S.K. DASGUPTA & ORS.

v.

VIJAY SINGH SENGAR & ORS.

(Civil Appeal of 6794 of 2003)

MAY 5, 2010*

[HARJIT SINGH BEDI AND K.S. RADHAKRISHNAN, JJ.]

Contempt of Court

Contempt petition before High Court – Arising out of directions by High Court in a writ petition filed in public interest to officials of State Electricity Board to provide uninterrupted supply of electricity to government Hospitals and street lights to be on during nights, throughout the State – High Court directing impleadment of senior Members of the Board and others as contemnors and ordering inquiry to be held by CBI – HELD: The directions made by High Court are clearly beyond courts' jurisdiction in a public interest litigation as they interfere with the functioning of independent State agencies in matters which are beyond their control insofar as uninterrupted supply of electricity is concerned – It cannot be ignored that shortage of power is a phenomenon common to the entire country and to single out Members of the Board or the Regulatory Commission for failure to comply with the directions of the High Court which are incapable of compliance, is not called for – Officers of the Board have repeatedly come to Court to explain that the situation was beyond their control and that the shortfall in the supply of electric power was not of their making nor in their control – High Court ignored this basic fact and passed orders which were incapable of compliance – Order of the High Court set aside and contempt proceeding discharged – Public Interest Litigation.

* Judgment Recd. on 26.7.2010

PUBLIC INTEREST LITIGATION:

Jurisdiction in public interest litigation- Held: Is to be invoked sparingly and with rectitude and any order made therein must be reasonable and must not reflect the pique of the court, more particularly, as it is not court's business to attempt to run the government in a manner which the court thinks is the proper way – Judicial restraint.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6794 of 2003.

From the Judgment & Order dated 1.4.2003 of the High Court of Judicature of M.P. Bench at Gwalior (M.P.) in CP (C) No. 37 of 2003 in W.P. No. 677 of 2003.

WITH

C.A. Nos. 6795 & 6796 of 2003.

Ashiesh Kumar, B.S. Banthia for the appearing parties.

The following Order of the Court was delivered

O R D E R

These appeals arise out of a contempt petition wherein a Single Judge of the Madhya Pradesh High Court, Gwalior Bench, in his order dated 1st April, 2003 has ordered an enquiry against some officials and members of the M.P. State Electricity Board by the Central Bureau of Investigation and arrayed some senior Members of the Board and others as contemnors as well.

The facts are as under:

The respondent, Vijay Singh Sengar, a practising Advocate at Jabalpur, filed a writ petition in public interest pointing out that patients in Government hospitals were suffering great agony on account of un-scheduled load-shedding from 6.30 a.m. to 8.30 a.m. and 7.00 p.m. to 8.00 p.m. and that the entire State was plunged into darkness taking

the State back to the 'Stone Age Days'. Alongwith the writ petition a large number of newspaper cuttings were also appended, to substantiate the pleas that had been raised. During the hearing of the petition several senior officers of the Board were summoned to Court including Mr. R.N. Mishra, the Chief Engineer (O & M). It was also observed in an interim order made by the Court that the Board had undertaken to take all measures to supply electricity for street lights and that in a democratic set up it was the responsibility of the State to maintain all essential services and the basic amenities of life. It was also observed that it was a matter of common knowledge that the absence of the power supply to Government hospitals caused great discomfort, pain and constituted a danger to the patients who were admitted therein. By an order dated 13th September, 2001, a direction was accordingly given in the following terms:

> "We, therefore, as an interim measure, direct respondents 1 and 2 to maintain round the clock electricity supply in the Government Hospitals throughout the State. We further direct that the street lights shall be kept on throughout the State between sunset and sunrise.
>
> The above directions be carried out in letter and spirit forthwith, even at the cost of discontinuing with the scheduled load shedding as a whole with the only exception in the event of the Madhya Pradesh Electricity Board itself not getting the power supply, or a 'Grid Failure' beyond their control It is further being made clear that any breach of the above directions would be viewed seriously.
>
> List for further orders on 27/9/2001.
>
> Let a copy of this order be supplied to Shri Sanjay Seth, Additional Advocate General, today for necessary compliance."

It appears that a special leave petition was filed against the aforesaid order but the same was dismissed in view of the fact that the M.P. Electricity Regulatory Commission had

passed certain effective orders and no orders were thus thought to be called from the Court. It appears that another public interest litigation was subsequently filed and an order was made on 17th March, 2003 while issuing notice that "there shall be no power cut during night time until further orders."

Another petition was filed before the Indore Bench, highlighting the difficulties being faced in the State due to interrupted supply of electricity by the Board and by an interim order officers of the M.P. Electricity Regulatory Commission were also directed to be present so that some method could be devised to reduce the rigour of the power cuts in force.

The matter was thereafter adjourned time and again to see if the directions given by the Court from time to time were effectively complied with. It was also observed during the course of the proceedings before the Indore Bench that the Court could not be a mere spectator to the miseries being felt by the public and that the arguments made on behalf of the staff, Board and State agencies that the Court could not interfere in policy matters, could be ignored as it was the bounden duty of the Court to ensure the welfare of the State citizens. The Court accordingly observed that it appeared that the officials of the Electricity Board and the Regulatory Commission were not serious in implementing the directions of the Court and they were prima facie guilty of having committed contempt of Court. Contempt notices were accordingly issued on 26th March, 2003. The officers of the Board appeared before the Court and pointed out that the situation was beyond their control but they were sternly warned that any further neglect of the Court's orders would be viewed seriously. The Court also felt that the Court's direction to the concerned officer that if a power cut could not be avoided they were to intimate to the Registrar of the Court (as to why the power cuts had been imposed) had been flouted and the Courts interference was thus essential on which further directions were issued on Ist April, 2003 in the following terms,

"Accordingly, the Director, C.B.I., New Delhi, shall constitute a team of officers not associated with the State of M.P. to be headed by an officer not below the rank of Joint Director to conduct an impartial enquiry with the help of the experts of the Central Electricity Authority on the following terms of reference.

(1) As to reasons leading to violation of this Court's order directing not to resort to power cuts after 8.30 in the night.

(2) As to justification being in the nature of situation beyond control, if any, for power cuts in violation of this Court's order after 8.30 in the night:

(3) As to individual liability of the contemners or any other person for deliberate violation of this Court's orders in the absence of a justification as such:

(4) As to veracity of claims of the Boad and the Govt. regarding non-availability of surplus electricity form any source for purchase at any cost:

(5) As to willful disobedience by the M.P.S.E.B., Headquarters, Jabalpur, if any, by ignoring request of the Board's establishment at Gwalior to strictly adhere to this Court's directions on power cuts in the night:

(6) As to fabrication and manipulation of records, if any, for justification of the Board/the Government's actions in resorting to power cuts; and

(7) As to any other area of enquiry, which the Director, C.B.I. thinks appropriate for proper adjudication of this Contempt Petition.

(10) We would like to indicate that, in view of prima facie deliberate violations of this Court's order the only way, we are left with to reiterate the rule of law is to punish the

contemners or persons responsible for such violation by warding exemplary punishments

11 even by involving our powers under Article 215 of the Constitution of impose punishments proportionate to damage caused to the credibility of this Institution, irrespective of the quantum of sentence prescribed under the Contempt of Courts Act. Besides, as there has been incidents of suicide by the students, due to power cuts during crucial periods of examinations and as there is commotion in the society on that count, C.B.I., shall take up the inquiry at the earliest and shall exercise all such powers as are enshrined in the Cr.P.C. and other relevant statues.

(11) As it is submitted that (i) Shri Baleshwar Sharma, chief Managing Director,, (ii) Shri R.K.Verma, Chief managing Director and (iii) Shri R.S.Yadav, Chief Engineer, have been inadvertently left out from the array of contemners, they are directed to be so added and be issued with notices of contempt today itself.

(12) the C.B.I. Shall also record all the power cuts henceforth and incorporate the same in its report. keeping in view the fact, that each power cut shall constitute an independent offence of the Contempt of this Court.

(13) A copy of this order be immediately sent by a special messenger and also by fax to the Director, C.B.I., New Delhi.

(14) The C.B.I. shall submit an interim report within one month and final report within two months."

It is against the order dated Ist April, 2003 that a special leave petition was filed and while after issuing notice. proceedings before the High Court had been stayed as well. The respondents though served have not put in appearance on which leave has also been granted. We have accordingly gone

through the matter with the assistance of the learned counsel for the appellant.

We are of the opinion that the directions made by the High Court in the impugned judgment are clearly beyond the Courts jurisdiction in a Public Interest Litigation as they interfere with the functioning of independent State agencies in matters which are beyond their control insofar as uninterrupted supply of electricity is concerned. We cannot ignore that a shortage of power is a phenomena common to the entire country and to single out Members of the Board or the Regulatory Bommission for failure to comply with the directions of the Court, which are incapable of compliance, is not called for.

The direction that the matter should be referred to Central Bureau of Investigation for enquiry is to our mind completely misplaced. There is no finding of the Court or even a suggestion of any misconduct on any attempt to forestall the uninterrupted supply of electricity to the State or Government hospitals. We, thus do not find any justification in the direction that the CBI investigates matters which are purely technical and administrative in nature. We must emphasize once again that a Public Interest Litigation is to be invoked sparingly and with rectitude and any order made in this situation must be reasonable and must not reflect the pique of the Court more particularly as it is not the Courts business to attempt to run the Government in a manner which the Court thinks is the proper way. The officers of the Board had repeatedly come to Court to explain that the situation was beyond their control and that the short fall in the supply of electric power was not of their making or in their control. The High court ignored this basic fact and passed orders which were incapable of compliance.

We therefore allow these appeals and set aside the order dated 1st April 2003 and discharge the contempt proceeding.

R.P. Appeals allowed.

PRADIP BURAGOHAIN

v.

PRANATI PHUKAN

(Civil Appeal No. 5561 of 2008)

JULY 7, 2010

[D.K. JAIN AND T.S. THAKUR, JJ.]

Representation of the People Act, 1951:

ss. 80, 100(1)(b) and 123(1) – State Assembly elections – Election petition, challenging election of returned candidate on grounds of corrupt practices of bribery – Dismissed by High Court – HELD: Standard of proof required for establishing a charge of corrupt practices is the same as is applicable to a criminal charge – In an election dispute it is unsafe to accept oral evidence at its face value unless it is backed by unimpeachable and incontrovertible documentary evidence – As regards election petitioner's explanation for non-production of documentary evidence that election petition was filed hurriedly to save the limitation, presumption would be drawn against him as per s.114, Illustration (g) of Evidence Act – There is no sufficient material to upset the judgment of High Court – Evidence Act, 1872 – s.114, Illustration (g).

