.

Submissions have been made on behalf of the respondents that as the Court lacks competence to extend the

period of limitation, direction issued by the High Court giving liberty to the appellant herein to make an application for making reference under Section 18 is without jurisdiction. Such a submission cannot be examined for the simple reason that the respondents-authorities have chosen not to challenge the impugned Judgment. Thus, we are not in a position to examine the correctness of that submission or making any observation regarding the law of limitation for the purpose of making reference. This question is left open.

32. In the facts and circumstances of the case, the appeal fails and is, accordingly, dismissed.

K.K.T. Appeal dismissed.

DINESH KUMAR
v.
YUSUF ALI
(Civil Appeal No. 4244 of 2006)

MAY 26, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

M.P. Accommodation Control Act, 1961 – s. 12(1)(f) – Bonafide requirement for non-residential purpose – Suit for eviction – Allowed by trial court – Set aside by first appellate court – In second appeal, order of eviction upheld by High Court holding that the findings recorded by first appellate court perverse – On appeal, held: Landlord is the best judge of his need, however, it should be real, genuine and need may not be a pretext to evict tenant only for increasing rent – High Court can entertain second appeal and re-appreciate evidence, if finding of fact recorded by court below is found to be perverse – On facts, order of High Court justified but it did not consider as to what would be the magnitude of business – In the interest of justice, landlord to recover possession of half of the area of the premises – Code of Civil Procedure, 1908 – s. 100.

Code of Civil Procedure, 1908 – s. 100 – Second appeal – Maintainability of – Held: Is maintainable on a substantial question of law and not on facts – However, if court comes to the conclusion that evidence recorded by courts below are perverse, appeal can be entertained, and it is permissible for the court to re-appreciate the evidence.

The respondent-landlord owned a shop measuring 152 sq.ft. It was situated at a main road in the market. In year 1978, the respondent let out the said premises to the appellant-tenant for a non-residential purpose on a monthly rent of Rs.150/-. The rent was enhanced from

time to time. The respondent took certain loan from the appellant and part of it was to be adjusted towards the monthly rent. Thereafter, the respondent-landlord filed a suit for eviction against the appellant on the grounds of nuisance and bone fide requirement for himself. He submitted that he was carrying his business in a rented 'Gumti' measuring 3 ft. x 4 ft. at a monthly rent of Rs. 75/-; and that the said 'Gumti' is situated on the Nalla in Cantonment Board established by encroaching upon the public land. The trial court allowed the suit for eviction under section 12(1)(f) of M.P. Accommodation Control Act, 1961 on the ground of bona fide need. The first appellate court set aside the order. The respondent filed a second appeal. The High Court allowed the same. Hence the appeal.

Disposing of the appeal, the Court

HELD: 1.1. The Second Appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence. The High Court should not entertain a second appeal unless it raises a substantial question of law. It is the obligation on the Court of law to further the clear intendment of the Legislature and not to frustrate it by ignoring the same. There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. [Paras 12 and 14] [231-F-G; 232-B]

1.2. The Second Appeal u/s. 100 CPC is maintainable basically on a substantial question of law and not on facts. However, if the High Court comes to the conclusion that the findings of fact recorded by the courts below are perverse being based on no evidence or based on

irrelevant material, the appeal can be entertained and it is permissible for the Court to re-appreciate the evidence. The landlord is the best Judge of his need, however, it should be real, genuine and the need may not be a pretext to evict the tenant only for increasing the rent. [Para 25] [235-C-D]

Ram Prasad Rajak Vs. Nand Kumar & Bros. & Anr. **AIR 1998 SC 2730;** *Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil & ors.* **AIR 1994 SC 678;** *Reserve Bank of India & Anr. Vs. Ramakrishna Govind Morey* **AIR 1976 SC 830;** *Kulwant Kaur & Ors. Vs. Gurdial Singh Mann (dead) by L.Rs. & Ors.* **AIR 2001 SC 1273;** *Sheel Chand Vs. Prakash Chand* **AIR 1998 SC 3063;** *Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa & Ors.* **AIR 2000 SC 2108;** *Jai Singh Vs. Shakuntala* **AIR 2002 SC 1428;** *P. Chandrasekharan & Ors. Vs. S. Kanakarajan & Ors.* **AIR 2007 SC 2306;** *Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali & Anr.* **AIR 2007 SC 248;** *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs & Ors.* **AIR 2008 SC 2033;** *Rishi Kumar Govil Vs. Maqsoodan and Ors.* **(2007) 4 SCC 465;** *Jagdish Singh Vs. Nathu Singh* **AIR 1992 SC 1604;** *Smt. Prativa Devi Vs. T.V. Krishnan* **(1996) 5 SCC 353;** *Satya Gupta @Madhu Gupta Vs. Brijesh Kumar* **(1998) 6 SCC 423;** *Ragavendra Kumar Vs. Firm Prem Machinery & Co.* **AIR 2000 SC 534;** *Molar Mal Through Lr. Vs. M/s. Kay Iron Works Pvt. Ltd.* **AIR 2000 SC 1261;** *Prativa Devi Vs. T.V. Krishnan* **(1996) 5 SCC 353;** *Ram Dass Vs. Ishwar Chander & Ors.* **AIR 1988 SC 1422;** *Rahabhar Productions Pvt. Ltd. Vs. Rajendra K. Tandon* **AIR 1998 SC 1639;** *Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta* **AIR 1999 SC 2507;** *Malpe Vishwanath Acharya & Ors. Vs. State of Maharashtra & Anr.* **AIR 1998 SC 602; and** *Siddalingamma & Anr. Vs. Mamtha Shenoy* **AIR 2001 SC 2896, relied on.**

Jurisprudence by Salmond **12th Edn. p 69 – referred to.**

2.1. In the instant case, the trial court after considering the evidence on record including increase in rent from time to time and the fact that after evicting S-doctor, in 1978, the landlord inspite of starting his business in the suit premises rented it out to the appellant, came to the conclusion that need of the landlord was bona fide as he was running his business on a rented premises having a very small area at an unhygienic place i.e. platform on a Nalla. No other alternative or convenient place was available to him to shift/start his business and there had been no increase in rent of the suit premises after 1995. The said findings were disturbed by the first appellate court mainly on the ground that the landlord did not require the suit premises for running his business, rather it was a pretext to increase the rent as rent had been increased from time to time and the landlord did not occupy the premises after being vacated by S-doctor. These circumstances made it clear that the landlord wanted to achieve the ulterior purpose. The landlord could be the best Judge of his need but he cannot be an arbitrary dictator. There was no evidence to show that his son was interested to come back and join his father in business. [Para 28] [236-B-F]

2.2. The High Court reached the conclusion that the landlord, inspite of the fact that he was owner of the suit premises could not be forced to continue his business in a shop of negligible area in a 'Gumti' made on platform on Nalla. Mere continuation of long tenancy could not be a ground to reject the case of bona fide need. [Para 29] [236-G]

2.3. The admitted facts make it clear that the appellant is enjoying the tenancy of the premises measuring 152 sq.ft. for the last 32 years. The landlord- respondent is running his business at a 'Gumti' measuring 3 ft. x 4 ft. made on a platform on a Nalla in Cantonment Board

established by encroaching upon the public land. The demand of plastic goods in which the landlord is dealing is increasing day by day. Undoubtedly after evicting S-doctor from the suit premises, the landlord did not start his business in the said premises but the incidence which occurred several decades ago cannot be relevant to determine the actual controversy for the reason that need of the landlord is to be examined as per the circumstances prevailing on the date of the institution of the case. Thus, an incident too remote from the date of institution of suit may not be relevant for consideration at all. The rent has been increased from time to time and it is not the case of the appellant-tenant that the rent had been enhanced arbitrarily or unreasonably or it could not be enhanced in law. The fact that rent had not been enhanced since 1995, the first appellate court erred in drawing the inference that need of the landlord may not be bona fide and it might be a pretext for increasing the rent or to evict the tenant. There is no pleading by the tenant that any attempt had ever been made by the landlord to enhance the rent during the period of 7 years prior to the date of institution of the suit. Undoubtedly, the son of the landlord is continuing his service abroad for last several years and he did not appear in witness box to prove that he was willing to start business with his father, remains immaterial or cannot put balance in favour of the appellant-tenant for the reason that the landlord himself wants to start his business in the suit premises. Therefore, it remains immaterial whether his son wants to join his business or not. [Para 30] [236-H; 237-A-F]

2.4. In the factual situation, no fault is found with the judgment of the High Court that it has committed an error reaching the conclusion that finding recorded by the first appellate court were perverse. However, in the facts and circumstances of the case, the High Court did not

consider as what would be the magnitude of his business, and whether partial eviction of the appellant could serve the purpose of both the parties. In order to meet the ends of justice, the landlord/respondent should recover possession of half of the area of the premises. [Paras 31, 32 and 33] [237-G-H; 238-A-B]

Case Law Reference:

(1996) 5 SCC 353	**Relied on.**	**Para 8**
AIR 1988 SC 1422	**Relied on.**	**Para 9**
AIR 1998 SC 1639	**Relied on.**	**Para 9**
AIR 1999 SC 2507	**Relied on.**	**Para 9**
AIR 1998 SC 602	**Relied on.**	**Para 10**
AIR 2001 SC 2896	**Relied on.**	**Para 11**
AIR 1998 SC 2730	**Relied on.**	**Para 13**
AIR 1994 SC 678	**Relied on.**	**Para 14**
AIR 1976 SC 830	**Relied on.**	**Para 15**
AIR 2001 SC 1273	**Relied on.**	**Para 16**
AIR 1998 SC 3063	**Relied on.**	**Para 17**
AIR 2000 SC 2108	**Relied on.**	**Para 18**
AIR 2002 SC 1428	**Relied on.**	**Para 19**
AIR 2007 SC 2306	**Relied on.**	**Para 20**
AIR 2007 SC 248	**Relied on.**	**Para 21**
AIR 2008 SC 2033	**Relied on.**	**Para 22**
(2007) 4 SCC 465	**Relied on.**	**Para 23**
AIR 1992 SC 1604	**Relied on.**	**Para 24**
(1996) 5 SCC 353	**Relied on.**	**Para 24**
(1998) 6 SCC 423	**Relied on.**	**Para 24**
AIR 2000 SC 534	**Relied on.**	**Para 24**
AIR 2000 SC 1261	**Relied on.**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4244 of 2006.

From the Judgment & Order dated 25.01.2006 of the High Court of Madhya Pradesh Bench at Indore in Second Appeal No. 726 of 2003.

Manish Vashisht, Sameer Vashisht, Sanjay Saini, Aashita Yadav, Ashok Mathur, S.K. Verma for the Appellant.

A.K. Chitale, Niraj Sharma, Sumit Kumar Sharma, Vikrant Singh Bais for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order of the High Court of Madhya Pradesh dated 25th January, 2006 passed in Second Appeal No. 726 of 2003 by which the High Court while allowing the Second Appeal reversed the judgment and decree dated 16th October, 2003 passed by the First Appellate Court in First Appeal No. 2/2003 by which the First Appellate Court had reversed the judgment and decree dated 13.12.2002 passed by the Trial Court in Civil Suit No. 30A/1999 allowing the application of the landlord for eviction of the tenant.

2. Facts and circumstances giving rise to this appeal are that the appellant-tenant was inducted by the respondent-landlord on 1.10.1978 in a shop in house No. 83, Main Street, Mhow for a non-residential purpose on a monthly rent of Rs.150/-. The respondent-landlord enhanced the rent from time to time and ultimately it was enhanced on 1.3.1995 to the extent of Rs.700/-p.m. The respondent-landlord had taken a sum of

Rs.35,000/- as loan from the appellant-tenant. Some amount therefrom was to be adjusted towards a part of monthly rent. Respondent-landlord filed suit No.30A/1999 on 1.4.1999 for eviction of the appellant on the grounds of nuisance and bone fide requirement for himself contending that he was carrying on business of plastic goods and shoes in a rented 'Gumti' measuring 3 ft. x 4 ft. on a Nalla. Respondent was in need of the disputed shop for carrying on his business alongwith his son Zulfikar Ali. Parties exchanged the affidavits and examined large number of witnesses in support of their respective claims before the Trial Court. The Trial Court, vide judgment and decree dated 13.12.2002, decreed the suit for eviction under Section 12(1)(f) of M.P. Accommodation Control Act, 1961 (hereinafter referred to as the 'Act 1961') on the ground of bona fide need, however, did not accept the plea of nuisance.

3. Being aggrieved, the appellant preferred the First Appeal No.2/2003 before the First Additional District Judge, Mhow and the same was allowed vide judgment and decree dated 16.10.2003 on the ground that the landlord had enhanced the rent from time to time; his son had been in employment in Dubai, therefore, the bona fide need was a pretext to enhance the rent or evict the tenant.