Maxim: Omnia praesumuntur contra spoliatorem – Applicability of.

The election of the respondent to the Assam Legislative Assembly held in March 2006 was challenged in an election petition before the High Court, by the appellant, who lost to the respondent by a margin of nearly 20,000 votes. The grounds of challenge alleged were seven acts of corrupt practices out of which six were alleged to have been committed by the respondent at different places where the voters residing in the localities

within the Constituency had assembled and the respondent requested the gathering to cast their votes in her favour and gave Rs.500/- each to the voters present at the respective places. The seventh act of corrupt practice stated to have been committed by the respondent was that her party workers, with the help of the money given by her, organized a feast on the date of the poll in the premises near a polling station within the Constituency; that she visited the said premises with her supporters, and inaugurated the feast. It was also alleged that the respondent invited the voters to the feast and requested them to vote in her favour. The allegations were refuted by the respondent in her written statement. The High Court dismissed the election petition. Aggrieved, the election petitioner filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1 From a conspectus of the pronouncements of this Court, three distinct aspects emerge that need to be kept in view while dealing with an election dispute involving commission of corrupt practices. Firstly, a charge of corrupt practice is in the nature of a criminal charge and has got to be proved beyond doubt. The standard of proof required for establishing a charge of corrupt practice is the same as is applicable to a criminal charge. This implies that a charge of corrupt practice is taken as proved only if there is clear cut evidence which is entirely credible by the standards of appreciation applicable to such cases. [para 9] [898-A-C]

Sarju Pershad Ramdeo Sahu v. Raja Jwaleshwari Pratap Narain Singh and Ors. **1950 SCR 781 =AIR 1951 SC 120;** *Rahim Khan v. Khurshid Ahmed and Ors*. **1975 (1) SCR 643 = (1974) 2 SCC 660; *D.*** *Vankata Reddy v. R. Sultan and Ors*. **1976 (3) SCR 445 = (1976) 2 SCC 455 and** *Ramji Prasad Singh v. Ram Bilas Jha and Ors*. **1977 (1) SCR 741 =**

(1977) 1 SCC 260, relied on.

1.2. Secondly, in an election dispute it is unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. [para 10] [898-E]

Rahim Khan v. Khurshid Ahmed and Ors. **1975 (1) SCR 643 = (1974) 2 SCC 660;** *M. Narayana Rao v. G. Venkata Reddy & Ors*. **1977 (1) SCR 490 = (1977) 1 SCC 771;** *Dadasaheb Dattatraya Pawar & Ors. v. Pandurang Raoji Jagtap & Ors*. **1978 (2) SCR 524 = (1978) 1 SCC 504; and** *Laxmi Narayan Nayak v. Ramratan Chaturvedi & Ors.* **1989 (2) Suppl. SCR 581 = (1990) 2 SCC 173; and** *Thakur Sen Negi v. Dev Raj Negi and Anr*. **1993 Supp (3) SCC 645 – relied on.**

1.3. The third aspect is that while as a court of first appeal there are no limitations on the powers of this Court in reversing a finding of fact or law which has been recorded on a misreading or wrong appreciation of the evidence or law, it would not ordinarily disregard the opinion by the trial Judge more so when he happens to be a High Court Judge who has recorded the evidence and has had the benefit of watching the demeanour of the witnesses in forming first-hand opinion regarding their credibility. [para 14] [901-F-G]

Sarju Pershad Ramdeo Sahu v. Raja Jwaleshwari Pratap Narain Singh and Ors. **1950 SCR 781 =AIR 1951 SC 120; and** *P.C. Thomas v. P.M. Ismail & Ors*. **(2009) 10 SCC 239, relied on.**

1.4. In the instant case, the evidence adduced by the appellant to substantiate the charges leveled against the respondent comprises oral depositions only. The High Court has critically evaluated the said evidence and given reasons why the same was insufficient to prove the

charge of corrupt practice leveled against the respondent. The High Court rightly noted that the evidence adduced by the appellant did not inspire confidence and was, therefore, insufficient to establish the charge of corrupt practice leveled against the respondent. There is no reason much less any compelling reason to take a view different from the one taken by the High Court regarding credibility or sufficiency of the evidence led by the appellant to prove the charge. [para 17] [903-A-D]

2.1 It is significant to note that neither the appellant nor his election agent (PW 30) claims to have been a witness to any act of corrupt practice alleged against the respondent. The entire case of the appellant as set up before the High Court and even before this Court is that the acts of corrupt practice allegedly committed by the respondent were reported to the appellant or his election agent by different individuals from time to time. [para 17] [903-E-F]

2.2. Further, the affidavit sworn by the witnesses in regard to each incident of alleged corrupt practice is a carbon copy of the other. The witnesses have admitted in their cross-examination that the affidavits were drawn by the counsel for the appellant in his chamber. A parrot like story has thus emerged from the depositions of the witnesses in regard to each one of the incidents which is unsafe to believe for purposes of setting aside an electoral process in which the appellant has lost the election by a huge margin of nearly 20000 votes. [para 17] [903-F-H; 904-A]

2.3. Besides, the witnesses examined by the appellant appear to be partisan in character. Suffice it to say that the depositions of the witnesses have been evaluated by the High Court and rejected for cogent reasons. In the absence of a palpable error in the

appreciation of the said evidence, there is no reason to strike a discordant note. [para 18]

3.1. There is no documentary evidence to show that any complaints were filed by the appellant or his election agent before the Election Commission of India or any other authority upon receipt of reports regarding commission of the corrupt practice by the respondent. The appellant's version in cross-examination and that given by his election agent is that such complaints were filed before the Chief Election Commission, the Chief Election Officer of the District, the Returning Officer and the Constituency Magistrate in writing and against proper acknowledgement. But neither any copy of complaint so made nor the acknowledgment regarding their receipt by the authorities concerned has been produced at the trial. What is important is that copies of the alleged complaints relating to the incident of bribery were said to be available with the election agent of the appellant but the same were not annexed to the petition nor were they produced at the trial. The explanation offered for this omission on the part of the appellant and his election agent that the election petition had been filed hurriedly, has been rightly rejected by the High Court as totally unacceptable. [para 19] [904-H; 905-A-E]

3.2. Illustration (g) to s.114 of the Evidence Act, 1872 permits the Court to draw an adverse presumption against the party in default to the effect that evidence which could be but is not produced would, if produced, have been unfavourable to the person who withholds it. The rule is contained in the well-known maxim : *omnia praesumuntur contra spoliatorem*. **If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. [para 19] [905-G-H; 906-A]**

3.3. In an election dispute where oral evidence is

generally partisan in character, as has been demonstrated in the instant case, non-production of documentary material that could lend support to the appellant's charge of bribery against the respondent would assume great importance. Absence of a plausible explanation for non-production of the documentary evidence would completely discredit the version which the oral evidence attempts to support. [para 19] [906-A-C]

3.4. Besides, in her deposition the respondent has denied her presence on 29th and 31st March, 2006 at the places alleged. She also denied in no uncertain terms that she had organized any public feast on 3rd April, 2006 at the place alleged. It is significant that these statements and denials of the respondent have not been seriously questioned in cross-examination, which would imply that the statement made by the respondent has not been seriously disputed by the appellant. At any rate, there is nothing in the cross-examination to discredit the version of the respondent. [para 20] [906-D-G]

4. Even taking the most charitable view of the evidence which the appellant has adduced in support of his case, all that may be said is that a second opinion on the same material was possible. That, however, is not by itself sufficient for this Court to upset the judgment of the High Court or interfere with the result of a hard earned electoral victory.Having regard to the seriousness of the charge of corrupt practice, and the nature of the evidence that has been adduced by the appellant, it is a fit case where this Court ought to give the benefit of doubt to the respondent and leave her election untouched. [para 21-22] [907-B-F]

Ram Singh and Ors. v. Col. Ram Singh **1985 (Supp) SCC 611 – relied on.**

Case Law Reference:

1950 SCR 781	**relied on**	**para 9**
1975 (1) SCR 643	**relied on**	**para 9**
1976 (3) SCR 445	**relied on**	**para 9**
1977 (1) SCR 741	**relied on**	**para 9**
1977 (1) SCR 490	**relied on**	**para 11**
1978 (2) SCR 524	**relied on**	**para 12**
1989 (2) Suppl. SCR 581	**relied on**	**para 12**
1993 Supp (3) SCC 645	**relied on**	**para 13**
(2009) 10 SCC 239	**relied on**	**para 16**
1985 (Supp) SCC 611	**relied on**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5561 of 2008.

From the Judgment & Order dated 21.07.2008 of the High Court of Gauhati in Election Petition No. 5 of 2006.

K.V. Viswanathan, Manish Goswami, Abantee Dutta, Subramanyan P.B., Abhishek Kaushik (for Map & Co.) for the Appellant.

Anoop G. Chaudhary, Navneet Kumar (for Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal under Section 116 A of the Representation of People Act, 1951 arises out of an order passed by the High Court of Assam at Gauhati whereby election petition No.5 of 2006 filed by the appellant herein challenging the election of the respondent to the Assam State Legislative Assembly has been dismissed. The factual backdrop in which

the election petition and the present appeal came to be filed may be summarised as under:

2. General elections to the Assam Legislative Assembly were held in March 2006 in terms of a schedule announced by the Election Commission of India. The appellant was an independent candidate for No.120 Naharkatiya Assembly Constituency that went to poll on 3rd April, 2006. The result announced by the Returning Officer for the said constituency, however, declared the respondent Smt. Pranati Phukan set up by the National Congress Party elected by a margin of nearly 20,000 votes over the appellant who emerged as her nearest rival. Aggrieved by the outcome of the electoral contest the appellant filed election petition No.5 of 2006 before the High Court at Gauhati assailing the election of the respondent on the ground that the same was vitiated by several acts of corrupt practice allegedly committed by the respondent. The appellant enumerated seven specific instances of corrupt practices in support of his case. The first of these acts of corrupt practices alleged by the appellant was committed on 29th March, 2006 at Langherjan Tea Estate where some voters residing in the said locality and enrolled in the electoral rolls for polling stations no.38 and 39 of the constituency had assembled. According to the appellant, when the respondent arrived at the place mentioned above she requested the gathering to cast their votes in her favour and gave Rs.500/- each to the voters present there.

3. The second act of corrupt practice allegedly committed by the respondent was on the same day at about 9.00 p.m. when she along with her supporters and party workers went to Line No.9, Baghmara village near M/s Makum Motors and requested the voters of polling stations no.77, 78 and 79 assembled there to cast their votes in her favour by offering Rs.500/- each to those present there.

4. The third act of corrupt practice allegedly committed by the respondent was at about 12.00 noon on 31st March, 2006

when she is alleged to have visited labour line of Desam Tea Estate situated near the playground of Desam Tea Estate and induced the voters present there to cast their votes for her by offering them Rs.500/- each. Shri Hiranya Mantri, election agent of the respondent, is also alleged to have offered Rs.500/- each to some of the voters named in the petition when he visited the labour line of Desam Tea estate on the same at about 4.00 p.m., constituting the fourth act of corrupt practice committed in the course of the electoral process.

5. The fifth act of corrupt practice is alleged to have been committed by the respondent at Chakalia Harimandir at Panibura village at about 1.30 p.m. on 1st April, 2006 when she offered Rs.500/- each to the voters named in the petition to induce them to vote for her. Shri Hiranya Mantri, the election agent of the respondent, accompanied by Shri Rajen Lahon is also alleged to have visited Nabajyoti L.P. School premises at Panibura Pathar village on the same day and offered Rs.500/- each to some of the voters named in the petition who were present there, constituting the sixth act of corrupt practice.

6. The seventh act of corrupt practices committed by the respondent was in the form of a feast allegedly organized by her on the date of the poll i.e. 3rd April, 2006 in a premises belonging to a garden employee of Namrup Tea Estate near polling station no.88 of the constituency. According to the averments made in the election petition the respondent visited the aforesaid place with her supporters Smt. Runu Arandhara, President of Dibrugarh Zila Parishad at about 10.00 a.m. and inaugurated the feast. The feast was enjoyed by the voters of polling station no.88 and was arranged by congress workers with the help of the money allegedly given by the respondent. It is also alleged that the respondent herself invited the voters to the feast and requested them to vote in her favour.

7. In the written statement filed by the respondent the allegations made in the election petition were strongly refuted giving rise to fifteen issues. Six out of these issues pertained

to the maintainability of the election petition while the remaining nine dealt with the commission of the corrupt practices alleged against the respondent and the consequences flowing from the same.

8. In support of his case the appellant examined as many as twenty nine witnesses apart from getting his own deposition recorded. The respondent also stepped into the witness box but remained content with examining her election agent as RW 2. By the judgment impugned in this appeal, the High Court decided Issues 1 to 6 in favour of the appellant. Issue nos.7 to 13 relating to the acts of corrupt practices alleged by the appellant were, however, decided against the appellant and in favour of the respondent, resulting in the dismissal of the election petition. The High Court held that the oral evidence adduced by the appellant in support of his allegations did not establish the truthfulness thereof. The High Court was also of the view that although complaints were alleged to have been made to the authorities conducting and supervising the election process yet copies of the said complaints had not been produced. The explanation offered by the appellant for non-production of the said complaints was rejected by the High Court as unacceptable. The witnesses examined by the appellant were found to be either partisan or untrustworthy on account of their association with the appellant and the Naharkatia Sports Association of which he is the President. Relying upon the decisions of this Court, the High Court held that a corrupt practice ought to be established by cogent and reliable evidence which evidence the appellant had failed to adduce. The present appeal assails the correctness of the said order, as noted above.

9. The law relating to proof of corrupt practices under the Representation of People Act has been authoritatively declared by this Court in a long line of decisions starting with *Sarju Pershad Ramdeo Sahu v. Raja Jwaleshwari Pratap Narain Singh and Ors.* (AIR 1951 SC 120). It is not, in our opinion,

necessary to refer to all the decisions that have been delivered by this Court on the subject over the past six decades since *Sarju Pershad's* case (supra). Reference to some of them only should suffice. From a conspectus of the pronouncements of this Court three distinct aspects emerge that need to be kept in view while dealing with an election dispute involving commission of corrupt practices. The first and foremost of these aspects to be borne in mind is the fact that a charge of corrupt practice is in the nature of a criminal charge and has got to be proved beyond doubt. The standard of proof required for establishing a charge of corrupt practice is the same as is applicable to a criminal charge. This implies that a charge of corrupt practice is taken as proved only if there is clear cut evidence which is entirely credible by the standards of appreciation applicable to such cases. (See *Rahim Khan v. Khurshid Ahmed and Ors.* (1974) 2 SCC 660, *D. Vankata Reddy v. R. Sultan and Ors.* (1976) 2 SCC 455 and *Ramji Prasad Singh v. Ram Bilas Jha and Ors.* (1977) 1 SCC 260.)

10. The second aspect that distinctly emerges from the pronouncements of this Court is that in an election dispute it is unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. The danger underlying acceptance of such oral evidence in support of a charge of corrupt practice was lucidly stated by this Court in *Rahim Khan's* case (supra) in the following words:

> "We must emphasize the danger of believing at its face value oral evidence in an election case without the backing of sure circumstances or indubitable documents. It must be remembered that corrupt practices may perhaps be proved by hiring half-a-dozen witnesses apparently respectable and dis-interested, to speak to short and simple episodes such as that a small village meeting took place where the candidate accused his rival of personal vices. There is no X-ray whereby the dishonesty of the

story can be established and, if the Court were gullible enough to gulp such oral versions and invalidate elections, a new menace to our electoral system would have been invented through the judicial apparatus. We regard it as extremely unsafe, in the present climate of kilkenny-cat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses. The Court must look for serious assurance, unlying circumstances or unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result, but extinguish many a man's public life."

11. To the same effect is the decision of this Court in *M. Narayana Rao v. G. Venkata Reddy & Ors.* (1977) 1 SCC 771 where this Court observed:

"A charge of corrupt practice is easy to level but difficult to prove. If it is sought to be proved only or mainly by oral evidence without there being contemporaneous document to support it, court should be very careful in scrutinizing the oral evidence and should not lightly accept it unless the evidence is credible, trustworthy, natural and showing beyond doubt the commission of corrupt practice, as alleged."

12. Reference may also be made to the decision of this Court in *Dadasaheb Dattatraya Pawar & Ors. v. Pandurang Raoji Jagtap & Ors.* (1978) 1 SCC 504 where this Court expressed a similar sentiment and *Laxmi Narayan Nayak v. Ramratan Chaturvedi & Ors.* (1990) 2 SCC 173 where this Court upon a review of the decisions on the subject held the following principles applicable to election cases involving corrupt practices:

"(I) The pleadings of the election petitioner in his petition should be absolutely precise and clear containing all

necessary details and particulars as required by law vide *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi* (1987) Supp. SCC 93 and *Kona Prabhakara Rao* v. *M. Seshagiri Rao* (1982) 1 SCC 442.

(II) The allegations in the election petition should not be vague, general in nature or lacking of materials or frivolous or vexatious because the court is empowered at any stage of the proceedings to strike down or delete pleadings which are suffering from such vices as not raising any triable issue vide *Manphul Singh* v. *Surinder Singh* (1973) 2 SCC 599, *Kona Prabhakara Rao* v. *M. Seshagiri Rao Rao* (1982) 1 SCC 442 and *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi* (1987) Supp. SCC 93.

(III) The evidence adduced in support of the pleadings should be of such nature leading to an irresistible conclusion or unimpeachable result that the allegations made, have been committed rendering the election void under Section 100 vide *Jumuna Prasad Mukhariya* v. *Lachhi Ram* AIR 1954 SC 686 and *Rahim Khan* v. *Khurshid Ahmed* (1974) 2 SCC 660.

(IV) The evidence produced before the court in support of the pleadings must be clear, cogent, satisfactory, credible and positive and also should stand the test of strict and scrupulous scrutiny vide *Ram Sharan Yadav* v. *Thakur Muneshwar Nath Singh* (1984) 4 SCC 649.

(V) It is unsafe in an election case to accept oral evidence at its face value without looking for assurances for some surer circumstances or unimpeachable documents vide *Rahim Khan* v. *Khurshid Ahmed* (1974) 2 SCC 660, *M. Narayana Rao* v. *G. Venkata Reddy* (1977) 1 SCC 771, *Lakshmi Raman Acharya* v. *Chandan Singh* (1977) 1 SCC 423 and *Ramji Prasad Singh* v. *Ram Bilas Jha* (1977) 1 SCC 260.

(VI) The onus of proof of the allegations made in the election petition is undoubtedly on the person who assails an election which has been concluded vide *Rahim Khan* v. *Khurshid Ahmed* (1974) (2) SCC 660, *Mohan Singh* v. *Bhanwarlal* AIR 1964 SC 1366 and *Ramji Prasad Singh* v. *Ram Bilas Jha* (1977) 1 SCC 260."

13. The decision of this Court in *Thakur Sen Negi v. Dev Raj Negi and Anr.* 1993 Supp (3) SCC 645 also states the same proposition and highlights the danger underlying acceptance of oral evidence in an election dispute as witnesses in such disputes are generally partisan and rarely independent. This Court observed:

"It must be remembered that in an election dispute the evidence is ordinarily of partisan witnesses and rarely of independent witnesses and, therefore, the court must be slow in accepting oral evidence unless it is corroborated by reliable and dependable material. It must be remembered that the decision of the ballot must not be lightly interfered with at the behest of a defeated candidate unless the challenge is on substantial grounds supported by responsible and dependable evidence."

14. The third aspect that is equally important and fairly well-settled is that while as a Court of first appeal there are no limitations on the powers of this Court in reversing a finding of fact or law which has been recorded on a misreading or wrong appreciation of the evidence or law, it would not ordinarily disregard the opinion by the trial Judge more so when the trial Judge happens to be a High Court Judge who has recorded the evidence and who has had the benefit of watching the demeanour of the witnesses in forming first-hand opinion regarding their credibility.

15. In *Sarju Pershad's* case (supra) this Court stated the approach to be adopted in an appeal arising out of an election dispute in the following words:

"The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact."

16. Reference may also be made to the recent decision of this Court in *P.C. Thomas v. P.M. Ismail & Ors.* (2009) 10 SCC 239 where this Court observed:

"This Court in *Gajanan Krishnaji Bapat* (1995) 5 SCC 347 has observed that although being the court of first appeal, this Court has no inhibition in reversing such a finding, of fact or law, which has been recorded on a misreading or wrong appreciation of the evidence or the law, but ordinarily the appellate court attaches great value to the opinion formed by the trial Judge, more so when the trial Judge happens to be a High Court Judge, had recorded the evidence and had the benefit of watching the demeanour of witnesses in forming first-hand opinion of them in the process of evaluation of evidence. This Court should not interfere with the findings of fact recorded by the trial court unless there are compelling reasons to do so."