4. Being aggrieved, the landlord-respondent approached the High Court by filing Second Appeal No.726 of 2003 under Section 100 of the Code of Civil Procedure, which has been allowed vide judgment and order dated 25.1.2006. Hence, this appeal.

5. Mr. Manish Vashisht, learned counsel appearing for the appellant has vehemently submitted that the High Court committed grave error in entertaining the Second Appeal though no substantial question of law was involved therein. As to whether the courts below have rightly appreciated the evidence on record to find out as to whether need of the landlord is real and bona fide, is a question of fact. Therefore, the Second Appeal itself was not maintainable. The suit property

is not required by the landlord as he is doing his business at another premises for last 35 years; his son is in employment in Dubai. Therefore, the appeal deserves to be allowed.

6. Per contra, Mr. A.K. Chitale, learned senior counsel appearing for the respondent-landlord has vehemently opposed the appeal contending that if the finding of fact recorded by the court below is found to be perverse, the High Court can entertain the Second Appeal and re-appreciate the evidence. The landlord is the best Judge to determine as to what is his requirement and what is the proper place of his business. A tenant cannot force the landlord to carry out his business in the rented premises of negligible dimension. Therefore, the judgment and order of the High Court does not warrant any interference. The appeal is liable to be dismissed.

7. We have considered the rival submissions of learned counsel for the parties and perused the record.

8. In *Prativa Devi Vs. T.V. Krishnan* (1996) 5 SCC 353, this Court held that the landlord is the best judge of his requirement and courts have no concern to dictate the landlord as to how and in what manner he should live.

9. However, in *Ram Dass Vs. Ishwar Chander & Ors.* AIR 1988 SC 1422, this Court held that 'bona fide need' should be genuine, honest and conceived in good faith. Landlord's desire for possession, however honest it might otherwise be, has, inevitably, a subjective element in it. The "desire" to become "requirement" must have the objective element of a "need" which can be decided only by taking all relevant circumstances into consideration so that the protection afforded to tenant is not rendered illusory or whittled down. The tenant cannot be evicted on a false plea of requirement or "feigned requirement". (See also *Rahabhar Productions Pvt. Ltd. Vs. Rajendra K. Tandon* AIR 1998 SC 1639; and *Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta* AIR 1999 SC 2507).

10. In *Malpe Vishwanath Acharya & Ors. Vs. State of Maharashtra & Anr.* AIR 1998 SC 602, this Court emphasised the need for social legislations like the Rent Control Act striking a balance between rival interests so as to be just to law. "The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society."

11. In *Siddalingamma & Anr. Vs. Mamtha Shenoy* AIR 2001 SC 2896, this Court held that while determining the case of eviction of the tenant, an approach either too liberal or too conservative or pedantic must be guarded against. If the landlord wishes to live with comfort in a house of his own, the law does not command or compel him to squeeze himself and dwell in lesser premises so as to protect the tenant's continued occupation in tenancy premises. However, the bona fide requirement of the landlord must be distinguished from a mere whim or fanciful desire. It must be manifested in actual need so as to convince the Court that it is not a mere fanciful or whimsical desire. The need should be bona fide and not arbitrary and the requirement pleaded and proved must neither be a pretext nor a ruse adopted by the landlord for evicting the tenant. Therefore, the Court must take relevant circumstances into consideration while determining the issue of bona fide need so that the protection afforded to a tenant is not rendered illusory or whittled down.

12. Second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence. The High Court should not entertain a second appeal unless it raises a substantial question of law. It is the obligation on the Court of Law to further the clear intendment of the Legislature and not to frustrate it by ignoring the same.

13. In *Ram Prasad Rajak Vs. Nand Kumar & Bros. & Anr.,* AIR 1998 SC 2730, this Court held that existence of substantial question of law is a sine-qua-non for the exercise of jurisdiction under Section 100 of the Code and entering into the question as to whether need of the landlord was bonafide or not, was

beyond the jurisdiction of the High Court as the issue can be decided only by appreciating the evidence on record.

14. There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong."

(Vide *Salmond, on Jurisprudence,* 12th Edn. page 69, cited in *Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil & ors.,* AIR 1994 SC 678).

15. In *Reserve Bank of India & Anr. Vs. Ramakrishna Govind Morey,* AIR 1976 SC 830, this Court held that whether trial Court should not have exercised its jurisdiction differently, is not a question of law or a substantial question of law and, therefore, second appeal cannot be entertained by the High Court on this ground.

16. In *Kulwant Kaur & Ors. Vs. Gurdial Singh Mann (dead) by L.Rs. & Ors.* AIR 2001 SC 1273, this Court held that the question whether Lower Court's finding is perverse may come within the ambit of substantial question of law. However, there must be a clear finding in the judgment of the High Court as to perversity in order to show compliance with provisions of Section 100 CPC. Thus, this Court rejected the proposition that scrutiny of evidence is totally prohibited in Second Appeal.

17. In *Sheel Chand Vs. Prakash Chand,* AIR 1998 SC 3063, this Court held that question of re-appreciation of evidence and framing the substantial question as to whether

the findings relating to factual matrix by the court below could vitiate due to irrelevant consideration and not under law, being question of fact cannot be framed.

18. In *Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa & Ors.* AIR 2000 SC 2108, this Court held that it is not permissible for the High Court to decide the Second Appeal by re-appreciating the evidence as if it was deciding the First Appeal unless it comes to the conclusion that the findings recorded by the court below were perverse.

19. In *Jai Singh Vs. Shakuntala,* AIR 2002 SC 1428, this Court held that it is permissible to interfere even on question of fact but it has to be done only in exceptional circumstances. The Court observed as under:-

> "While scrutiny of evidence does not stand out to be totally prohibited in the matter of exercise of jurisdiction in the second appeal and that would, in our view, be too broad a proposition and too rigid an interpretation of law not worth acceptance but that does not also clothe the superior courts within jurisdiction to intervene and interfere in any and every matter- it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extensor stands permissible it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

20. In *P. Chandrasekharan & Ors. Vs. S. Kanakarajan & Ors.* AIR 2007 SC 2306, this Court reiterated the principle that interference in second appeal is permissible only when the findings are based on misreading of evidence or are so perverse that no person of ordinary prudence could take the said view. More so, the Court must be conscious that intervention is permissible provided the case involves a substantial question of law which is altogether different from the

question of law. Interpretation of a document which goes to the root of title of a party may give rise to substantial question of law.

21. In *Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali & Anr.,* AIR 2007 SC 248, this Court considered the scope of appeal under Section 30 of the Workmen's Compensation Act, 1923 and held as under :

> "Section 30 of the said Act postulates an appeal directly to the High Court if a substantial question of law is involved in the appeal….. A jurisdictional question will involve a substantial question of law. A finding of fact arrived at without there being any evidence would also give rise to a substantial question of law……. A question of law would arise when the same is not dependent upon examination of evidence, which may not require any fresh investigation of fact. A question of law would, however, arise when the finding is perverse in the sense that no legal evidence was brought on record or jurisdictional facts were not brought on record."

22. Similar view has been reiterated by this Court in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs & Ors.* AIR 2008 SC 2033.

23. In *Rishi Kumar Govil Vs. Maqsoodan and Ors.* [(2007) 4 SCC 465], this Court while dealing with the provisions of Section 21(1)(a) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 and Rule 16 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972, held that the bona fide personal need of the landlord is a question of fact and should not be normally interfered with.

24. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration

of relevant evidence or by showing erroneous approach to the matter. (Vide *Jagdish Singh Vs. Nathu Singh,* AIR 1992 SC 1604; *Smt. Prativa Devi Vs. T.V. Krishnan,* (1996) 5 SCC 353; *Satya Gupta @Madhu Gupta Vs. Brijesh Kumar,* (1998) 6 SCC 423 *Ragavendra Kumar Vs. Firm Prem Machinery & Co.,* AIR 2000 SC 534; and *Molar Mal Through Lr. Vs. M/s. Kay Iron Works Pvt. Ltd.,* AIR 2000 SC 1261).

25. Thus, the law on the subject emerges to the effect that Second Appeal under Section 100 CPC is maintainable basically on a substantial question of law and not on facts. However, if the High Court comes to the conclusion that the findings of fact recorded by the courts below are perverse being based on no evidence or based on irrelevant material, the appeal can be entertained and it is permissible for the Court to re-appreciate the evidence. The landlord is the best Judge of his need, however, it should be real, genuine and the need may not be a pretext to evict the tenant only for increasing the rent.

26. The instant case is required to be examined in the light of the aforesaid settled legal propositions.

27. The admitted facts of the case are that the suit property, 18 ft. x 14 ft. i.e. 152 Sq.ft., is situated at a main road in the market. The premises in which the landlord is running his business is 3 ft. x 4 ft. at a monthly rent of Rs. 75/-. The 'Gumti' is situated on the Nalla on the land of Cantonment Board. The said 'Gumti' belongs to one Mohd. Hussain who had established it by encroaching upon the land of the Cantonment Board. Son of the landlord, namely, Zulfikar Ali is in service in Dubai for last several years. The suit premises was earlier on rent with Dental Surgeon Dr. Sharma from 1970 to 1978 who vacated it considering the need of the landlord. After eviction of Dr. Sharma, it was given on rent to the appellant at a monthly rent of Rs.150/-p.m. The rent was enhanced to the tune of Rs.400/-p.m. in 1990, to Rs.500/-p.m in 1991 and further enhanced to Rs.700/-p.m. on 1.3.1995. Landlord had taken

loan of Rs.35,000/- from the tenant and a part of it was to be adjusted toward the monthly rent for the said premises.

28. The Trial Court after considering the pleadings framed as many as 10 issues. However, the relevant issues had been Issue Nos. 1 and 3 regarding the bona fide and real need of the landlord. After considering the evidence on record including increase in rent from time to time and the fact that after evicting Dr. Sharma, Dental Surgeon, in 1978, the landlord in spite of starting his business in the suit premises rented it out to the appellant, came to the conclusion that need of the landlord was bona fide as he was running his business on a rented premises having a very small area at an unhygienic place i.e. platform on a Nalla. No other alternative or convenient place was available to him to shift/start his business and there had been no increase in rent of the suit premises after 1995. The said findings have been disturbed by the First Appellate Court mainly on the ground that the landlord did not require the suit premises for running his business, rather it was a pretext to increase the rent as rent had been increased from time to time and the landlord did not occupy the premises after being vacated by Dr. Sharma, Dentist. These circumstances made it clear that the landlord wanted to achieve the ulterior purpose. The landlord could be the best Judge of his need but he cannot be an arbitrary dictator. There was no evidence to show that his son Zulfikar Ali was interested to come back and join his father in business.

29. The High Court reached the conclusion that the landlord, in spite of the fact that he was owner of the suit premises could not be forced to continue his business in a shop of negligible area in a 'Gumti' made on platform on Nalla. Mere continuation of long tenancy could not be a ground to reject the case of bona fide need.

30. The admitted facts referred to hereinabove, make it clear that the appellant is enjoying the tenancy of the premises measuring 152 sq.ft. for the last 32 years. The landlord-

respondent is running his business at a 'Gumti' measuring 3 ft. x 4 ft. made on a platform on a Nalla in Cantonment Board established by encroaching upon the public land. The demand of plastic goods in which the landlord is dealing is increasing day by day. Undoubtedly after evicting Dr. Sharma from the suit premises, the landlord has not started his business in the said premises but the incidence which occurred several decades ago cannot be relevant to determine the actual controversy for the reason that need of the landlord is to be examined as per the circumstances prevailing on the date of the institution of the case. Thus, an incident too remote from the date of institution of suit may not be relevant for consideration at all. Undoubtedly, the rent has been increased from time to time and it is not the case of the appellant-tenant that the rent had been enhanced arbitrarily or unreasonably or it could not be enhanced in law. The fact that rent had not been enhanced since 1995, the First Appellate Court erred in drawing the inference that need of the landlord may not be bona fide and it might be a pretext for increasing the rent or to evict the tenant. There is no pleading by the tenant that any attempt had ever been made by the landlord to enhance the rent during the period of 7 years prior to the date of institution of the suit. Undoubtedly, Zulfikar Ali, son of the landlord is continuing his service in Dubai for last several years and he has not appeared in witness box to prove that he was willing to start business with his father, remains immaterial or cannot put balance in favour of the appellant-tenant for the reason that the landlord himself wants to start his business in the suit premises. Therefore, it remains immaterial whether his son, Zulfikar Ali wants to join his business or not.

31. In such a fact-situation, we do not find any fault with the judgment of the High Court that it has committed an error reaching the conclusion that finding recorded by the First Appellate Court were perverse.

32. However, in the facts and circumstances of the case, the High Court did not consider the relevant factors i.e. as what

would be the magnitude of his business, and whether partial eviction of the appellant could serve the purpose of both the parties.