17. Coming to the facts of the case at hand the evidence adduced by the appellant to substantiate the charges leveled by him against the respondent comprises oral depositions of as many as 30 witnesses including the appellant himself. The High Court has critically evaluated the said evidence and given reasons why the same was insufficient to prove the charge of corrupt practice leveled against the respondent. The High Court noted, and in our opinion rightly so, that the evidence adduced by the appellant did not inspire confidence and was therefore insufficient to establish the charge of corrupt practice leveled against the respondent. We have been taken through the deposition of the witnesses examined by the parties at considerable length and we see no reason much less any compelling reason to take a view different from the one taken by the High Court regarding the credibility or the sufficiency of the evidence led by the appellant to prove the charge. We do not consider it necessary to discuss the deposition of each witness examined on behalf of the appellant for that exercise has been done by the High Court in detail which we find satisfactory. We may all the same note a few significant features that emerge from the deposition of the witnesses examined by the appellant and that impinge seriously upon the case of the appellant. The first and the foremost feature that needs to be noticed is the fact that neither the appellant nor his election agent (PW 30) claims to be a witness to any act of corrupt practice alleged against the respondent. The entire case of the appellant as set up before the High Court and even before us is that the acts of corrupt practice allegedly committed by respondent were reported to the appellant or his election agent by different individuals from time to time. The second aspect which is noteworthy is that the affidavit sworn by the witnessess in regard to each incident of alleged corrupt practice is a carbon copy of the other. The witnesses have admitted in their cross-examination that the affidavits were drawn by the counsel for the appellant in his chamber. A parrot like story has thus emerged from the depositions of the witnesses in regard to each one of the incidents which we consider unsafe to believe

for purposes of setting aside an electoral process in which the appellant has lost the election by a huge margin of nearly 20000 votes.

18. The third aspect which we find noteworthy is that the witnesses examined by the appellant appear to be partisan in character. For instance PW-23 Smt. Gita Romoni has admitted in her cross-examination that she had come to depose before the Court at the instance of the election agent of the appellant. She has also admitted that she was a member of Naharkatia Sports Association of which the appellant is the President. She appears to have readily accepted the bribe offered to her but failed to report the matter to any authority except to the petitioner. Similarly, PW-23 Smt. Gita Romoni is also a sportsperson and plays football for Naharkatia Sports Association of which the appellant is the President. This is true even in regard to PWs 8 and 9 who happen to be father and daughter respectively, the latter being a football player associated with Naharkatia Sports Association. The incident of bribery alleged against the respondent at labour line of Desam ea Estate was not reported by these two witnesses to anyone and not even to the Manager of the tea garden concerned. So also PWs 15 and 16 are father and daughter whose testimony has been disbelieved by the High Court for good reasons while dealing with Issue No.13 pertaining to the commission of corrupt practice of bribery by Shri Hiranya Mantri, the election agent of the respondent at Nabajyoti L.P. School premises. Suffice it to say that the deposition of the witnesses has been evaluated by the High Court and rejected for cogent reasons. In the absence of a palpable error in the appreciation of the said evidence we see no reason to strike a discordant note.

19. The last but not the least of noteworthy aspects to which we must refer at this stage is the absence of any documentary evidence to show that any complaints were filed by the appellant or his election agent before the Election

Commission of India or any other authority upon receipt of reports regarding commission of the corrupt practice by the respondent. The appellant's version in cross-examination and that given by his election agent is that such complaints were filed before the Chief Election Commission, the Chief Election Officer of the District, the Returning Officer and the Constituency Magistrate in writing and against proper acknowledgement. But neither any copy of complaint so made nor the acknowledgment regarding their receipt by the concerned authorities has been produced at the trial. What is important is that copies of the alleged complaints relating to the incident of bribery were said to be available with the election agent of the appellant but the same were not annexed to the petition or produced at the trial. The explanation offered for this omission on the part of the appellant and his election agent is that the election petition had been filed hurriedly. The High Court has, in our opinion, rightly rejected that explanation as totally unacceptable. Even assuming that the election petition had been filed hurriedly on account of constraints of period of limitation prescribed for the same, nothing prevented the appellant from placing the said complaints on record or having the same summoned from the concerned authorities to whom they were addressed. Non-production of the documents admittedly available with the appellant that would lend credence to the version set up by the appellant that the incident of corrupt practice was reported to him and/or to his election agent would give rise to an adverse inference against the appellant that either such complaints were never made or if the same were made they did not contain any charge regarding the commission of corrupt practices by the respondent in the manner and on the dates and the places alleged in the petition. We may in this regard refer to illustration (g) to Section 114 of the Evidence Act which permits the Court to draw an adverse presumption against the party in default to the effect that evidence which could be but is not produced would, if produced, have been unfavourable to the person who withholds it. The rule is contained in the well-known maxim : *omnia praesumuntur*

contra spoliatorem. If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. We need to remind ourselves that in an election dispute where oral evidence is generally partisan in character as has been demonstrated in the present case, the non-production of documentary material that could lend support to the appellant's charge of bribery against the respondent would assume great importance. Absence of a plausible explanation for non-production of the documentary evidence would completely discredit the version which the oral evidence attempts to support.

20. Before parting with the discussion on the evidence adduced by the appellant we may note one other factor that needs to be mentioned. In her deposition the respondent has denied her presence at Langherjan Tea Estate on 29th March, 2006 or at any place near the said tea estate. She also denied her presence on 29th March, 2006 at 9.00 p.m. at Line No.9, Baghmara village near M/s Makum Motors where she is alleged to have committed the corrupt practice of offering bribe to the voters. The allegation that she was at the Desam Tea Estate on 31st March, 2006 and went to the labour line of the said estate has also been denied by her specifically in her examination-in-chief. The fact that she had organized a public feast at a quarter belonging to tea garden employee on 3rd April, 2006, has also been similarly denied in no uncertain terms. It is significant that the above statements and denials of the respondent have not been seriously questioned in cross-examination. In the absence of cross-examination on these aspects regarding the denial of the respondent about her presence at the places where she is alleged to have committed the corrupt practices would imply that the statement made by her has not been seriously disputed by the appellant. At any rate, there is nothing in the cross-examination to discredit the version of the respondent leave alone suggest that she was making a false statement regarding her presence at the places

where she is alleged to have committed the acts of corrupt practices.

21. In conclusion we would say that even taking the most charitable view of the evidence which the appellant has adduced in support of his case, all that may be said is that a second opinion on the same material was possible. That, however, is not by itself sufficient for this Court to upset the judgment of the High Court or interfere with the result of a hard earned electoral victory. We may gainfully extract the following passage from the decision of this Court in *Ram Singh and Ors. v. Col. Ram Singh* 1985 (Supp) SCC 611:

> "In borderline cases the courts have to undertake the onerous task of, "disengaging the truth from falsehood, to separate the chaff from the grain". In our opinion, all said and done, if two views are reasonably possible - one in favour of the elected candidate and the other against him - courts should not interfere with the expensive electoral process and instead of setting at naught the election of the winning candidate should uphold his election giving him the benefit of the doubt. This is more so where allegations of fraud or undue influence are made."

22. Having regard to the seriousness of the charge of corrupt practice, and the nature of the evidence that has been adduced by the appellant the present is a fit case where we ought to give the benefit of doubt to the respondent and leave her election untouched.

23. In the result this appeal fails and is hereby dismissed but in the circumstances without any order as to costs.

R.P. Appeal dismissed.

EAST COAST RAILWAY & ANR. ETC.
v.
MAHADEV APPA RAO & ORS.
(Civil Appeal No. 4964 of 2010 etc.)

JULY 7, 2010

[AFTAB ALAM AND T.S. THAKUR, JJ.]

Administrative Law:

Judicial review – Order of administrative authority – Canceling typewriting test without assigning reasons – HELD: An order passed by a public authority must be judged by reasons stated in the order or the record contemporaneously maintained – Application of mind by the authority is best disclosed by recording reasons in support of the order – Absence of reasons in the order or the contemporaneous record is suggestive of the order being arbitrary – High Court rightly set aside the order by which the typewriting test was cancelled – Constitution of India, 1950 – Articles 14 and 16 – Service Law.

Service Law:

Appointment – Cancellation of typewriting test – Challenged by successful candidate – HELD: Although no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected in the merit list – The candidates who had appeared in the test and were otherwise eligible for appointment were entitled to ensure that selection process was not allowed to be scuttled for mala fide reasons or in an arbitrary manner – Validity of such decision is not beyond

judicial review – Judicial review – Constitution of India, 1950 – Articles 14 and 16 – Locus standi.

The appellant-organization held a typewriting test on 30.10.2006 for the posts of Chief Typists, and its result was announced on 22.11.2006. On a representation made by some of the unsuccessful candidates, the test was cancelled by order dated 14.12.2006. The said order was challenged before the Central Administrative Tribunal. A fresh typewriting test was held on 16.12.2006. However, result of the second test was not declared. The Tribunal upheld the order dated 14.12.2006. But, the High Court set aside the order of the Tribunal as also the order dated 14.12.2006 and directed the employers to proceed with the selection process as per the first test conducted on 30.10.2006. Aggrieved, the employers as also some of the candidates filed the appeals.