33. Thus, in order to meet the ends of justice the appeal is allowed partly. The landlord/respondent shall recover possession of half of the area of the premises dividing the same either on the side of "Bohara Masjid" or on the other side.

Appeal stands disposed of accordingly. No costs.

N.J. Appeal disposed of.

U.P. STATE ROAD TRANSPORT CORPORATION

v.

SURESH CHAND SHARMA

(Civil Appeal No. 3086 of 2007)

MAY 26, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Service Law:

Misconduct – Misappropriation of public money – Appropriate punishment – Conductor in State Road Transport Corporation recovering travelling fare from passengers but not issuing tickets to them – Misappropriating the recovered fare i.e. public money – Conductor terminated from service – Punishment of termination challenged as being disproportionate on the ground that the amount misappropriated was petty – Held: The challenge is not tenable – Amount misappropriated may be small or large; it is the mens rea to misappropriate the public money that is relevant – In cases of corruption/ misappropriation, the only punishment is dismissal – Any sympathy in such cases would be opposed to public interest.

Termination – On ground of misconduct – Labour Court declined relief to the employee – Writ petition – High Court directed re-instatement – Justification of – Held: Not justified – The High Court dealt with the matter in a most cryptic manner – Did not give cogent reasons while reversing the order of Labour Court – Judgment/Order – Obligation of the Court to record reasons for the order made – Administration of Justice.

Disciplinary proceedings were initiated against a Bus Conductor in State Road transport Corporation on the allegation that he recovered fare from travelling

passengers, but did not issue tickets to them, and thus misappropriated the fare recovered from the passengers. The charges were found proved by the Disciplinary Authority and consequently, the Conductor was terminated from service. He raised an industrial dispute.

The Labour Court declined to give any relief to the Conductor on which he filed writ petition. The High Court directed re-instatement of the Conductor, but without back wages.

In the present cross-appeals, the Corporation contended that the High Court had mis-directed itself as it did not give any cogent reason for setting aside the well-reasoned Award of the Labour Court.

Per contra, the Conductor submitted that there was no justification for imposing the punishment of dismissal and once the Award of the Labour Court was set aside, the Conductor was entitled to full back wages.

Allowing the appeal of the Corporation and dismissing that of the Conductor, the Court

HELD:1.1. The Labour Court considered the matter at length and came to the conclusion that enquiry had been conducted strictly in accordance with law. There has been no violation of the principles of natural justice or any other statutory provision. The employee (Conductor) was given full opportunity to defend himself, he cross examined the witnesses examined by the Corporation. The Enquiry Officer has rightly appreciated the evidence and found the charges proved. The Disciplinary Authority has taken a right decision accepting the enquiry report and punishment order was passed after serving second show cause to the employee. [Para 9] [246-G-H; 247-A]

1.2. The Labour Court recorded a finding of fact that the passengers were found travelling without tickets and they had already paid fare to the employee/Conductor. Thus, it is not a case where the said employee could not issue the ticket and recover the fare from the travelling passengers, rather the finding has been recorded that after recovering the fare from the passengers, he did not issue tickets to them. Thus, there was an intention to mis-appropriate the fare recovered from the passengers who were found travelling without tickets. [Para 10] [247-E-F]

2.1. The High Court dealt with the matter in a most cryptic manner. It decided the Writ Petition only on the ground that the passengers found without tickets, had not been examined and the cash with the employee was not checked. The reasoning so given by the High Court cannot be sustained in the eye of law. No other reasoning has been given whatsoever by the High Court. [Paras 11, 12 and 14] [247-G; 248-C-D; 249-A-B]

2.2. Moreso, the High Court is under an obligation to give not only the reasons but cogent reasons while reversing the findings of fact recorded by a domestic tribunal. In case the judgment and order of the High Court is found not duly supported by reasons, the judgment itself stands vitiated. While deciding a case, the court is under an obligation to record reasons, however, brief, the same may be, as it is a requirement of principles of natural justice. Non-observance of the said principle would vitiate the judicial order. In view of the above, the judgment and the order of the High Court is liable to be set aside. [Paras 14 and 19] [249-A-B; 250-C-D]

State of Haryana & Anr. v. Rattan Singh **AIR 1977 SC 1512;** *State of Maharashtra v. Vithal Rao Pritirao Chawan* **AIR 1982 SC 1215;** *State of U.P. v. Battan & Ors.* **(2001) 10 SCC 607;** *Raj Kishore Jha v. State of Bihar & Ors.* **AIR 2003 SC 4664;** *State of Orissa v. Dhaniram Luhar* **AIR 2004 SC 1794;** *State of West Bengal v. Atul Krishna Shaw & Anr.* **AIR 1990 SC 2205;** *State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi* **AIR 2008 SC 2026 and** *Krishna Swami v. Union of India & Ors.* **AIR 1993 SC 1407, relied on.**

3. There is no force in the submission that for embezzlement of such a petty amount, punishment of dismissal could not be justified, for the reason that it is not the amount embezzled by a delinquent employee but the *mens rea* to mis-appropriate the public money that is relevant. In a case of corruption/misappropriation, the only punishment is dismissal. Thus, the contention raised that the punishment of dismissal from service was disproportionate to the proved delinquency of the Conductor, is not worth acceptance. The award of the Labour Court is restored. [Paras 20, 21, 22] [250-E; 251-B-D]

Municipal Committee, Bahadurgarh v. Krishnan Bihari & Ors. **AIR 1996 SC 1249;** *Ruston & Hornsby (I) Ltd. v. T.B. Kadam,* **AIR 1975 SC 2025;** U.P. *State Road Transport Corporation v. Basudeo Chaudhary & Anr.* **(1997) 11 SCC 370;** *Janatha Bazar (South Kanara Central Cooperative Wholesale Stores Ltd.) & Ors. v. Secretary, Sahakari Noukarara Sangha & Ors.* **(2000) 7 SCC 517;** *Karnataka State Road Transport Corporation v. B.S. Hullikatti* **AIR 2001 SC 930 and** *Regional Manager, R.S.R.T.C. v. Ghanshyam Sharma* **(2002) 10 SCC 330, relied on.**

Divisional Controller N.E.K.R.T.C. v. H. Amaresh **AIR 2006 SC 2730 and** *U.P.S.R.T.C. v. Vinod Kumar*, **(2008) 1 SCC 115, referred to.**

Case Law Reference:

AIR 1977 SC 1512	**relied on**	**Para 12**
AIR 1982 SC 1215	**relied on**	**Para 14**

(2001) 10 SCC 607	**relied on**	**Para 14**
AIR 2003 SC 4664	**referred to**	**Para 14**
AIR 2004 SC 1794	**relied on**	**Para 14**
AIR 1990 SC 2205	**relied on**	**Para 15**
AIR 2008 SC 2026	**relied on**	**Para 16**
AIR 1993 SC 1407	**relied on**	**Para 18**
AIR 1996 SC 1249	**relied on**	**Para 21**
AIR 1975 SC 2025	**relied on**	**Para 21**
(1997) 11 SCC 370	**relied on**	**Para 21**
(2000) 7 SCC 517	**relied on**	**Para 21**
AIR 2001 SC 930	**relied on**	**Para 21**
(2002) 10 SCC 330	**relied on**	**Para 21**
AIR 2006 SC 2730	**referred to**	**Para 21**
(2008) 1 SCC 115	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3086 of 2007.

From the Judgment & Order dated 07.09.2005 of the High Court of Uttaranchal at Nainital in Writ Petition No. 4143 of 2001(M/S) (Old No. 9129 of 1996).

WITH

Civil Appeal No. 3088 of 2007

Suraj Singh (for Pradeep Mishra) for the Appellant.

Dr. J.N. Dubey, Anurag Dubey, Meenesh Dubey, Anu Sawhney for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Both these appeals have been preferred against the impugned judgment and order of the High Court of Uttaranchal at Nainital in Writ Petition No. 4143 of 2001 by which the Writ Petition filed by the Respondent-employee of the U.P. State Road Transport Corporation (hereinafter referred to as the 'Corporation') has been allowed directing his re-instatement in service, but without back wages. The Corporation has filed appeal being aggrieved of the order of re-instatement and reversal of the Award of the Labour Court dated 28.4.1995, while Civil Appeal No.3088 of 2007 has been preferred by the employee Shri Suresh Chand Sharma claiming full back wages.

2. Facts and circumstances giving rise to these appeals are that the said employee while working as a Conductor on bus No.UTL-9194 on the route Haridwar-Rishikesh was found, on checking on 24.5.1987, carrying 13 passengers without ticket from whom he has already recovered the fare and on 10.5.1988 on bus No.UGA-9059 on which he was working as a Conductor, 10 passengers were found without ticket. However, the employee had already recovered the fare from them. The Corporation served charge sheets upon the employee on 16.5.1988 and 7.7.1988 in respect of the mis-conducts dated 10.5.1988 and 24.5.1987. Employee submitted his reply to the charge sheets. However, the management not being satisfied with his reply decided to proceed with the regular enquiry and one Shri H.L. Saxena, a retired I.F.S. Officer was appointed as Enquiry Officer. The enquiry was conducted on both the charges giving full opportunity of hearing/defence to the employee. Enquiry Officer submitted the enquiry report wherein charges in respect of both the misconducts had been found proved. The Disciplinary Authority accorded its concurrence thereto. The management served the copy of the enquiry report and issued a second show cause dated 14.12.1988 to the employee to which he submitted his reply on

9.1.1999. The Disciplinary Authority was not satisfied with his reply and after considering the material on record, the Authority passed the punishment order dated 29.1.1989 dismissing the employee from service.

3. Being aggrieved, the Employee preferred a Departmental Appeal which was duly considered by the Appellate Authority and rejected vide order dated 21.3.1990. The Employee raised an industrial dispute and thus, the matter was referred by the Appropriate Government to the Labour Court vide reference dated 19.12.1991 to the following effect:

> *"Whether the termination of the services of the applicant/workman Shri S.C. Sharma s/o Late Shri Om Prakash, conductor by the employer from 29.1.1989 is unjustified and/or illegal? If so, which benefit/ compensation the applicant/workman is entitled and to what extent?*

4. Both the parties appeared before the Labour Court, filed their replies and affidavits. Both parties filed documentary evidence and also led oral evidence and advanced submissions in support of their respective cases. The Labour Court considered all aspects and vide Award dated 28.4.1995 held that enquiry had been held strictly in accordance with law and both the charges in respect of both the incidents were found duly proved. Therefore, the employee was not entitled to any relief whatsoever.

5. Being aggrieved, the employee challenged the Award by filing C.M.W.P. No.9129 of 1996 before the High Court of Judicature at Allahabad which was transferred to the High Court at Nainital after Re-organisation of States and the said transferred case was registered as Writ Petition No. 4143 (M/S) of 2001. The High Court allowed the Writ Petition partly vide impugned judgment and order dated 7.9.2005 and directed the re-instatement of the employee without back wages. Hence, these appeals.

6. We have heard Shri Suraj Singh, learned counsel appearing for the Corporation and Dr. J.N. Dubey, learned senior counsel appearing for the employee. Large number of submissions have been made by the parties and it has been contended on behalf of the Corporation that the High Court has not recorded any reason whatsoever while setting aside the Award of the Labour Court. No fault could be found with the Award of the Labour Court and it was not necessary for the checking authority to record the evidence of the passengers who were found travelling without tickets nor it was necessary to check the cash at the hand of the employee. The High Court mis-directed itself while setting aside the well-reasoned Award of the Labour Court without giving any reason whatsoever. Thus, the appeal of the Corporation deserves to be allowed and Award of the Labour Court deserved to be restored.

7. Per contra, Dr. J.N. Dubey, learned counsel appearing for the employee has submitted that the High Court was justified in accepting the submissions on behalf of the employee that material witnesses were not examined. Thus, no disciplinary proceeding could be initiated against the employee. There was no justification for imposing the punishment of dismissal by the authority and once the Award of the Labour Court is set aside, the employee was entitled to full back wages. Thus, the Corporation's appeal is liable to the dismissed and appeal filed by the employee deserves to be allowed.

8. We have considered the rival submissions made by learned counsel for the parties and perused the record.

9. The Labour Court has considered the matter at length and came to the conclusion that enquiry had been conducted strictly in accordance with law. There has been no violation of the principles of natural justice or any other statutory provision. The employee was given full opportunity to defend himself, cross examined the witnesses examined by the Corporation. The Enquiry Officer has rightly appreciated the evidence and found the charges proved in respect of both the incidents. The

Disciplinary Authority has taken a right decision accepting the enquiry report and punishment order was passed after serving second show cause to the employee. The Labour Court recorded the findings on facts as under:

> "As far as the question of conclusions drawn by the Enquiry officer is concerned, in the enquiry conducted in respect of first charge sheet dated 7.7.1988 Ext.E/2, statement of Shri Atar Singh, Traffic Inspector has been recorded wherein he has proved the report Ext.E/1 of Shri Atar Singh, Traffic Inspector. Shri Atar Singh had checked the vehicle and 13 without ticket passengers have been found travelling *from whom the petitioner-workman had already taken Rs..43/- as fare.* Shri Atar Singh has accordingly made a remark on the way bill and obtained the signatures of petitioner-workman also. The petitioner-workman did not ask any question in cross-examination to this witness. The petitioner workman has also not asked any question in cross- examination with the other witness Shri Kailash Chandra, Traffic Inspector." (Ephasis added)

10. The Labour Court recorded a finding of fact that in respect of both the mis-conducts the passengers were found travelling without tickets and they had already paid fare to the employee/Conductor. Thus, it is not a case where the said employee could not issue the ticket and recover the fare from the travelling passengers, rather the finding has been recorded that after recovering the fare from the passengers, he did not issue tickets to them. Thus, there was an intention to mis-appropriate the fare recovered from the passengers who were found travelling without tickets at both the times.

11. The High Court dealt with the matter in a most cryptic manner. Relevant/main part of the judgment of the High Court reads as under:

> "5…..The Inspector in the cross-examination has also stated on oath that the cash was not checked. The learned

> counsel for the petitioner further submitted that when the bus was checked, ten passengers were boarded on the bus and they were drunk and they were also denying taking the tickets. The learned Tribunal has not considered this fact at all. I find force in the contention of the learned counsel for the petitioner. The learned Tribunal ought to have considered this fact that *neither the passengers were examined,* nor the cash was checked. Therefore, the order of the learned Tribunal cannot be sustained in the eye of law."
>
> (Emphasis added)

12. The High Court has decided the Writ Petition only on the ground that the passengers found without tickets, had not been examined and the cash with the employee was not checked. No other reasoning has been given whatsoever by the Court.

13. In *State of Haryana & Anr. Vs. Rattan Singh* AIR 1977 SC 1512, this Court has categorically held that in a domestic enquiry, complicated principles and procedure laid down in the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 do not apply. The only right of a delinquent employee is that he must be informed as to what are the charges against him and he must be given full opportunity to defend himself on the said charges. However, the Court rejected the contention that enquiry report stood vitiated for not recording the statement of the passengers who were found travelling without ticket. The Court held as under:

> "We cannot hold that merely because statements of passengers were not recorded the order that followed was invalid. Likewise, the re-evaluation of the evidence on the strength of co-conductor's testimony is a matter not for the court but for the administrative tribunal. In conclusion, we do not think courts below were right in over-turning the finding of the domestic tribunal."

14. In view of the above, the reasoning so given by the High Court cannot be sustained in the eye of law. More so, the High Court is under an obligation to give not only the reasons but cogent reasons while reversing the findings of fact recorded by a domestic tribunal. In case the judgment and order of the High Court is found not duly supported by reasons, the judgment itself stands vitiated. (Vide *State of Maharashtra Vs. Vithal Rao Pritirao Chawan,* AIR 1982 SC 1215; *State of U.P. Vs. Battan & Ors.* (2001) 10 SCC 607); *Raj Kishore Jha Vs. State of Bihar & Ors.* AIR 2003 SC 4664; and *State of Orissa Vs. Dhaniram Luhar* AIR 2004 SC 1794.

15. In *State of West Bengal Vs. Atul Krishna Shaw & Anr.* AIR 1990 SC 2205, this Court observed that "giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."

16. In *State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi* AIR 2008 SC 2026, this Court held as under:

> "Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made".

17. In *Raj Kishore Jha* (supra), this Court observed as under:

> "Before we part with the case, we feel it necessary to indicate that non-reasoned conclusions by appellate Courts are not appropriate, more so, when views of the lower Court are differed from. In case of concurrence, the need to again repeat reasons may not be there. It is not so in case of reversal. Reason is the heartbeat of every

> conclusion. Without the same, it becomes lifeless".

18. In fact, "reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusion reached". (vide: *Krishna Swami Vs. Union of India & Ors.* AIR 1993 SC 1407)

19. Therefore, the law on the issue can be summarized to the effect that, while deciding the case, court is under an obligation to record reasons, however, brief, the same may be as it is a requirement of principles of natural justice. Non-observance of the said principle would vitiate the judicial order.

Thus, in view of the above, the judgment and order of the High Court impugned herein is liable to be set aside.

20. We do not find any force in the submissions made by Dr. J.N. Dubey, learned Senior counsel for the employee that for embezzlement of such a petty amount, punishment of dismissal could not be justified for the reason that it is not the amount embezzled by a delinquent employee but the mens rea to mis-appropriate the public money.

21. In *Municipal Committee, Bahadurgarh Vs. Krishnan Bihari & Ors.,* AIR 1996 SC 1249, this Court held as under:–

> "In a case of such nature - indeed, in cases involving corruption - there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant."

Similar view has been reiterated by this Court in *Ruston & Hornsby (I) Ltd. Vs. T.B. Kadam,* AIR 1975 SC 2025; *U.P. State Road Transport Corporation Vs. Basudeo Chaudhary & Anr.,* (1997) 11 SCC 370; *Janatha Bazar (South Kanara*

Central Cooperative Wholesale Stores Ltd.) & Ors. Vs. Secretary, Sahakari Noukarara Sangha & Ors., (2000) 7 SCC 517; *Karnataka State Road Transport Corporation Vs. B.S. Hullikatti,* AIR 2001 SC 930; and *Regional Manager, R.S.R.T.C. Vs. Ghanshyam Sharma,* (2002) 10 SCC 330.

In *Divisional Controller N.E.K.R.T.C. Vs. H. Amaresh,* AIR 2006 SC 2730; and *U.P.S.R.T.C. Vs. Vinod Kumar,* (2008) 1 SCC 115, this Court held that the punishment should always be proportionate to the gravity of the misconduct. However, in a case of corruption/misappropriation, the only punishment is dismissal.

22. Thus, in view of the above, the contention raised on behalf of the employee that punishment of dismissal from service was disproportionate to the proved delinquency of the employee, is not worth acceptance.

Appeal preferred by the Corporation i.e. Civil Appeal No. 3086 of 2007 is allowed. The judgment and order of the High Court dated 7.9.2005 is hereby set aside and the Award of the Labour Court dated 28.4.1995 is restored. The appeal preferred by the employee i.e. Civil Appeal No.3088 of 2007 is hereby dismissed. No order as to costs.

B.B.B. Appeals disposed of.

RAJASTHAN PRADESH V.S. SARDARSHAHAR AND ANR.

v.

UNION OF INDIA AND ORS.

(Civil Appeal No. 5324 of 2007)

JUNE 01, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Education/Educational institution:

Indian Medicine Central Council Act, 1970:

ss.17(3) – Medical education – Degree/Diploma/ Certificate holder of Vaidya Visharad or Ayurved Ratna from Hindi Sahitya Sammelan Prayag/Allahabad – Held: Is not entitled to medical practice – Rajasthan Indian Medicine Act, 1953.

Second Schedule – Entry 105; ss.14, 17 – Cut off date of 1967 in the said Entry, whether arbitrary – Held: The cut off date cannot be termed as arbitrary – The certificates issued by Hindi Sahitya Sammelan Prayag/Allahabad were recognised only upto 1967 – The Society never made an attempt to get recognition after 1967 – In fact, it was not the cut off date fixed by the statutory authorities, rather it indicated that such courses or certificates were not recognised after 1967.

Un-recognised institution – Students of un-recognised institution are not legally entitled to appear in any examination conducted by any government, university or board.

Rajasthan Indian Medicine Act, 1953: s.32 – Restriction to practice unless names entered in Central Register, not violative of equality clause enshrined in Article 14 of the

Constitution – Constitution of India, 1950 – Article 19(6) – Indian Medicine Central Council Act, 1970.

Constitution of India, 1950: Articles 19(1)(g), 19(6), 21 – Right to practice – Held: Is not absolute – Restriction on practice without possessing the requisite qualification prescribed in Schedule II, III and IV of 1970 Act is not violative of Article 14 or ultra vires to any of the provisions of the Act – Mere inclusion of name of a person in the State

Register maintained under the State Act is not enough to make him eligible to practice – Indian Medicine Central Council Act, 1970 – Schedule II, III and IV.

Pleadings: Incomplete pleadings – Held: Court is under no obligation to entertain the pleas.

Words and phrases: Recognition – Meaning of.

The questions which arose for consideration in these appeals were whether the persons holding either the degree or diploma of "Vaidya Visharad" or "Ayurved Ratna" from Hindi Sahitya Sammelan Prayag/Allahabad which were not included as recognized qualification in Schedule II of the Indian Medicine Central Council Act, 1970 have a right to practice in medical sciences; whether the cut off date i.e. 1967 as per Entry No.105 in the Second Schedule of the 1970 Act is arbitrary and liable to be quashed and whether the restriction imposed under the Central Act from practicing, unless the names appear in the Central Register, is violative of Article 14 of the Constitution of India with reference to the State Act.

Disposing of the appeals, the Court

HELD: 1.1. There is nothing on record to show that the persons who have acquired certificates from the Hindu Sahitya Sammelan Prayag/Allahabad, possess any other academic qualification i.e. as to whether they have

passed matriculation or intermediate or they possess any other qualification to make them eligible to apply for such certificate. Study of medical sciences require attendance in the classes and a proper technical training under competent faculty as they play an important role in maintaining the public health. There was nothing to show that the educational institution where they were imparted medical education was affiliated to University/Board and as to whether such schools were ever accorded recognition by the competent Statutory Authorities. A party has to plead the case and adduce sufficient evidence to substantiate his submissions made in the petition. In case the pleadings are not complete, the Court is under no obligation to entertain the pleas. In the absence of any pleadings made by the appellants, it is difficult to say that any of such persons possessed any qualification making them eligible even to apply for such certificates from Hindi Sahitya Sammelan Prayag. [Paras 9-11, 15] [264-D, F-H; 265-A; 266-B]

Bharat Singh & Ors. v. State of Haryana & Ors. **AIR 1988 SC 2181;** *M/s. Larsen & Toubro Ltd. & Ors. v. State of Gujarat & Ors.* **AIR 1998 SC 1608;** *National Building Construction Corporation v. S. Raghunathan & Ors.* **AIR 1998 SC 2779;** *Ram Narain Arora v. Asha Rani & Ors.* **(1999) 1 SCC 141;** *Smt Chitra Kumari etc. v. Union of India & Ors.* **AIR 2001 SC 1237;** *State of U.P. & Ors. v. Chandra Prakash Pandey & Ors.* **AIR 2001 SC 1298;** *M/s. Atul Castings Ltd.v. Bawa Gurvachan Singh* **AIR 2001 SC 1684;** *Vithal N. Shetti & Anr. v. Prakash N. Rudrakar & Ors.* **(2003) 1 SCC 18;** *Devasahayam (Dead) by L.Rs. v. P. Savithramma & Ors.* **(2005) 7 SCC 653;** *Sait Nagjee Purushottam & Co. Ltd. v. Vimalabai Prabhulal & Ors.* **(2005) 8 SCC 252;** *The Principal & Ors. v. The Presiding Officer & Ors.* **AIR 1978 SC 344;** ***Re :*** *The Kerala Education Bill,* ***1957*** **AIR 1958 SC 956;** *T.M.A Pai Foundation & Ors.v. State of Karnataka & Ors.* **(2002) 8 SCC 481, relied on.**

1.2. Students of a un-recognised institution cannot

legally be entitled to appear in any examination conducted by any government, university or board. Similarly, recognition must be there with the school to make it subject to the provisions of the Act. Recognition signifies an admission or an acknowledgement of something existing before. To recognize is to take cognizance of a fact. It implies an overt act on the part of the person taking such cognizance. Any institution which is not recognised cannot impart an education and students thereof cannot appear in the examination held by the government, university or Board. [Paras 18- 20] [267-A-F]

Minor Sunil Oraon Thr. Guardian & Ors. v. C.B.S.E. & Ors. **AIR 2007 SC 458;** *T.V.V. Narasimham & Ors. v. State of Orissa* **AIR 1963 SC 1227;** *State of Tamil Nadu & Ors. v. St. Joseph Teachers Training Institute & Anr.* **(1991) 3 SCC 87, relied on.**