Disposing of the appeals, the Court

HELD: 1.1 Article 14 of the Constitution of India strikes at arbitrariness which is an anti thesis of the guarantee contained in Articles 14 and 16 of the Constitution. Whether or not the cancellation of the typing test was arbitrary is a question which the Court shall have to examine once a challenge is mounted to any such action. [para 15] [919-E-G]

1.2 There is no precise statutory or other definition of the term "arbitrary". Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Application of mind is best disclosed by recording the reasons that led the authority to pass the order in question. An order passed by a public authority exercising administrative/executive or statutory powers must be judged by the reasons stated in the order or any record or file contemporaneously maintained. The

infirmity arising out of the absence of reasons cannot be cured by the authority passing the order stating such reasons in an affidavit filed before the court where the validity of any such order is under challenge. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary and, therefore, legally unsustainable. In the instant case, the order passed by the competent authority or the contemporaneous record or file does not state any reasons whatsoever for cancellation of the typing test. Therefore, it cannot be assumed that the authority properly applied its mind before passing the order cancelling the test. [para 18, 20 and 21] [920-F-G; 922-C-G]

Commissioner of Police, Bombay v. Gordhandas Bhanji **1952 SCR 135 = AIR 1952 SC 16;** *Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors*. **1978 (2) SCR 272 = (1978) 1 SCC 405;** and R*. Vishwanatha Pillai v. State of Kerala & Ors.* **2004 (1) SCR 360 = (2004) 2 SCC 105;** and *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors.* **2005 Suppl. (3) SCR 388 = (2005) 7 SCC 627 - relied on.**

Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors. **1990 Suppl. (1) SCR 625 = AIR 1991 SC 537 – referred to.**

Black's Law Dictionary; *Corpus Juris Secundum*; **and** "*Judicial Review of Administrative Action*" **by Prof. De Smith, Woolf & Jowell – referred to.**

1.3 Although no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to

disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make an appointment is thus a matter which is not beyond judicial review before a competent writ court. If any such decision is found to be arbitrary, appropriate directions can be issued in the matter. In the instant case, the least which the candidates who were otherwise eligible for appointment and who had appeared in the examination that constituted a step in aid of a possible appointment in their favour, were entitled to is to ensure that the selection process was not allowed to be scuttled for malafide reasons or in an arbitrary manner. [para 13 and 15] [918-D-G; 919-D-F]

Shankarsan Dash v. Union of India **1991 (2) SCR 567 = (1991) 3 SCC 47;** and *Union Territory of Chandigarh v. Dilbagh Singh and Ors.* **1992 Suppl. (2) SCR 311 = (1993) 1 SCC 154 – relied on.**

Union of India and Ors. v. Tarun K. Singh and Ors. **(2003) 11 SCC 768 – referred to.**

2.1 The fact that some representations were received against the test or the procedure followed for the same, could not by itself justify cancellation of the test unless the authority concerned applied its mind to the allegations levelled by the persons making the representation, came to the conclusion that the grievance made in the complaint was not without merit and recorded reasons as to why in its opinion it was necessary to cancel the test. In the instant case, the order of cancellation passed by the competent authority was not preceded even by a prima facie satisfaction about the correctness of the allegations made by the unsuccessful candidates leave alone an inquiry into the same. The order of cancellation passed by the competent authority falls short of the legal requirements and was rightly quashed by the High Court. [para 22-23] [923-A-B; F-G; 924-C]

2.2 While application of mind to the material available to the competent authority is an essential pre-requisite for the making of a valid order, that requirement should not be confused with the sufficiency of such material to support any such order. Sufficiency or otherwise of the material and so also its admissibility to support a decision the validity whereof is being judicially reviewed may even otherwise depend upon the facts and circumstances of each case. No hard and fast rule can be formulated in that regard. So also whether the competent authority ought to have conducted an enquiry into or verification of the allegations before passing an order of cancellation is a matter that would depend upon the facts and circumstances of each case. But what is absolutely essential is that the authority making the order is alive to the material on the basis of which it purports to take a decision. [para 24] [924-D-H; 925-A-B]

3. The competent authority would re-examine the matter in the context of the representation received by it, and if upon due and proper consideration thereof, it comes to the conclusion that the test earlier held suffered from any infirmity or did not give a fair opportunity to all the candidates, it shall be free to pass a fresh order cancelling the said examination after recording such a finding in which event the second test conducted under the directions of the Tribunal would become the basis for the selection process to be finalized in accordance with law. In case, however, the authority comes to the conclusion that the earlier test suffered from no procedural or other infirmity or did not cause any prejudice to any candidate, the second test/examination shall stand cancelled and the process of appointment shall be finalized on the basis of the test held earlier. The order passed by the High Court is to that extent modified. [para 25] [925-D-G; 926-A-B]

Case Law Reference:

1952 SCR 135	**relied on**	**para 8**
1978 (2) SCR 272	**relied on**	**para 9**
2004 (1) SCR 360	**relied on**	**para 10**
2005 Suppl. (3) SCR 388	**relied on**	**para 10**
2003) 11 SCC 768	**referred to**	**para 11**
1991 (2) SCR 567	**relied on**	**para 12**
1992 Suppl. (2) SCR 311	**relied on**	**para 14**
1990 Suppl. (1) SCR 625	**referred to**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4964 of 2010.

From the Judgment & Order dated 05.11.2007 of the High Court of Judicature Andhra Pradesh at Hyderabad in W.P. No. 15196 of 2007.

WITH

C.A. Nos. 4965-4966 of 2010.

P.P. Malhotra, ASG, Satya Siddiqui, S.K. Mishra , V.B. Gugnani, Anil Katiyar, Y. Raja Gopala Rao, Ramesh, Y. Vismai for the Appellants.

Gireesh Kumar, Vijay Kumar for the Respondents.

The following Judgment of the Court was delivered

1. Leave granted.

2. These appeals arise out of an order passed by the High Court of Andhra Pradesh at Hyderabad whereby Writ Petition No.15196 of 2007 has been allowed and the order passed by

the Central Administrative Tribunal, Hyderabad Bench in OA No.748 of 2006 set aside.

3. Senior Divisional Personnel Officer, East Coast Railway, Visakhapatnam, issued a notification proposing to conduct a written/practical typewriting test for filling up the vacant posts of Chief Typists in the pay-scale of Rs.5500-9000. In response as many as 12 candidates appeared in the test held on 30th October, 2006 the result whereof was announced on 22nd November, 2006. Some of the candidates who failed to qualify made a representation complaining about the manner in which the test was conducted alleging that defective typewriting machines provided to them placed them at a disadvantage vis-a-vis candidates declared successful. The successful candidates also appear to have made a representation impressing upon the authorities to go ahead with the interviews and to complete the selection process expeditiously. Since that did not happen, OA No.748 of 2006 was filed before the CAT by one of the successful candidates for a direction to respondent to proceed with the selection. In the meantime the Divisional Manager of the appellant-Railways issued an order on 14th of December, 2006 cancelling the typewriting test conducted on 30th October, 2006. By another notification of even date a fresh typewriting test was notified to be held on 16th December, 2006 for all the 12 in-service candidates who had appeared in the earlier test. By an interim order passed by the Tribunal the railway authorities were allowed to conduct the proposed second test in which the applicant before the Tribunal could also appear. The applicant was at the same time permitted to amend the prayer in the OA to assail the order passed by the Divisional Manager of the Railways cancelling the earlier test.

4. It is not in dispute that pursuant to the said notification and the order passed by the Tribunal a fresh test was indeed conducted in which all the eligible in-service candidates appeared although the result of the said test has not been

announced so far. The Tribunal eventually dismissed OA No.748 of 2006 holding that the test earlier conducted was rightly cancelled inasmuch as the candidates were made to take the test in batches and no option was given to them to bring their own typewriters. The Tribunal further held that although some of the candidates had made representation as early as on 23rd October, 2006 seeking permission to use computers their request was not considered. All this according to the Tribunal justified the cancellation of the typewriting test held on 30th October and the issue of a notification for a fresh test.

5. Aggrieved by the order passed by the Tribunal Shri Mahadev Appa Rao declared successful in the first test filed Writ Petition No.15196/2007 before the High Court of Andhra Pradesh which has by the order impugned in the present appeal allowed the same and set aside the order passed by the Tribunal as also the order by which the earlier test was cancelled. The High Court further directed the respondent to proceed with the selection process pursuant to notification dated 18th October, 2006 and the practical test conducted on 30th October, 2006 in terms thereof. The present appeals, as noted above, assail the correctness of the said order.

6. We have heard learned counsel for the parties at some length and perused the record. The High Court has found fault with the order cancelling the earlier test primarily because the same was unsupported by any reasons whatsoever. The said order is in the following words:

> "The practical test conducted to Hd. Typists in scale Rs.5000-8000 (RSRP) on 30.10.2006 in connection with the selection of Chief Typist in scale Rs.5500-9000 (RSRP) to form a panel of 4 UR + 1 SC and the results published vide O.A. No. Estt/Pers/52/2006, Dt. 22.12.2006 are hereby cancelled."

7. The High Court was also of the view that no reasons for cancellation of the test having been recorded even on the

file contemporaneously maintained for that purpose, the same could not be supplied in the affidavit filed in reply to the Writ Petition challenging the said order, especially when the cancellation of the test was not according to the High Court necessitated by any irregularity in the conduct of the test or any mala fides vitiating the same. In the absence of any such infirmity the cancellation of the examination was arbitrary and unsustainable, declared the High Court.

8. There is no quarrel with the well-settled proposition of law that an order passed by a public authority exercising administrative/executive or statutory powers must be judged by the reasons stated in the order or any record or file contemporaneously maintained. It follows that the infirmity arising out of the absence of reasons cannot be cured by the authority passing the order stating such reasons in an affidavit filed before the Court where the validity of any such order is under challenge. The legal position in this regard is settled by the decisions of this Court in *Commissioner of Police, Bombay v. Gordhandas Bhanji* (AIR 1952 SC 16) wherein this Court observed :

> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. "

9. Reference may also be made to the decision of this Court in *Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors.* (1978) 1 SCC 405 where this Court reiterated the above principle in the following words:

> "8. The second equally relevant matter is that when a

statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

10. Later decisions of this Court in *R. Vishwanatha Pillai v. State of Kerala & Ors.* (2004) 2 SCC 105 and Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors. (2005) 7 SCC 627 have re-stated the legal position settled by the earlier two decisions noticed above.

11. Relying upon the decision of this Court in *Union of India and Ors. v. Tarun K. Singh and Ors.* (2003) 11 SCC 768, Mr. Malhotra all the same argued that the challenge to the order cancelling the test was legally untenable as no candidate had any legally enforceable right to any post until he was selected and an order of appointment issued in his favour. Cancellation of the selection process on the ground of malpractices could not, therefore, be subjected to judicial scrutiny before a Writ Court, at the instance of a candidate who had not even found a place in the select list.

12. A Constitution Bench of this Court in *Shankarsan Dash v. Union of India* (1991) 3 SCC 47 had an occasion to examine whether a candidate seeking appointment to a civil post can be regarded to have acquired an indefeasible right to appointment again such post merely because his name appeared in the merit list of candidates for such post. Answering the question in the negative this Court observed:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be

legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in the *State of Haryana v. Subhash Chander Marwaha* 1974 (3) SCC 220; *Neelima Shangla (Miss) v. State of Haryana* 1986(4) SCC 268 or *Jitender Kumar v. State of Punjab* 1985 (1) SCC 122."

13. It is evident from the above that while no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make an appointment is thus a matter which is not beyond judicial review before a competent Writ court. If any such decision is indeed found to be arbitrary, appropriate directions can be issued in the matter.