1.3. As per Entry 66 of List I to the 7th Schedule of the Constitution, the Parliament is competent to make laws for determining standards of institution for higher education or research and scientific and technical institutions. Such powers are also available with the Parliament in view of Entries 25 and 26 of List III as it includes the medical education. However, in view of Entry 6 of List II, the State Legislature is competent to make laws pertaining to public health and sanitation, i.e. hospitals and dispensaries. Section 2(1)(h) of the Indian Medicine Central Council Act, 1970 provides "recognised medical qualification" as any of the medical qualifications included in the II, III or IV Schedule to that Act. Section 14 of the 1970 Act provides a procedure for recognition of medical qualifications provided in medical institutions in India and Section 17 provides for entitlement/eligibility of persons possessing qualifications included in II, III and IV Schedule to the Act to be enrolled for practice. [Para 21] [267-F-H; 268-A-B]

2. Section 14(2) of the 1970 Act provides that any University or Board/Medical Institution if wants to impart medical education and has not been included in the Second Schedule, may apply to the Central Government for recognition of its medical qualification and to be included in Second Schedule. If such an application is made, the Central Government is empowered to make necessary amendment as and when required in the Second Schedule, after considering the application. Under the then prevailing rules, certificates issued by the Hindi Sahitya Sammelan Prayag remained recognised only upto 1967. The Authorities under the Statute, on the report submitted by the State of U.P. had taken a decision not to recognise the said courses any further. The Society for the reasons best known to it never made an attempt to get recognition after fulfilling the legal requirements and getting the Entry No.105 in Second Schedule of the Act, 1970, modified. In such a fact-situation, even by stretch of imagination, the said cut-off date cannot be termed as arbitrary. In fact it is not the cut-off date fixed by the Statutory Authorities, rather it indicates that such "courses" or certificates had not been recognised after 1967. [Paras 22 32, 33] [268-D-E; 272-B-D]

Pramod Kumar v. U.P. Secondary Education Services Commission & Ors. **(2008) 7 SCC 153;** *Delhi Pradesh Registered Medical Practitioners v. Delhi Admn. Director of Health Services & Ors.* **AIR 1998 SC 67;** *Dr. Mukhtiar Chand & Ors. v. State of Punjab & Ors.* **AIR 1999 SC 468;** *Vaid Brij Bhushan Sharma v. Board of Ayur & Unani Systems, Med. & Anr.* **SLP(C) No.22124 of 2002 decided by Supreme Court on 2.12.2002;** *Udai Singh Dagar & Ors. v. Union of India & Ors.* **(2007) 10 SCC 306;** *Ayurvedic Enlisted Doctor's Assn. Mumbai v. State of Maharashtra & Anr.* **(2009) 3 SCR 840, relied on.**

UmaKant Tiwari & Ors. v. State of U.P. & Ors. **(2003) 4**

AWC 3016; Dr. *Vijay Kumar Gupta & Ors. v. State of U.P. & Ors.* **(1999) AWC 1783;** *Dr. Vijay Kumar Gupta & Ors. v. State of U.P. & Ors.* **(1999) 2 UPLBEC 1063;** *Virender Lal Vaishya v. Union of India & Ors.* **2003 (2) Mah.LJ 64;** *Charan Singh & Ors. v. State of U.P. & Ors.* **AIR 2004 All. 373, approved.**

3. It is evident that right to practice under Article 19(1)(g) of the Constitution is not absolute. By virtue of the provisions of Clause (6) to Article 19, reasonable restrictions can be imposed. The Court has a duty to strike a balance between the right of a Vaidya to practice, particularly, when he does not possess the requisite qualification and the right of a "little Indian" guaranteed under Article 21 of the Constitution which includes the protection and safeguarding the health and life of a public at large from mal-medical treatment. An unqualified, unregistered and unauthorized medical practitioner possessing no valid qualification, degree or diploma cannot be permitted to exploit the poor Indians on the basis of a certificate granted by an institution without any enrolment of students or imparting any education or having any affiliation or recognition and that too without knowing the basic qualification of the candidates. Hindi Sahitya Sammelan is neither a University/Deemed University nor an Educational Board; it is a Society registered under the Societies Registration Act. It is not an educational institution imparting education in any subject inasmuch as the Ayurveda or any other branch of medical science. It merely conducts the test. The Society never submitted any application after 1967 before the Statutory Authority to accord recognition and modify the Entry No.105 to Part I of Schedule II to the Act 1970. Submissions to the effect that the Rajasthan Indian Medicine Act, 1953 conferred privileges upon the Vaidyas in exceptional circumstances to practice and any restriction to practice unless the names are entered in the Central Register is arbitrary and violative of

statutory provisions of the State Act, are preposterous for the reason that such privileges, if are repugnant to the provisions of Act 1970, cannot be availed by operation of the provisions contained in Article 254 of the Constitution. Thus, such a restriction cannot be held violative of equality clause enshrined in Article 14 of the Constitution. After commencement of Act, 1970, a person not possessing the qualification prescribed in Schedule II, III & IV to the Act, 1970 is not entitled to practice. Restriction on practice without possessing the requisite qualification prescribed in Schedule II, III & IV to the Act, 1970 is not violative of Article 14 or ultra vires to any of the provisions of the State Act. Mere inclusion of name of a person in the State Register maintained under the State Act is not enough making him eligible to practice. [Paras 42, 43] [277-C-E; 278-D-H; 279-A-D]

4. The observation made by the High Court to the extent that persons who possessed the certificate upto 1.10.1976 i.e. the date on which the provisions of Section 17 had been enforced in the State of Rajasthan is liable to be set aside. [Paras 44] [279-E-F]

Case Law Reference:

AIR 1988 SC 2181	**relied on**	**Para 11**
AIR 1998 SC 1608	**relied on**	**Para 12**
AIR 1998 SC 2779	**relied on**	**Para 12**
(1999) 1 SCC 141	**relied on**	**Para 12**
AIR 2001 SC 1237	**relied on**	**Para 12**
AIR 2001 SC 1298	**relied on**	**Para 12**
AIR 2001 SC 1684	**relied on**	**Para 13**
(2003) 1 SCC 18	**relied on**	**Para 14**

(2005) 7 SCC 653	**relied on**	**Para 14**
(2005) 8 SCC 252	**relied on**	**Para 14**
AIR 1978 SC 344	**relied on**	**Para 16**
AIR 1958 SC 956	**relied on**	**Para 17**
(2002) 8 SCC 481	**relied on**	**Para 17**
AIR 2007 SC 458	**relied on**	**Para 18**
AIR 1963 SC 1227	**relied on**	**Para 19**
(1991) 3 SCC 87	**relied on**	**Para 20**
(2003) 4 AWC 3016	**approved**	**Paras 23, 28, 34**
(1999) AWC 1783	**approved**	**Para 24**
(1999) 2 UPLBEC 1063	**approved**	**Para 25**
2003 (2) Mah.LJ 64	**approved**	**Para 26**
AIR 2004 All. 373	**approved**	**Para 27**
(2008) 7 SCC 153	**relied on**	**Para 35**
AIR 1998 SC 67	**relied on**	**Para 36**
AIR 1999 SC 468	**relied on**	**Para 37**
(2007) 10 SCC 306	**relied on**	**Para 39**
(2009) 3 SCR 840	**relied on**	**Paras 31,40,44**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5324 of 2007.

From the Judgment & Order dated 06.01.2005 of the High Court of Judicature for Rajasthan at Jodhpur in DB Civil Writ Petition No. 733 of 2000.

WITH

C.A. Nos. 5325 of 2007 & 4757, 4758 4759 of 2010.

S.K. Dholakia, Manjit Singh, AAG, B.D. Sharma, Narottam Vyas, Ghanshyam Singh, Deep Shika Bharti, Anish Kumar Gupta, Balbir Singh Gupta, Mohd. Azam Siddiqui, Kunwar C.M. Khan, Irshad Ahmad, Ramesh Kumar Koli, Rakesh Uttamchandra Upadhyay, T.K. Joseph, Abhijeet Kakoti, Milind Kumar, Aruneshwar Gupta (NP), Shrish Kumar Misra (NP), S.K. Verma (NP), Yash Pal Rangi, Kamal Mohan Gupta, Naresh Bakshi (NP) for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted in SLP (C) Nos. 21043/2008, 20912/2009 and 3986/2010.

In all the aforesaid Civil Appeals, common questions of law are involved and, therefore, they are heard together. Questions involved in all these cases are as under:

(i) As to whether persons who hold either the degree or diploma of "Vaidya Visharad" or "Ayurved Ratna" from Hindi Sahitya Sammelan Prayag/Allahabad which are not included as recognized qualification in Schedule II of the Indian Medicine Central Council Act, 1970 (hereinafter called as the 'Act 1970') have a right to practice in medical sciences.

(ii) As to whether cut off date i.e. 1967 as per Entry No.105 in the Second Schedule of the Act,1970 is arbitrary and thus, liable to be quashed.

(iii) As to whether restriction imposed under the Central Act from practicing, unless names appear in the Central Register, is violative of Article 14 of the Constitution of India with reference to the State Act.

2. Facts and circumstances giving rise to Civil Appeal Nos.5324-5325 of 2007 and appeal arising out of SLP(C)

No.21043/2008 are that Section 32 of the Rajasthan Indian Medicine Act, 1953 (hereinafter referred to as 'Act 1953') provided that persons who had obtained degree of "Vaidya Visharad" or "Ayurved Ratna" from Hindi Sahitya Sammelan Prayag were recognized as having sufficient qualification for practicing as Vaidyas in Rajasthan and they were permitted to get themselves registered as Vaidyas in the register maintained under the said Act 1953. Section 17(2) of the Act 1970 provided that persons who possessed the qualifications as laid down in Second, Third and Fourth Schedule of the Act 1970 would be permitted to practice. Section 17(3) however, carved out an exception for those Vaidyas who had been practicing prior to the commencement of the Act 1970. Different provisions of the Act 1970 were enforced throughout the country but on different dates. In Rajasthan, Section 17 came to be enforced w.e.f. 1.10.1976. One Ved Prakash Tyagi filed Writ Petition No.733 of 2000 before the High Court of Rajasthan for seeking large number of reliefs including the restrain order to those who obtained the degree/certificate of "Vaidya Visharad" or "Ayurved Ratna" from Hindi Sahitya Sammelan Prayag after 1967 to practice as Vaidyas and further to delete their names from the register so maintained under the Act 1953. The High Court considered the matter elaborately and came to the following conclusions:

(1) Persons who did not possess requisite qualification prescribed under Schedule II, III and IV of the Act 1970 were not eligible to contest the elections notwithstanding they were enrolled in the State Register and were covered by the exception clause under Section 17(3)(b) and were permitted to practice medicines;

(2) Qualification prescribed under the Act 1953 to the extent it was repugnant to the Act 1970, would not confer any person a right to practice or seeking enrolment in the State Register;

(3) Section 17 of the Act 1970 came into force in Rajasthan w.e.f. 1.10.1976. Thus, a person who has acquired the diploma/certificate from Hindi Sahitya Sammelan Prayag, subsequent thereto would not be eligible to be enrolled in State Register; and

(4) Any person who acquired such certificate/diploma after 1.10.1976 would not have any right to practice or participate in election.

3. Hence, Civil Appeal Nos. 5324-25 of 2007 have been filed by Vaidya's Samiti and Chikitasak Sangh being aggrieved by the judgment and order of the High Court that persons who acquired qualification from Hindi Sahitya Sammelan after 1.10.1976 were not eligible and entitled to practice. Appeal arising out of SLP (C) No.21043 of 2008 has been filed by the Central Council of Indian Medicine (hereinafter referred to as 'CCIM') challenging the order of the High Court to the extent that persons who acquired certificates between 1967 and 1.10.1976 have also been permitted to practice.

4. Appeal arising out of SLP(C) No. 3986 of 2010 has been filed by the Haryana Vaidya Samiti against the judgment and order dated 13.10.2009 passed by the Punjab and Haryana High Court in C.W.P. No. 14392 of 2009 holding that persons who acquired certificates/diplomas from Hindi Sahitya Sammelan Prayag after 1967 are not entitled to practice and it had upheld the validity of Entry No.105 in the 4th Column regarding the expression "upto 1967" in the Second Schedule of the Act, 1970.

5. Appeal arising out of SLP(C) No. 20912 of 2009 has been preferred by Delhi Pradesh Registered Medical Practitioners Association being aggrieved by the judgment and order of Delhi High Court dated 19.11.2009 passed in C.W.P. No. 1999 of 1998 wherein it has been held that unless a person possessed qualification as required in Schedule II, III and IV to

the Act 1970, he is not entitled to practice.

6. In all these cases, learned counsel appearing for the appellants namely, Shri S.K.Dholakia, Sr. Advocate and Shri B.D. Sharma have submitted that such a restriction imposed on appellants infringes their right to practice under Article 19(1)(g) of the Constitution of India, 1950. More so, once their names stood enrolled in the State Register, they were entitled to practice. More so, they are entitled to continue to practice, as an exception has been carved out under Section 17(3) of the Act, 1970. Restriction imposed under the Act 1970 from practicing unless the names appear in the Central Register is violative of Art.14 of the Constitution with reference to the statutory provisions of the Act 1953. There is no rational for fixing the cut- off date as 1967 in Entry No.105 of the Second Schedule to the Act, 1970 and thus liable to be quashed. Hence, the appeals deserve to be allowed.

7. Per contra, Shri R.U. Upadhyay, learned counsel appearing for CCIM submitted that a person who does not possess the qualifications as mentioned in Schedule II, III and IV of the Act, 1970 is not eligible and entitled to indulge in any kind of medical practice. The Legislature has power to put reasonable restrictions on the right to practice under Article 19(1)(g) of the Constitution by virtue of Clause (6) of the said provision. Provisions contained in the Act 1953, being repugnant to the statutory provisions of Act 1970, will not apply by virtue of Art.254 of the Constitution. Cut-off date i.e. 1967 appearing in Entry No.105 of the Second Schedule to the 1970 Act shows that certificates issued by the said Society were not recognized after 1967. More so, Article 21 which deals with the life and liberty of persons has also to be kept in mind and the poor people of this country who cannot afford to avail the facilities of qualified doctors have to be protected from quacks. Hindi Sahitya Sammelan Prayag had not been recognised for imparting medical education after 1967. Hindi Sahitya Sammelan is not a medical institution or university or a board.

It is merely a society registered under the Registration of Societies Act. It does not have any affiliated colleges. Therefore, such persons cannot be permitted to indulge in medical practice. Rajasthan High Court erred observing that persons, who possessed the qualifications from Hindi Sahitya Sammelan Prayag upto 1.10.1976 i.e. the date of enforcement of Section 17 of the Act 1970 in Rajasthan, be allowed to practice.

8. We have considered the rival submissions made by learned counsel for the parties and perused the record.

9. Admittedly, in none of these cases, the Hindi Sahitya Sammelan Prayag/Allahabad has been impleaded as party. There is nothing on record to show that the persons who have acquired such certificates from the said societies possess any other academic qualification i.e. as to whether they have passed matriculation or intermediate or they possess any other qualification to make them eligible to apply for such certificate.

10. There is no document on record disclosing as what was the institution/school where such persons had got admission, imparted education, attended the classes and practicals in laboratories and what was its duration. A bald statement in all these cases that persons possess certificates from Hindi Sahitya Sammelan has been made. Study of medical sciences require attendance in the classes and a proper technical training under competent faculty as they play an important role in maintaining the public health. None of the learned counsel appearing for the appellants is able to point out as to which University/Board, the educational institution where they were imparted medical education had been affiliated and as to whether such schools had ever been accorded recognition by the competent Statutory Authorities.

11. It is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the petition and in case

the pleadings are not complete, the Court is under no obligation to entertain the pleas. In *Bharat Singh & Ors. Vs. State of Haryana & Ors.,* AIR 1988 SC 2181, this Court has observed as under:-

> "In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

12. Similar view has been reiterated in *M/s. Larsen & Toubro Ltd. & Ors. Vs. State of Gujarat & Ors.,* AIR 1998 SC 1608; *National Building Construction Corporation Vs. S. Raghunathan & Ors.,* AIR 1998 SC 2779; *Ram Narain Arora Vs. Asha Rani & Ors.,* (1999) 1 SCC 141; *Smt Chitra Kumari etc. Vs. Union of India & Ors.,* AIR 2001 SC 1237; and *State of U.P. & Ors. Vs. Chandra Prakash Pandey & Ors.,* AIR 2001 SC 1298.

13. In *M/s. Atul Castings Ltd. Vs. Bawa Gurvachan Singh,* AIR 2001 SC 1684, this Court observed as under:-

> "The findings in the absence of necessary pleadings and supporting evidence cannot be sustained in law."

14. Similar view has been reiterated in *Vithal N. Shetti &*

Anr. Vs. Prakash N. Rudrakar & Ors., (2003) 1 SCC 18; *Devasahayam (Dead) by L.Rs. Vs. P. Savithramma & Ors.,* (2005) 7 SCC 653; and *Sait Nagjee Purushottam & Co. Ltd. Vs. Vimalabai Prabhulal & Ors.,* (2005) 8 SCC 252.

15. In absence of any pleadings made by the appellants, it is difficult to say that any of such persons possessed any qualification making them eligible even to apply for such certificates from Hindi Sahitya Sammelan Prayag.

16. In *The Principal & Ors. Vs. The Presiding Officer & Ors.* AIR 1978 SC 344, this Court held that 'recognition' means that the school has been recognized or acknowledged by the appropriate authority under the Statute and 'affiliation' means that the students of that school are eligible to appear in the examination. Therefore, purpose of affiliation is only to prepare and present the students for public examination, recognition of a private school is for the other purposes mentioned under the Statute and unless the school is recognized by the appropriate authority, the school cannot be amenable to any other provision of the Statute applicable in this regard.

17. In *Re : The Kerala Education Bill,* 1957 AIR 1958 SC 956; and *T.M.A Pai Foundation & Ors. Vs. State of Karnataka & Ors.* (2002) 8 SCC 481, this Court held that it is always open to the State or the Statutory Authority to lay down conditions for recognition of an educational institution namely, that the institution must have particular amount of funds or properties or number of students or standard of education and so on and so forth and it is also permissible for the Legislature to make a law prescribing conditions for such recognition, however, such a law should be constitutional and should not infringe any Fundamental Right of the minorities etc. Recognition is a Governmental function.

18. This Court has persistently deprecated the practice of an educational institution admitting the students and to allow them to appear in the examinations without having requisite

recognition and affiliation. This kind of infraction of law has been treated as of very high magnitude and of serious nature. Students of a un-recognised institution cannot legally be entitled to appear in any examination conducted by any government, university or board. (Vide *Minor Sunil Oraon Thr. Guardian & Ors. Vs. C.B.S.E. & Ors.* AIR 2007 SC 458).

19. Similarly, recognition must be there with the school to make it subject to the provisions of the Act. Recognition signifies an admission or an acknowledgement of something existing before. To recognize is to take cognizance of a fact. It implies an overt act on the part of the person taking such cognizance. (Vide *T.V.V. Narasimham & Ors. Vs. State of Orissa,* AIR 1963 SC 1227).

20. In *State of Tamil Nadu & Ors. Vs. St. Joseph Teachers Training Institute & Anr.* (1991) 3 SCC 87, this Court held that students of un-recognised institutions are not entitled to appear in any public examination held by the Government and it is not permissible for the Court to grant relief on humanitarian grounds contrary to law to the person who claim to have passed any examination from such institutions.

In view of the above, it is evident that any institution which is not recognised cannot impart an education and students thereof cannot appear in the examination held by the government, university or Board.

21. As per Entry 66 of List I to the 7th Schedule of the Constitution, the Parliament is competent to make laws for determining standards of institution for higher education or research and scientific and technical institutions. Such powers are also available with the Parliament in view of Entries 25 and 26 of List III as it includes the medical education. However, in view of Entry 6 of List II, the State Legislature is competent to make laws pertaining to public health and sanitation, i.e. hospitals and dispensaries. Section 2(1)(h) of the Act 1970 provides "recognised medical qualification" as any of the

medical qualifications included in the II, III or IV Schedule to that Act. Section 14 of the Act 1970 provides a procedure for recognition of medical qualifications provided in medical institutions in India and Section 17 provides for entitlement/ eligibility of persons possessing qualifications included in II, III and IV Schedule to the Act to be enrolled for practice. So far as the II Schedule to the Act 1970 is concerned, the relevant entries read as under:-

105	Hindi Sahitya Sammelan, Prayag	Vaidya Visharad	…….	From 1931 to 1967
		Ayurved-Ratana	……..	From 1931 to 1967

22. Section 14(2) of the Act 1970 provides that any University or Board/Medical Institution if wants to impart medical education and has not been included in the Second Schedule, may apply to the Central Government for recognition of its medical qualification and to be included in Second Schedule. If such an application is made, the Central Government is empowered to make necessary amendment as and when required in the Second Schedule, after considering the application.

23. In *UmaKant Tiwari & Ors. Vs. State of U.P. & Ors.* (2003) 4 AWC 3016, a Division Bench of the Allahabad High Court has considered the issue at length and came to the conclusion that the Hindi Sahitya Sammelan Allahabad/Prayag were only registered societies and not educational institutions. The said societies had no business to impart education in medical sciences. Hindi Sahitya Sammelan, Allahabad was a fake institution whereas Hindi Sahitya Sammelan, Prayag was recognised only from 1931 to 1967.

24. In *Dr. Vijay Kumar Gupta & Ors. Vs. State of U.P. & Ors.* (1999) AWC 1783, a Division Bench of the Allahabad High Court has held that a degree/certificate/diploma from Hindi

Sahitya Sammelan, Prayag acquired after 1967 was not recognised and those who obtained the same subsequent to 1967 were not entitled to practice medicines.

25. *In Dr. Vijay Kumar Gupta & Ors. Vs. State of U.P. & Ors.* (1999) 2 UPLBEC 1063, a Division Bench of the Allahabad High Court considered the matter at length alongwith statutory provisions of the Act, 1970 and came to the conclusion that Hindi Sahitya Sammelan, Allahabad had never been empowered to issue such certificates/degrees. However, certificates issued by the Hindi Sahitya Sammelan, Prayag were recognised during the period of 1931 to 1967. Thus, any such certificate subsequent thereto could not entitle a person to practice medicine.

26. *In Virender Lal Vaishya Vs. Union of India & Ors*. 2003 (2) Mah.LJ 64, a Division Bench of the Bombay High Court held that Hindi Sahitya Sammelan, Prayag was not a recognised university/Board and thus could not award degree, diploma or certificate.

27. In *Charan Singh & Ors. Vs. State of U.P. & Ors.* AIR 2004 All. 373, the Allahabad High Court considered the issue of validity of certificates issued by Hindi Sahitya Sammelan, Prayag and came to the conclusion that the said institution had absolutely no authority to confer any degree or diploma of "Vaidya Visharad" and "Ayurved-Ratna" after 1967 and any person who has acquired such certificate after 1967 was not entitled to practice at all.

28. The judgment of the Allahabad High Court in *Umakant Tiwari* (supra) was set aside by this Court and the matter was remanded to the High Court to decide afresh in Civil Appeal No.1453/2004 vide judgment and order dated 25th May, 2007, for the reason that matter had initially been decided by the High Court in 2003 without giving opportunity of hearing to Hindi Sahitya Sammelan Allahabad/Prayag.

29. After remand, Hindi Sahitya Sammelan Allahabad/ Prayag were given notices and were directed to file the counter affidavits. The Court, after hearing all the parties concerned, including Hindi Sahitya Sammelan Prayag, vide judgment and order dated 23.10.2009, dismissed the writ petition.

30. So far as the question of validity of the cut-off date "1967 in Entry No.105" to Schedule II is concerned, the High Court observed as under:

> "From a bare reading of the aforesaid provisions of Act, 1970, it will be seen that only degrees/certificates granted by the Hindi Sahitya Sammelan, Prayag between 1931 to 1967 alone have been held to be recognised medical qualification for the purposes of Section 14 conferring a right to practice upon the holder of the degree under Act, 1970.
>
> With regard to challenge to the words "upto 1967", the only ground raised for contending that the cut off date is arbitrary and violative of Article 14 of the Constitution of India, is that no reasons have been disclosed. In support thereof, it is stated that the course/curriculum which was there prior to 1967 continues even thereafter for the purposes of examinations held by the Hindi Sahitya Sammelan and, no change has been introduced in the course after 1967.
>
> From the counter affidavit filed on behalf of Central Council of Indian Medicine, it is apparently clear that the words "upto 1967" have been provided in the Second Schedule of Act, 1970 with reference to the information supplied by the State Government. Such prescription of 1967 in these circumstances, cannot be termed to be arbitrary, more so when in the facts of the case a power was conferred upon the institution, namely, Hindi Sahitya Sammelan, Prayag to make an application under Section 14(2) of Act, 1970 for amendment in the Schedule and for

the degrees granted subsequent to 1967 also being included therein. The Hindi Sahitya Sammelan has deliberately avoided to make such an application. Because of such inaction, it has further avoided the directions referable to Sections 18 to 22 of Act, 1970 which would have been otherwise become applicable. This Court may record that it does not lie in the mouth of Hindi Sahitya Sammelan to challenge the cut off date mentioned in the Schedule as arbitrary, inasmuch as the said provisions itself provided an opportunity to get the Schedule amended by inclusion the degrees/certificates offered by the institution, i.e. Hindi Sahitya Sammelan, Prayag subsequent to 1967.