14. To the same effect is the decision of this Court in *Union Territory of Chandigarh v. Dilbagh Singh and Ors.* (1993) 1 SCC 154, where again this Court reiterated that while a candidate who finds a place in the select list may have no vested right to be appointed to any post, in the absence of any specific rules entitling him to the same, he may still be aggrieved

of his non-appointment if the authority concerned acts arbitrarily or in a malafide manner. That was also a case where selection process had been cancelled by the Chandigarh Administration upon receipt of complaints about the unfair and injudicious manner in which the select list of candidates for appointment as conductors in CTU was prepared by the Selection Board. An inquiry got conducted into the said complaint proved the allegations made in the complaint to be true. It was in that backdrop that action taken by the Chandigarh Administration was held to be neither discriminatory nor unjustified as the same was duly supported by valid reasons for cancelling what was described by this Court to be as a "dubious selection".

15. Applying these principles to the case at hand there is no gainsaying that while the candidates who appeared in the typewriting test had no indefeasible or absolute right to seek an appointment, yet the same did not give a licence to the competent authority to cancel the examination and the result thereof in an arbitrary manner. The least which the candidates who were otherwise eligible for appointment and who had appeared in the examination that constituted a step in aid of a possible appointment in their favour, were entitled to is to ensure that the selection process was not allowed to be scuttled for malafide reasons or in an arbitrary manner. It is trite that Article 14 of the Constitution strikes at arbitrariness which is an anti thesis of the guarantee contained in Articles 14 and 16 of the Constitution. Whether or not the cancellation of the typing test was arbitrary is a question which the Court shall have to examine once a challenge is mounted to any such action, no matter the candidates do not have an indefeasible right to claim an appointment against the advertised posts.

16. What then is meant for arbitrary/arbitrariness and how far can the decision of the competent authority in the present case be described as arbitrary? Black's Law Dictionary describes the term "arbitrary" in the following words:

> "1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious."

17. To the same effect is the meaning given to the expression "arbitrary" by *Corpus Juris Secundum* which explains the term in the following words:

> *"ARBITRARY* – Based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; capricious; exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power; fixed or done capriciously or at pleasure, without adequate determining principle, nonrational, or not done or acting according to reason or judgment; not based upon actuality but beyond a reasonable extent; not founded in the nature of things; not governed by any fixed rules or standard; also, in a somewhat different sense, absolute in power, despotic, or tyrannical; harsh and unforbearing. When applied to acts, "arbitrary" has been held to connote a disregard of evidence or of the proper weight thereof; to express an idea opposed to administrative, executive, judicial, or legislative discretion; and to imply at least an element of bad faith, and has been compared with "willful".

18. There is no precise statutory or other definition of the term "arbitrary". In *Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors.* (AIR 1991 SC 537), this Court explained that the true import of the expression "arbitrariness" is more easily visualized than precisely stated or defined and that whether or not an act is arbitrary would be determined on the facts and circumstances of a given case. This Court observed:

> "The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The

question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."

19. Dealing with the principle governing exercise of official power *Prof. De Smith, Woolf & Jowell* in their celebrated book on *"Judicial Review of Administrative Action"* emphasized how the decision-maker invested with the wide discretion is expected to exercise that discretion in accordance with the general principles governing exercise of power in a constitutional democracy unless of course the statute under which such power is exercisable indicates otherwise. One of the most fundamental principles of rule of law recognized in all democratic systems is that the power vested in any competent authority shall not be exercised arbitrarily and that the power is exercised that it does not lead to any unfair discrimination. The following passage from the above is in this regard apposite:

"We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy. The courts presume that these

principles apply to the exercise of all powers and that even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles unless Parliament clearly indicates otherwise. One such principle, the rule of law, contains within it a number of requirements such as the right of the individual to access to the law and that power should not be arbitrarily exercised. The rule of law above all rests upon the principle of legal certainty, which will be considered here, along with a principle which is partly but not wholly contained within the rule of law, namely, the principle of equality, or equal treatment without unfair discrimination."

20. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

21. In the instant case the order passed by the competent authority does not state any reasons whatsoever for the cancellation of the typing test. It is nobody's case that any such reasons were set out even in any contemporaneous record or file. In the absence of reasons in support of the order it is difficult to assume that the authority had properly applied its mind before passing the order cancelling the test.

22. Mr. Malhotra's contention that the order was passed entirely on the basis of the complaint received from the

unsuccessful candidates is also of no assistance. The fact that some representations were received against the test or the procedure followed for the same could not by itself justify cancellation of the test unless the authority concerned applied its mind to the allegations levelled by the persons making the representation and came to the conclusion that the grievance made in the complaint was not without merit. If a test is cancelled just because some complaints against the same have been made howsoever frivolous, it may lead to a situation where no selection process can be finalized as those who fail to qualify can always make a grievance against the test or its fairness. What is important is that once a complaint or representation is received the competent authority applies its mind to the same and records reasons why in its opinion it is necessary to cancel the examination in the interest of purity of the selection process or with a view to preventing injustice or prejudice to those who have appeared in the same. That is precisely what had happened in *Dilbagh Singh's* case (supra). The examination was cancelled upon an inquiry into the allegations of unjust, arbitrary and dubious selection list prepared by the Selection Board in which the allegations were found to be correct. Even in Tarun K. Singh's case (supra) relied upon by *Mr. Malhotra* an inquiry into the complaints received against the selection process was conducted no matter after the cancellation of the examination. This Court in that view held that since the selection process was vitiated by procedural and other infirmities cancellation thereof was perfectly justified.

23. That is not, however, the position in the instant case. The order of cancellation passed by the competent authority was not preceded even by a prima facie satisfaction about the correctness of the allegations made by the unsuccessful candidates leave alone an inquiry into the same. The minimum that was expected of the authority was a due and proper application of mind to the allegations made before it and formulation and recording of reasons in support of the view that the competent authority was taking. There may be cases where

an enquiry may be called for into the allegations, but there may also be cases, where even on admitted facts or facts verified from record or an enquiry howsoever summary the same maybe, it is possible for the competent authority to take a decision, that there are good reasons for making the order which the authority eventually makes. But we find it difficult to sustain an order that is neither based on an enquiry nor even a prima facie view taken upon a due and proper application of mind to the relevant facts. Judged by that standard the order of cancellation passed by the competent authority falls short of the legal requirements and was rightly quashed by the High Court.

24. We may hasten to add that while application of mind to the material available to the competent authority is an essential pre-requisite for the making of a valid order, that requirement should not be confused with the sufficiency of such material to support any such order. Whether or not the material placed before the competent authority was in the instant case sufficient to justify the decision taken by it, is not in issue before us. That aspect may have assumed importance only if the competent authority was shown to have applied its mind to whatever material was available to it before cancelling the examination. Since application of mind as a thresh-hold requirement for a valid order is conspicuous by its absence the question whether the decision was reasonable having regard to the material before the authority is rendered academic. Sufficiency or otherwise of the material and so also its admissibility to support a decision the validity whereof is being judicially reviewed may even otherwise depend upon the facts and circumstances of each case. No hard and fast rule can be formulated in that regard nor do we propose to do so in this case. So also whether the competent authority ought to have conducted an enquiry into or verification of the allegations before passing an order of cancellation is a matter that would depend upon the facts and circumstances of each case. It may

often depend upon the nature, source and credibility of the material placed before the authority. It may also depend upon whether any such exercise is feasible having regard to the nature of the controversy, the constraints of time, effort and expense. But what is absolutely essential is that the authority making the order is alive to the material on the basis of which it purports to take a decision. It cannot act mechanically or under an impulse, for a writ court judicially reviewing any such order cannot countenance the exercise of power vested in a public authority except after due and proper application of mind. Any other view would amount to condoning a fraud upon such power which the authority exercising the same holds in trust only to be exercised for a legitimate purpose and along settled principles of administrative law.

25. The next question then is whether the selection should be finalized on the basis of the test held earlier or the matter allowed to be re-examined by the authority in the context of the representation received by it. In our opinion the latter course would be more in tune with the demands of justice and fairness especially when a second test has been conducted in which all the in service candidates have appeared. The result of this examination/test has not, however, been declared so far apparently because of the pendency of these proceedings. If upon due and proper consideration of the representation received from the candidates who were unsuccessful in the first examination, the competent authority comes to the conclusion that the test earlier held suffered from any infirmity or did not give a fair opportunity to all the candidates, it shall be free to pass a fresh order cancelling the said examination after recording such a finding in which event the second test conducted under the directions of the Tribunal would become the basis for the selection process to be finalized in accordance with law. In case, however, the authority comes to the conclusion that the earlier test suffered from no procedural or other infirmity or did not cause any prejudice to any candidate,

the second test/examination shall stand cancelled and the process of selection finalized on the basis of the test held earlier. The order passed by the High Court is to that extent modified and the present appeals disposed of leaving the parties to bear their own costs. In order to avoid any delay in the finalization of the process of appointments which have already been delayed, we direct that the competent authority shall pass an appropriate order on the subject expeditiously but not later than two months from today.

R.P. Appeals disposed of.

K. NAINA MOHAMED (DEAD) THROUGH LRS.

v.

A.M. VASUDEVAN CHETTIAR (D) BY LRS. & ORS.

(Civil Appeal No. 8365 of 2002)

JULY 7, 2010

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

Succession Act, 1925 – s. 114 – Rule against perpetuity – Execution of Will – Life interest given to two sisters and after their death absolute rights given to their male heirs – Restriction in the Will that alienation of the property was permitted only among the male heirs of the two sisters and not to strangers – In a compromise, partition of the property in equal shares among the descendants of two sisters – Thereafter, one of the sisters and her son selling the property to a stranger – Suit challenging the sale by descendants of other sister – Vendors and vendee challenging the restriction clause of the Will – Trial court decreeing the suit – Appeal by the purchaser allowed by appellate court – High Court restoring the decree – On appeal, held: The restriction in the Will is valid and does not violate rule against perpetuity – The restriction was in the nature of right of pre-emption – Purchaser having purchased the property in violation of the restriction, cannot challenge the validity of the Will – Will – Succession – Pre-emption.

Abatement – Abatement of appeal – Defendant-vendors of the property selling the property to defendant-vendee – Vendors not challenging the decree – Vendee alone filing appeal – Death of vendors during pendency of second appeal – Plea that appeal stood abated – Held: Since vendee was representing the estate of the deceased, in view of s. 2 (11) CPC second appeal cannot be treated as having abated – Moreover, the plea, having been raised for the first time before Supreme Court, cannot be allowed to be raised – Plea

– Code of Civil Procedure, 1908 – s. 2 (11) – Practice and Procedure.

The original owner of the suit property executed a Will creating life interest in favour of her two sisters 'S' and 'R' with a stipulation that after their death, their male heirs would acquire absolute rights in properties 'A' and 'B' respectively subject to the rider that they would sell the property to other sharers as per market value and not to strangers. After death of one of the sisters i.e. 'S', one of her sons filed a partition suit. The parties including 'R' and her son settled the matter out of court, whereby it was decided that sons of 'S' would divide the property 'A' amongst themselves and property 'B' would be absolute property of 'R' and her descendants.

Thereafter, 'R' and her son sold the property 'B' (suit property) to the appellant. Respondent Nos. 1 and 2, the descendants of 'S', filed a suit challenging the same. They pleaded that in view of restriction in the Will, the property should have been sold to them. 'R' and her son took the plea that Will was void as the same was against the 'rule against perpetuity' and the law of alienation. Appellant-purchaser also challenged the validity of the Will. Trial court held that clause 11 of the Will did not violate the rule against perpetuity and the same was valid, and thus decreed the suit. 'R' and her son did not challenge the decree. Appeal filed by the appellant-purchaser, challenging the decree was allowed by lower appellate court. It held that the suit was premature and that after creating absolute right in favour of her two sisters, the executant did not have the power to impose restriction on alienation of their respective shares. In second appeal, the decree passed by the trial court was restored by High Court.

In the instant appeal, the appellant-purchaser

contended that since 'R' and her son died during the pendency of the second appeal, the appeal stood abated because legal representatives of the deceased were not brought on record; that the restriction on the alienation of the property was to operate only within the respective branches and not on the male heirs of the other branch; that the restriction on the alienation was violative of the rule against perpetuity; and that in view of the compromise in the earlier suit, 'R' and her son became absolute owners of 'B' property and their rights cannot be restricted by the conditions enshrined in the Will.

Dismissing the appeal, the Court

HELD: 1.1. Neither the factum of death of 'R' and her son was brought to the notice of the Judge who decided the appeal nor any argument was made before him that the second appeal will be deemed to have abated on account of non-impleadment of the legal representatives of the deceased. The reason for this appears to be that 'R' and her son who had also signed the sale deed as one of the vendors did not challenge the judgment and decree of the trial court and only the appellant had questioned the same by filing an appeal. Son of 'R' did not even contest the second appeal preferred by respondent Nos.1 and 2. Before this Court, the issue of abatement has been raised but the memo of appeal is conspicuously silent whether such a plea was raised and argued before the High Court. Therefore, the appellant cannot be allowed to raise this plea for frustrating the right of respondent Nos.1 and 2 to question alienation of the suit property in violation of the restriction contained in clause 11 of the Will. [Para 14] [940-A-E]

1.2. The definition of the term 'legal representative' contained in Section 2(11) CPC also supports the plea that the second appeal cannot be treated as having abated because the appellant who had purchased the

property was representing the estate of the deceased. [Para 15] [941-B-D]

Mohd. Arif v. Allah Rabbul Alamin **AIR 1982 SC 948;** *Ghafoor Ahmad Khan v. Bashir Ahmed Khan* **AIR 1983 SC 123, relied on.**

State of Punjab v. Nathu Ram **AIR 1962 SC 89;** *Madan Naik v. Hansubala Devi* **AIR 1983 SC 676;** *Amba Bai v. Gopal* **(2001) 5 SCC 570;** *Amar Singh v. Lal Singh* **(1997) 11 SCC 570, distinguished.**

Haradhone v. Panchanan **AIR 1943 Calcutta 570;** *Umrao v. Kapuria* **AIR 1930 Lahore 651;** *Deokuer and Anr. v. Sheoprasad Singh and Ors.* **AIR 1966 SC 359, referred to.**

2.1. The restriction contained in clause 11 of the Will was not absolute inasmuch as alienation was permitted among male heirs of the two sisters. The object of incorporating this restriction was to ensure that the property does not go out of the families of the two sisters. The male heirs of the two sisters did not question the conditional conferment upon them of title of the properties. Therefore, the appellant who purchased 'B' property in violation of the aforesaid condition cannot be heard to say that the restriction contained in clause 11 of the Will should be treated as void because it violates the rule against perpetuity. [Para 20] [950-G-H; 951-A-B]

Ram Baran Prasad v. Ram Mohit Hazra **AIR 1967 SC 744;** *Shivji v. Raghunath* **1997 (10) SCC 309;** *Mohammad Raza and Ors. v. Mt. Abbas Bandi Bibi* **AIR 1932 PC 158, relied on.**

Re. MACLEAY **1875 M. 75, referred to.**

http : *//* www.lawcom.gov.uk – referred to.

2.2. Executor of the Will had indirectly conferred a

preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sisters. This was in the nature of a right of pre-emption which could be enforced by male heir of either sister in the event of sale of property by the male heir of other sister. If the term 'other sharers' used in clause 11 is interpreted keeping in view the context in which it was used in the Will, there can be no manner of doubt that it referred to male heirs of other sister. The only restriction contained in clause 11 was on alienation of property to strangers. The restriction which was meant to ensure that the property bequeathed does not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity evolved by the English Courts or the one contained in Section 114 of the Indian Succession Act, 1925. Thus the trial court and the High Court did not commit any error by relying upon clauses 10 and 11 of the Will for granting relief to respondent Nos.1 and 2. Since the intention of the testator was to impose a restriction on alienation of property, clauses 10 and 11 cannot be interpreted in a manner which would permit violation of that condition. [Paras 25 and 26] [959-G-H; 960-A-G]

Bishan Singh v. Khazan Singh **AIR 1958 SC 838;** *Zila Singh v. Hazari* **AIR 1979 SC 1066, relied on.**

3. It is not correct to say that in view of the compromise decree passed in the earlier suit, 'R' became owner of the property in her own right and respondent Nos.1 and 2 were not entitled to invoke the Will executed by 'R' for questioning the sale deed executed in favour of the appellant. The record of the case does not show that any such plea was raised in the written statement filed in the present suit. From the impugned judgment it is not clear that any such argument was raised before the High Court. Therefore, it is extremely doubtful that whether the appellant can be allowed to raise such a plea

first time before this Court. Moreover, for the reasons best known to him, the appellant did not produce before the trial court, copy of the compromise decree passed in the earlier suit and without going through the same, it is not possible to hold that 'R' had acquired independent right to sell the suit property to the appellant. [Para 27] [960-H; 961-A-C]

Case Law Reference:

AIR 1982 SC 948	**Relied on.**	**Para 15**
AIR 1983 SC 123	**Relied on.**	**Para 15**
AIR 1943 Calcutta 570	**Referred to.**	**Para 15**
AIR 1962 SC 89	**Distinguished.**	**Para 15**
AIR 1983 SC 676	**Distinguished.**	**Para 15**
2001 (5) SCC 570	**Distinguished.**	**Para 15**
1997 (11) SCC 570	**Distinguished.**	**Para 15**
AIR 1930 Lahore 65	**Referred to.**	**Para 15**
AIR 1967 SC 744	**Relied on.**	**Para 19**
1997 (10) SCC 309	**Relied on.**	**Para 19**
1875 M. 75	**Referred to.**	**Para 21**
AIR 1932 PC 158	**Relied on.**	**Para 22**
AIR 1958 SC 838	**Relied on.**	**Para 23**
AIR 1979 SC 1066	**Relied on.**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8365 of 2002.

From the final Judgment and Order dated 3.1.2001 of the High Court of Judicature at Madras in S.A. No. 360 of 1989.

S. Balakrishnan, Subramonium Prasad and Sree Narain Jha for the Appellants.

R. Sundaravaradhan, P.B. Suresh and Vipin Nair (for Temple Law firm) for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. This appeal is directed against the judgment of the learned Single Judge of Madras High Court, who allowed the second appeal preferred by respondent Nos.1 and 2 – A.M. Vasudevan Chettiar and A.M. Nagamian Chettiar, set aside the judgment of District Judge, Tiruchirappalli (hereinafter described as 'the lower appellate Court') and restored the decree passed by Subordinate Judge, Tiruchirappalli (hereinafter described as 'the trial Court') in a suit filed by them for directing Rukmani Ammal, her son, A.B.M. Ramanathan Chettiar and appellant – K. Naina Mohamed (defendant Nos.1 to 3 in the suit) to execute sale deed in their favour in respect of property bearing Municipal Door No.58, Walaja Bazaar Street, Woriur, Tiruchirapalli Town and Talluk (hereinafter described as, 'the suit property').

2. The suit property belonged to one Smt. Ramakkal Ammal wife of Pattabiraman of Uraiyur of Tiruchirapalli. She executed registered Will dated 22.9.1951 in respect of her properties and created life interest in favour of her two sisters, namely, Savithiri Ammal and Rukmani Ammal with a stipulation that after their death their male heirs will acquire absolute right in 'A' and 'B' properties respectively subject to the rider that they shall not sell the property to strangers. Clauses 4, 10 and 11 of the Will and details of 'A' and 'B' properties (English translation of the Will and details of the properties were made available by the learned counsel after conclusion of the arguments), which have direct bearing on the decision of this appeal read as under:

"(4) My sisters i) Savithri Ammal, wife of A.R. Manickam

Chettiar, residing at Madukkur, Pattukkottai Taluk, Thanjavur District and ii) Rukumani Ammal, wife of A.B. Muthukrishna Chettiar, residing at Bazaar Street, Karur, Karur Taluk shall inherit and enjoy House Properties detailed hereunder after my life during their lifetime without encumbering the same during their life time and receive the income therefrom equally among them after paying the taxes.

(10) After my lifetime if any one of my sisters die that sister's share of 'A' & 'B' mentioned properties shall go to the male heirs of the deceased person. After demise of both sisters, the male heirs of Savithiri Ammal shall obtain 'A' property in equal shares and the male heirs of Rukumani Ammal shall obtain 'B' property subject to conditions specified in clause 11 hereunder with absolute rights.

(11) As and when Savithiri Ammal's male heirs get and enjoy 'A' property and as and when Rukmani Ammal's heirs get and enjoy 'B' property, if any one of them wants to sell their share, they have to sell to the other sharers only as per the market value then prevailing and not to strangers.