The reasons disclosed by the State-respondent for fixation of year 1967 as the cut off year, for recognising the degrees, i.e. *supply of information by the State Government has also not been disputed by Hindi Sahitya Sammelan nor any facts for questioning the aforesaid disclosure made by the State Government has been brought on record* of the present writ petition." (Emphasis added)

31. A Division Bench of the Bombay High Court while considering the writ Petition No. 7648 of 2000 (*Ayurvedic Enlisted Doctor's Association, Bombay Vs. The State of Maharashtra & Anr.*) on the cut-off date, i.e. upto 1967 vide judgment and order dated 22.12.2006, recorded the following finding:

"It is pointed out on behalf of the State that under the prevailing relevant rules upto 1967, the degrees of Vaidya Visharad and Ayurved Ratna were recognised by Uttar Pradesh Government and its Council. After that it *lost the recognition.* Therefore, these degrees conferred by Hindi Sahitya Sammelan, Prayag till 1967 only were recognised as medical qualifications under the Central Act but after that the recognition to these degrees was refused."

(Emphasis added)

32. Thus, from the above, it is evident that under the then prevailing rules, certificates issued by the Hindi Sahitya Sammelan Prayag remained recognised only upto 1967. The Authorities under the Statute, on the report submitted by the State of U.P. had taken a decision not to recognise the said courses any further. The Society for the reasons best known to it never made an attempt to get recognition after fulfilling the legal requirements and getting the Entry No.105 in Second Schedule of the Act, 1970, modified.

33. In such a fact-situation, even by stretch of imagination, the said cut-off date cannot be termed as arbitrary. In fact it is not the cut-off date fixed by the Statutory Authorities, rather it indicates that such "courses" or certificates had not been recognised after 1967.

34. After remand, in *Umakant Tiwari* (supra) the Allahabad High Court has recorded the following findings of fact:-

"Shri Jeevan Prakash Sharma, learned counsel for Hindi Sahitya Sammelan has fairly stated that Hindi Sahitya Sammelan does not grant affiliation to any institution for imparting education in medical courses. Hindi Sahitya Sammelan in fact only conducts written examination for the purposes of awarding the said degrees. Any person, who is successful in the written examination so held by the Hindi Sahitya Sammelan is awarded the degree, irrespective of the fact as to whether he was enrolled as a regular student in any institution or not.

No application was ever made by the Hindi Sahitya Sammelan, Allahabad/Prayag to get its medical qualifications i.e. Vaidya Visharad and Ayurved Ratna recognized and included in the Second Schedule. They have not represented in exercise of powers under Section 14(2) of Act, 1970 before the Central Government for

inclusion of the said qualifications in the Second Schedule at any point of time in respect of degrees/certificates granted subsequent to 1967. This has led a very peculiar situation. By not getting their medical qualifications approved/recognised under Second Schedule of Act, 1970, the Hindi Sahitya Sammelan has successfully evaded any inspection/any direction of the Central Council of India qua medical qualification granted by it for years together and therefore on one hand not only it did not represent the Government for inclusion of medical qualification even after publication of schedule as early as in the year 1971 till date i.e. nearly 38 years, it has also successfully evaded inspection by the Government/Central Council, for issuance of directions for maintenance of standard of education, curriculum etc. At the same time it alleges that its qualification be treated to be valid by the Central Council of Indian Medicine for the purpose of permitting practice of medicine. Despite being aware of the total prohibition qua grant of medical qualification as per the Act of Parliament namely, Act No.48 of 1970 and despite there being a provision to get its medical qualifications recognized and included in the Second Schedule, no effort has been made by the Hindi Sahitya Sammelan for the purpose….

Hindi Sahitya Sammelan has fairly stated that it does not affiliate or recognise any institution and it exercises absolutely no control on the teaching in the subject of medicine qua degrees of Vaidya Visharad and Ayurved Ratana, nor it is necessary for a candidate to appear in the examination conducted by the Hindi Sahitya Sammelan to have been admitted as a regular student in any institution imparting education in the field of medicine. The Hindi Sahitya Sammelan holds written examination only for awarding the degree. In the opinion of the Court such grant of degree without any practical teaching, cannot be approved of and it is for this reason that the Central

Government has come out with Central Act laying down the norms in detail for education being imparted in the field of medicine."

35. In *Pramod Kumar Vs. U.P. Secondary Education Services Commission & Ors.* (2008) 7 SCC 153, this Court held that recognised degree can only be awarded by University constituted/established under the provisions of University Grants Commission Act or Rule or any State Act or Parliament Act. No University can be established by a private management without any statutory backing. Similar reasons apply to Hindi Sahitya Sammelan also, as it is only a society duly registered under the Societies Registration Act. The competence to grant medical degree under any provisions of law is therefore, wanting.

36. In *Delhi Pradesh Registered Medical Practitioners Vs. Delhi Admn. Director of Health Services & Ors.,* AIR 1998 SC 67, this Court held that unless a person possess the qualifications prescribed in Schedule II, III and IV of the Act, 1970, does not have a right to practice and the Central Legislation will proceed over State Act if there is any repugnancy between the two.

37. In *Dr. Mukhtiar Chand & Ors. Vs. State of Punjab & Ors.* AIR 1999 SC 468, this Court examined the issue of delegation of power dealing with the provisions of the Drugs and Cosmetics Act, 1940 wherein various observations have been made regarding registered medical practitioners and certain rules therein had been declared ultra vires by the High Court. However, the issue involved herein had not been raised in that case, though an observation has been made that persons enrolled on the State register under accepted law who enjoyed the privileges including the privilege to practice in any system of medicine may under certain circumstances also practice other system of medicine. In the said case, the issue was confined to the rights of those persons who were otherwise entitled to prescribe all medicines under the Drugs and

Cosmetics Act, 1940 and the issue involved herein i.e. as to whether a person having no qualification as prescribed under the provisions of Act 1970 can be held to be qualified and entitled to practice Indian medicines, was not involved in *Dr. Mukhtiar Chand* (supra).

38. This Court in SLP (C) No. 22124 of 2002, *Vaid Brij Bhushan Sharma Vs. Board of Ayur & Unani Systems, Med. & Anr.* decided on 2.12.2002 also re-iterated the view that issue involved in *Dr. Mukhtiar Chand* (supra) was quite different and persons possessing such certificates were not entitled to practice. The Court held as under:-

"We are of the considered view that the judgment of the three Judge Bench reported in Dr. Mukhtiar Chand and Others case (supra) is totally different on principles as also the basis of claim therein, from the one relevant and necessary so far as the case on hand is concerned. The right of the petitioner therein to continue to practice as registered medical practitioner was not claimed on the basis of a degree of Vaid Visharad and Ayurved Rattan awarded by Hindi Sahitya Sammelan, Prayag as in this case, before us. The efficacy of this very degree to entitle the holders thereof to continue to practice as medical practitioner by virtue of the saving clause and protection under Section 17(3) of the Indian Medicine Central Council Act, 1970, had come up for decision in the earlier case and with particular reference to the provisions of Section 14 of the Indian Medical Central Council Act, 1970, read with the provisions contained in the schedule thereto it has been held that only such of those degrees issued between 1931 and 1967 were alone recognized for the purposes and not the one obtained by the petitioner in the year 1974, long after the coming into force of Section 14 on 15.8.1971 in the whole of the country. In the light of the above principles which directly applied to the case of the petitioner we find no merit in this petition and the same is dismissed."

39. In *Udai Singh Dagar & Ors. Vs. Union of India & Ors.*

(2007) 10 SCC 306 while dealing with a similar issue, this Court has held as under:-

"We, therefore, are of the opinion that even in the matter of laying down of qualification by a statute, the restriction imposed as envisaged under second part of Clause (6) of Article 19 of the Constitution of India must be construed being in consonance with the interest of the general public. The tests laid down, in our opinion, stand satisfied. We may, however, notice that Clause (6) of Article 19 of the Constitution of India stands on a higher footing vis-à-vis Clause (5) thereof. (vide State of Madras v. V.G. Row AIR 1952 SC 196)."

40. In Civil Appeal No. 1337 of 2007, *Ayurvedic Enlisted Doctor's Assn. Mumbai Vs. State of Maharashtra & Anr.* decided on 27.2.2009, this Court considered the issue involved herein at length and came to the conclusion as under:-

"So far as the claim that once the name is included in the register of a particular State is a right to practice in any part of the country is not tenable on the face of Section 29 of the Central Act. The right to practice is restricted in the sense that only if the name finds place in the Central Register then the question of practicing in any part of the country arises. The conditions under Section 23 of the Central Act are cumulative. Since the appellants undisputedly do not possess recognized medical qualifications as defined in Section 2(1)(h) their names cannot be included in the Central Register. As a consequence, they cannot practice in any part of India in terms of Section 29 because of non-inclusion of their names in the Central Register. Section 17(3A) of the Maharashtra Act refers to Section 23 of the Central Act relating to Central Register. Section 17(1) relates to the register for the State. In any event, it is for the State to see that there is need for having qualification in terms of Second and fourth Schedule. The claim of the appellants

is that they have a right to practice in any part of the country. In terms of Article 19(6) of the Constitution, reasonable restriction can always be put on the exercise of right under Article 19(g)."

41. This Court further came to the conclusion that unless the person possesses the qualification as prescribed in Schedule II , III and IV of the Act, 1970, he cannot claim any right to practice in medical science and mere registration in any State register is of no consequence.

42. In view of the above, it is evident that right to practice under Article 19(1)(g) of the Constitution is not absolute. By virtue of the provisions of Clause (6) to Article 19 reasonable restrictions can be imposed. The Court has a duty to strike a balance between the right of a Vaidya to practice, particularly, when he does not possess the requisite qualification and the right of a "little Indian" guaranteed under Article 21 of the Constitution which includes the protection and safeguarding the health and life of a public at large from mal-medical treatment. An unqualified, unregistered and unauthorized medical practitioner possessing no valid qualification, degree or diploma cannot be permitted to exploit the poor Indians on the basis of a certificate granted by an institution without any enrolment of students or imparting any education or having any affiliation or recognition and that too without knowing the basic qualification of the candidates.

Question of entertaining the issue of validity of Entry No.105 to the Second Schedule to the Act 1970 i.e. "to 1967" does not arise as it is not a cut-off date fixed by the Statutory Authority rather a date, after which the qualification in question was not recognised. Hindi Sahitya Sammelan itself admitted that the Society was not imparting any education. It had no affiliated colleges. It merely conducts the test. The Society never submitted any application after 1967 before the Statutory Authority to accord recognition and modify the Entry No.105 to Part I of Schedule II to the Act 1970.

Submissions to the effect that 1953 Act conferred privileges upon the Vaidyas in exceptional circumstances to practice and any restriction to practice unless the names are entered in the Central Register is arbitrary and violative of statutory provisions of the State Act, are preposterous for the reason that such privileges, if are repugnant to the provisions of Act 1970, cannot be availed by operation of the provisions contained in Article 254 of the Constitution. Thus, such a restriction cannot be held violative of equality clause enshrined in Article 14 of the Constitution.

43. At the cost of repetition, it may be pertinent to mention here that in view of the above, we have reached to the following inescapable conclusions :-

(I) Hindi Sahitya Sammelan is neither a University/ Deemed University nor an Educational Board.

(II) It is a Society registered under the Societies Registration Act.

(III) It is not an educational institution imparting education in any subject inasmuch as the Ayurveda or any other branch of medical field.

(IV) No school/college imparting education in any subject is affiliated to it. Nor Hindi Sahitya Sammelan is affiliated to any University/Board.

(V) Hindi Sahitya Sammelan has got no recognition from the Statutory Authority after 1967. No attempt had ever been made by the Society to get recognition as required under Section 14 of the Act, 1970 and further did not seek modification of entry No. 105 in II Schedule to the Act, 1970.

(VI) Hindi Sahitya Sammelan only conducts examinations without verifying as to whether the candidate has some elementary/basic education or has attended classes in Ayurveda in any

recognized college.

(VII) After commencement of Act, 1970, a person not possessing the qualification prescribed in Schedule II, III & IV to the Act, 1970 is not entitled to practice.

(VIII) Mere inclusion of name of a person in the State Register maintained under the State Act is not enough making him eligible to practice.

(IX) The right to practice under Article 19(1)(g) of the Constitution is not absolute and thus subject to reasonable restrictions as provided under Article 19(6) of the Constitution.

(X) Restriction on practice without possessing the requisite qualification prescribed in Schedule II, III & IV to the Act, 1970 is not violative of Article 14 or ultra vires to any of the provisions of the State Act.

44. The instant cases have to be determined strictly in consonance with the law laid down by this Court referred to hereinabove and, particularly, in *Ayurvedic Enlisted Doctor's Assn.* (supra). The observation made by the Rajasthan High Court to the extent that persons who possessed the certificate upto 1.10.1976 i.e. the date on which the provisions of Section 17 had been enforced in the State of Rajasthan is not in consonance with the law laid down by this Court in the above referred cases. Therefore, that observation is liable to be set aside.

45. In view of the above, Civil Appeal arising out of SLP (C) No. 21043 of 2008 is allowed and it is held that a person who acquired the certificate, degree or diploma from Hindi Sahitya Sammelan Prayag after 1967 is not eligible to indulge in any kind of a medical practice. All other Civil Appeals are dismissed. No costs.

D.G. Appeals disposed of.

THE DISTRICT COLLECTOR, SRIKAKULAM & ORS.

v.

BAGATHI KRISHNA RAO & ANR.

(Civil Appeal No.2754 of 2007)

JUNE 2, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Code of civil procedure, 1908:

s.100 r/w s.79, O.27 r.1, O.1, r.9, proviso and Article 300 of Constitution of India – Second appeal filed by District Collector and District Forest Officer – State not impleaded as a party – HELD: State of Andhra Pradesh was a party before the trial court as well as before the first appellate court – The relief sought by the plaintiff was declaration of title of suit land which according to appellants was in favour of State of Andhra Pradesh and the suit land in physical possession of Forest Department – Thus, keeping in view the provisions of s.79, r.1 of O.27, proviso to r.9 of O.1 of the Code and Article 300 of the Constitution, prima facie the State was a necessary party – Second appeal filed by the officials was not maintainable – High Court decided the second appeal without considering this important aspect of the matter – Judgment of High Court set aside – Case remanded to High Court to decide the second appeal afresh – Appellants permitted to file an application for impleadment of State of Andhra Pradesh as appellant, which would be considered by High Court in accordance with law – Constitution of India, 1950 – Article 300 – Party.

The State of Punjab Vs. The Okara Grain Buyers Syndicate Ltd., Okara & Anr. **(1964) SCR 387 =AIR 1964 SC 669;** *Ranjeet Mal Vs. General Manager, Northern Railway, New Delhi & Anr.,* **(1977) 2 SCR 409 =AIR 1977 SC 1701;** *Kali Prasad Agarwala (Dead by L.Rs.) & Ors. v. M/s. Bharat*

Coking Coal Limited & Ors. **(1989) 2 SCR 283 = AIR 1989 SC 1530;** *Sangamesh Printing Press v. Chief Executive Officer, Taluk Development Board* **(1999) 6 SCC 44;** *Chief Conservator of Forests, Government of A.P. Vs. Collector & Ors* **(2003) 2 SCR 180 = AIR 2003 SC 1805;** *Bal Niketan Nursery School Vs. Kesari Prasad* **(1987) 3 SCR 510 = AIR 1987 SC 1970, relied on.**

s.100 – Second appeal – Substantial question of law – High Court deciding the second appeal without framing any substantial question of law though making reference to the pleadings taken in the second appeal, it discussed and decided the question of law raised therein – HELD: Matter remanded to High Court to decide the second appeal afresh after framing the substantial question of law.

Case Law Reference:

(1964) SCR 387	**relied on**	**para 8**
(1977) 2 SCR 409	**relied on**	**para 9**
(1989) 2 SCR 283	**relied on**	**para 10**
(1999) 6 SCC 44	**relied on**	**para 11**
(2003) 2 SCR 180	**relied on**	**para 12**
(1987) 3 SCR 510	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2754 of 2007.

From the Judgment & Order dated 10.04.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Second Appeal No. 122 of 2006.

June Choudhary, C.K. Sucharita for the Appellants.

R. Venkataramani, P. Raja Sekhar, K. Subba Rao, Aniruddha P. Mayee for the Respondents.

The following order of the Court was delivered

O R D E R

1. The present appeal has been preferred against the judgment and order dated 10.4.2006 passed by the High Court of Andhra Pradesh at Hyderabad in Second Appeal No.122/06 by which it dismissed the Second Appeal filed by the appellant affirming the judgments and order of the First Appellate Court dated 15.4.2005 passed in Appeal Suit No.121/2000 and of the Trial Court dated 28.7.2000 passed in O.S. No.26/94.

2. Facts and circumstances giving rise to this Appeal are that the respondents herein filed Original Suit No.26/94 for seeking declaration of title and possession of the suit land admeasuring Ac.8.90 cents situate within the erstwhile jamindari of Tarla Estate in Srikakulam District and for other consequential relief, i.e. permanent injunction from interfering in any manner with the peaceful possession and enjoyment of suit land, before the Senior Civil Judge at Sompeta. The appellants/defendants filed written statement contending that the suit land being forest land had vested in the State of Andhra Pradesh and in order to substantiate the said averment it annexed the copy of the Gazette Notification, G.O. No.650 dated 25.9.1975 according to which possession and enjoyment of land in dispute was shown to be in favour of the Forest Department. The Ld. Trial Court vide judgment and decree dated 28.7.2000 decreed the suit. Being aggrieved, the appellants preferred Appeal Suit No.121/2000 before the First Additional Judge, Srikakulam District mainly on the ground that the plaintiffs/respondents were not in possession and enjoyment of the suit land and it was a Government land in physical possession of the Forest Department. However, the appeal preferred by the appellants stood dismissed vide judgment and order dated 15.4.2005. Being aggrieved, the appellants preferred Second Appeal before the High Court which has also

been dismissed vide impugned Judgment dated 10.04.2006. Hence, this appeal.

3. Shri Anup Chaudhary, Ld. Senior Counsel appearing for the appellants and Shri R. Venkataramani, Ld. Senior Counsel appearing for the respondents have made claims and counter-claims on various issues and merit of the case. However, we are of the view that the High Court entertained the Second Appeal which was not maintainable for more than one reason and, particularly, that relief sought by the plaintiffs/ respondents was declaration of title in respect of the suit land which according to the appellants has been in favour of the State of Andhra Pradesh and in physical possession of the Forest Department in view of Notification dated 25.9.1975. However, State of Andhra Pradesh had not been the appellant/ party before the High Court though it was defendant no.1 before the Trial Court as well as before the First Appellate Court. A large number of private defendants in the Original Suit were also not impleaded as respondents in Second Appeal before the High Court. The Second Appeal has been filed by the three appellants, namely, District Collector, Mandal Revenue Officer and the District Forest Officer impleading original two plaintiffs as respondents. The original defendants 4 to 11 had not been impleaded before the High Court. Thus, the question does arise as to whether Appeal in the form it had been presented before the High Court could be entertained without State of Andhra Pradesh being the appellant party. More so, the High Court did not frame any substantial question of law before deciding the Appeal though making reference to the pleadings taken in the Second Appeal, the Court has discussed and decided the question of law raised therein.

4. Admittedly, it is not a case where the order passed by statutory Authority was sought to be quashed in the suit, the relief sought in O.S. No.26/94 had been as under:-

"(a) For declaration that the plaintiffs have title and possession over the suit land.

(b) For consequential relief of permanent injunction against all the defendants restraining them and their agents, subordinates, servants and workmen from ever interfering in any manner with the peaceful possession and enjoyment of the suit lands of the plaintiffs."

(c) …….

(d) ……."

Thus, it is evident from the aforesaid relief clause that plaintiffs had sought declaration of title and possession over the suit land and further consequential relief of permanent injunction. Thus, in case the title is also claimed by the State Government with it, we are of the prima facie view that the State of Andhra Pradesh was a necessary party.

5. Section 79 of the Code of Civil Procedure (hereinafter 'CPC') specifically deals with suits by and against the Government and provides that in suits by and against the Government, the authority to be impleaded as the plaintiff or defendant, would be the Union of India or Central Government or the State or State Government.

Proviso to Rule 9 of Order 1 provides that non-joinder of necessary party is fatal.

6. Rule 1 of Order XXVII CPC deals with suits by or against the Government or by officers in their official capacity. It provides that in any suit by or against the Government, the plaint or the written statement shall be signed by such person as the Government may like by general or special order authorize in that behalf and shall be verified by any person whom the Government may so appoint.

7. Article 300 of the Constitution deals with legal proceedings by or against the Union of India or State and provides that in a suit by or against the Government, the authority

to be named as plaintiff or defendant, as the case may be; in the case of the Central Government, the Union of India and in the case of State Government, the State, which is suing or is being sued.

8. A Constitution Bench of this Court in *The State of Punjab Vs. The Okara Grain Buyers Syndicate Ltd., Okara & Anr.* AIR 1964 SC 669 held that if relief is sought against the State, suit lies only against the State, but, it may be filed against the Government if the Government acts under colour of the legal title and not as a Sovereign Authority e.g. in a case where the property comes to it under a decree of the Court.

9. In *Ranjeet Mal Vs. General Manager, Northern Railway, New Delhi & Anr.,* AIR 1977 SC 1701, this Court considered a case where the writ petition had been filed challenging the order of termination from service against the General Manager of the Northern Railways without impleading the Union of India. The Court held as under :-

> "The Union of India represents the Railway Administration. The Union carries administration through different servants. These servants all represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court."
>
> [see also *The State of Kerala v. The General Manager, Southern Railway, Madras* AIR 1976 SC 2538]

10. In *Kali Prasad Agarwala (Dead by L.Rs.) & Ors. v. M/s. Bharat Coking Coal Limited & Ors.* AIR 1989 SC 1530, while considering an issue whether the suit lands had vested,

free from encumbrance in the State consequent upon the issuance of Notification under Section 3 of the Bihar Land Reforms Act, this Court did not entertain the case observing as under :-

> "In our opinion, it is unnecessary to consider the first question and indeed it is not proper also to consider the question in the absence of the State which is a necessary party for adjudication of that dispute. The State of Bihar is not impleaded as a party to the suit and we, therefore, refrain from expressing any opinion on the first question."

11. In *Sangamesh Printing Press v. Chief Executive Officer, Taluk Development Board* (1999) 6 SCC 44, the State was not impleaded as a party before the Trial Court in a money recovery suit. The same was dismissed on the ground of non-impleadment of necessary party. During appeal, an application was made under O. 1 R. 10 praying for impleadment of the State, however the High Court decided the matter on merits without considering the same. This Court observed as under:

> "Keeping in view the facts and circumstances of the case, we are of the opinion that the High Court should have decided the appellant's application under Order 1 Rule 10 C.P.C. and, thereafter, proceeded to hear the appeal in question. Not having disposed of the application under Order 1 Rule 10 has caused serious prejudice to the appellant. We, therefore, set aside the judgment of the High Court and restore Regular First Appeal No 29 of 1987 to its file. The High Court should first deal with the application under Order 1 Rule 10 C.P.C. which is pending before it and then proceed to dispose of the appeal in accordance with law."

12. While considering the similar case in *Chief Conservator of Forests, Government of A.P. Vs. Collector & Ors;* AIR 2003 SC 1805, this Court accepted the submission that writ cannot be entertained without impleading the State if

relief is sought against the State. This Court had drawn the analogy from Section 79 CPC, which directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the Government and Section 80 thereof directs notice to the Secretary of that State or the Collector of the district before the institution of the suit and Rule 1 of Order XXVII lays down as to who should sign the pleadings. No individual officer of the Government under the scheme of the constitution nor under the CPC, can file a suit nor initiate any proceeding in the name and the post he is holding, who is not a juristic person.

13. In *Bal Niketan Nursery School Vs. Kesari Prasad* AIR 1987 SC 1970, this Court held that application for impleadment of a necessary party can be filed at any stage of proceeding provided the Court is satisfied that exceptional circumstances prevailing in the case, warrant the impleadment.

14. In view of the above, State of Andhra Pradesh was necessary party. Thus, the Second Appeal filed by the officials was not maintainable.

The High Court decided the appeal without considering this important aspect of the matter. Shri Anup Chaudhary, Ld. Senior Counsel has submitted that in order to meet the ends of justice, this Court should grant indulgence to the appellants to file an application for impleadment before this Court, and in case it is not willing to do so, the judgment and order of the High Court be set aside and the case be remanded to the High Court and appellants be given an opportunity to file an application for impleadment of the State therein. Shri R. Venkataramani, Ld. Senior Counsel opposed the suggestion made by Shri Anup Chaudhary.

15. That State of Andhra Pradesh was a party before the Trial Court as well as before the First Appellate Court. In such a fact-situation and in order to meet the end of justice, an opportunity should be given to the appellants to move an

application for impleadment of the State of Andhra Pradesh. Such a course is in public interest as the State who also claim to have title over the suit land cannot be deprived of the right to present its case before the Court in case it looses the land. However, it would be desirable that such a course is adopted before the High Court.

16. In view of the above, we set aside the judgment and order of the High Court passed in Second Appeal No.122/06 dated 10.4.2006 and remand the case to the High Court to decide afresh after framing the substantial question of law. The appellants are permitted to file an application for impleadment of the State of Andhra Pradesh as appellant and if such an application is filed, the High Court shall be at liberty to consider it in accordance with law. With these observations, the appeal is allowed. No costs.

R.P. Appeal allowed.