'A' Property Details

The Terraced House with tiled Verandhas including open backyard with water pump and meter at Walaja Bazaar Street, Thamalvaru Bayamajar, Woriur, 3rd Block, A Ward, Puthur Circle, Tirchirapallai Town to the West of Bazaar lying North to South, to the North of 'B' Item Property hereunder and the backyard of Muthu Veerswami Chettiar to the East of Padmaji Lane and to the South of the House belonging to Krishnammal, wife of Venogopal Naidu bounded on the

NORTH BY : Survey No.2069

SOUTH BY : Survey No.2067

EAST BY : Survey No.2065 and

WEST : Survey No.2088

situate within the Registration District of Tirchirapalli and Sub-Registration District No.3 Joint Sub-Registrar.

'B' Property Details

Tiled House and vacant site on the above said Walaja Bazaar Street, bearing Municipal Door No.58 lying to the West of Bazaar lying South to North, to the North of House of Muthu Veerasami Chettiar, to the East the aboe Muthu Veerasami Chettiar's backyard, to the South 'A' item Property running 126 feet from East to West and 12 feet on the Eastern side from South to North and 8 feet on the Western Side from South to North comprised in T.S. No.2067"

3. Savithiri Ammal died in February 1979. After about two years, one of her three sons, namely, A.M. Krishnamurthy filed a suit (O.S. No.473 of 1981) for partition of his share in `A' property. He impleaded Rukmani Ammal as one of the defendants. The suit was disposed of in terms of the compromise arrived at between the parties, which envisaged that the plaintiff therein and his brothers will divide `A' property among themselves and `B' property will be the absolute property of Smt. Rukmani Ammal and her descendants.

4. Soon after disposal of O.S. No.473 of 1981, Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar executed registered sale deed dated 9.12.1982 in favour of the appellant in respect of the suit property. Respondent Nos.1 and 2 challenged the same in O.S. No.226 of 1983. They pleaded that in view of the restriction embodied in clause 11 of the Will, Rukmani Ammal and her son could not have sold the property to a stranger. They prayed that the sale deed be declared void and defendants in the suit be directed to execute sale deed in their favour.

5. Rukmani Ammal and her son contested the suit by asserting that the Will executed by Ramakkal Ammal did not obligate them to sell the property to the plaintiffs; that clause 11 of the Will was liable to be treated as void because the same was against the rule against perpetuity and the law of alienation; that Rukmani Ammal was in need of money for maintaining herself and, therefore, her son gave up his right in the suit property facilitating alienation thereof in favour of K. Naina Mohamed. They further pleaded that before executing the sale deed, an offer was made to the plaintiffs to purchase the suit property but they refused to do so.

6. In a separate written statement filed by him, appellant – K. Naina Mohamed pleaded that the Will did not provide for joint possession and enjoyment of the properties by two sisters and that clause 11 of the Will cannot be relied upon by the plaintiffs for claiming pre-emption. He also questioned the legality of the restriction contained in clause 11 of the Will on alienation of the property to the strangers by asserting that the said clause violated the rule against perpetuity.

7. Respondent No.1 examined himself as P.W.1 and one Srinivasan as P.W.2 and produced nine documents which were marked as Exhibits A1 to A9. Rukmani Ammal and her son neither appeared in the witness box nor produced any documentary evidence. Appellant K. Naina Mohamed examined himself as D.W.1 and one Thangavel as D.W.2, but he did not produce any document.

8. The trial Court negatived the appellant's challenge to the Will by observing that being a purchaser from one of the legatees, he does not have the locus to question legality of the Will. The trial Court held that clause 11 is valid and binding on the legatees and it does not violate the rule against perpetuity. The trial Court further held that K. Naina Mohamed had

purchased the property with notice of the clause relating to pre-emption and as such he is bound by the same.

9. Rukmani Ammal and her son did not challenge the judgment and decree of the trial Court but the appellant did so by filing an appeal. The lower appellate Court agreed with the trial Court that the appellant before it was not entitled to challenge the Will but opined that the restriction contained in clause 11 of the Will was void and not binding on Rukmani Ammal and her son. The learned lower appellate Court referred to the judgments of Allahabad and Oudh High Courts in *Askar Begum v. Moula Butch* AIR 1923 All 381 and *Doss Singh v. Gupchand* AIR 1921 Oudh 125 and held that after creating absolute right in favour of male heirs of her two sisters, the executant did not have the power to impose restriction on alienation of their respective shares. The learned lower appellate Court also referred to the judgment of this Court in *Rukmanbai v. Shivaram* AIR 1981 SC 1881 and held that the suit filed by two sons of Savithiri Ammal was pre-mature.

10. Respondent Nos.1 and 2 challenged the appellate decree in Second Appeal No.360/1989. While admitting the appeal, the High Court framed the following substantial question of law:

> "Whether the first appellate court is correct in holding that the restriction, namely the pre-emption clause in the Will is not valid?"

11. The learned Single Judge analysed the pleadings and evidence of the parties, referred to clauses 10 and 11 of the Will and held that the restriction contained therein does not violate the rule against perpetuity. He rejected the appellants' plea that right of pre-emption was not available to respondent Nos.1 and 2 against Rukmani Ammal and restored the decree passed by the trial Court.

12. Shri S. Balakrishnan, learned senior counsel appearing

for the appellant made three fold arguments. Learned senior counsel pointed out that Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar died during the pendency of the second appeal before the High Court and argued that the same stood automatically abated because legal representatives of the deceased were not brought on record. Shri Balakrishnan relied upon the judgments of this Court in *State of Punjab v. Nathu Ram* AIR 1962 SC 89, *Deokuer and another v. Sheoprasad Singh and others* AIR 1966 SC 359, *Madan Naik v. Hansubala Devi* AIR 1983 SC 676, *Amar Singh v. Lal Singh* (1997) 11 SCC 570, *Amba Bai v. Gopal* (2001) 5 SCC 570 and *Umrao v. Kapuria* AIR 1930 Lahore 651 and argued that the High Court committed serious error by granting relief to respondent Nos.1 and 2 without insisting on the impleadment of the legal representatives of Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar. Learned senior counsel further argued that the restriction contained in clause 11 on alienation of the property was to operate only within the respective branches and it was not obligatory for the male heirs of one branch to sell the property to the male heirs of the other branch. An alternative argument made by learned senior counsel is that the restriction contained in clause 11 of the Will against alienation of the property is ex facie violative of the rule against perpetuity and the trial Court and the High Court committed serious error by relying upon the same for the purpose of nullifying the sale deed executed by Rukmani Ammal and her son A.B.M. Ramanathan Chettiar. The last argument of the learned senior counsel is that in view of the compromise arrived at between the parties in OS No.473 of 1981, Rukmani Ammal and her son became absolute owner of 'B' property and their rights cannot be regulated or restricted by the conditions enshrined in the Will.

13. Shri R. Sundaravaradhan, learned senior counsel appearing for the respondents supported the impugned judgment and argued that the appellant is not entitled to seek a declaration that the second appeal filed by respondent Nos.1

and 2 stood abated on account of non-impleadment of the legal representatives of Rukmani Ammal and her son, who died during the pendency thereof. Learned senior counsel submitted that rules contained in Order XXII of the Code of Civil Procedure are required to be interpreted liberally so as to avoid abatement of the pending matters. He then argued that the second appeal did not abate on account of death of Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar because in terms of the Will executed by Smt. Ramakkal Ammal, Rukmani Ammal got life interest only and her son, who became absolute owner neither challenged the decree passed by the trial Court nor contested the second appeal. Learned counsel then referred to the definition of term 'legal representatives' contained in Section 2(11) of the Code of Civil Procedure and argued that the appellant, who had purchased the suit property will be deemed to be legal representative of the deceased because he represented their estate. In support of this argument, Shri Sundaravaradhan relied upon the judgments of this Court in *Mohd. Arif v. Allah Rabbul Alamin* AIR 1982 SC 948 and *Ghafoor Ahmad Khan v. Bashir Ahmed Khan* AIR 1983 SC 123. Learned senior counsel submitted that the restriction contained in clause 11 of the Will was not absolute inasmuch as it was open to the male heirs of Savithiri Ammal and Rukmani Ammal to transfer the property within the family. Learned counsel placed strong reliance on the judgments of the Privy Council in *Mohammad Raza and others v. Mt. Abbas Bandi Bibi* AIR 1932 PC 158 and of this Court in *Ram Baran Prasad v. Ram Mohit Hazra* AIR 1967 SC 744 and *Zila Singh v. Hazari* AIR 1979 SC 1066 and emphasized that the object of the restriction on alienation of the properties to strangers was to protect the interest of the family and there was no violation of the rule against perpetuity.

14. We have considered the respective submissions and perused the records. We shall first deal with the question whether the second appeal filed by respondent Nos.1 and 2 stood abated due to their alleged failure to bring on record the

legal representatives of Rukmani Ammal and her son A.B.M. Ramanathan Chettiar, who died on 23.6.1989 and 21.6.1995 respectively i.e. much before the disposal of the second appeal. A reading of the judgment under challenge shows that neither the factum of death of Rukmani Ammal and her son was brought to the notice of the learned Judge who decided the appeal nor any argument was made before him that the second appeal will be deemed to have abated on account of non impleadment of the legal representatives of the deceased. The reason for this appears to be that Rukmani Ammal and her son A.B.M. Ramanathan Chettiar, who had also signed the sale deed as one of the vendors did not challenge the judgment and decree of the trial Court and only the appellant had questioned the same by filing an appeal. A.B.M. Ramanathan Chettiar did not even contest the second appeal preferred by respondent Nos.1 and 2. Before this Court, the issue of abatement has been raised but the memo of appeal is conspicuously silent whether such a plea was raised and argued before the High Court. Therefore, we do not think that the appellant can be allowed to raise this plea for frustrating the right of respondent Nos.1 and 2 to question alienation of the suit property in violation of the restriction contained in clause 11 of the Will. Here, it is necessary to mention that by virtue of the Will executed by her sister, Rukmani Ammal got only life interest in the property of the testator and her male heir, A.B.M. Ramanathan Chettiar got absolute right after her death. Therefore, during her life time, Rukmani Ammal could not have sold the property by herself. This is the precise reason why she joined her son in executing the sale deed in favour of the appellant. If an objection had been taken before the High Court that legal representatives of A.B.M. Ramanathan Chettiar have not been brought on record, an order could have been passed under Rule 4 of Order XXII which reads as under:

> "The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written

statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

15. The definition of the term 'legal representative' contained in Section 2(11) of the Code of Civil Procedure also supports the argument of the learned counsel for the respondents that the second appeal cannot be treated as having abated because the appellant who had purchased the property was representing the estate of the deceased. In *Mohd. Arif v. Allah Rabbul Alamin* (supra), this Court considered a somewhat similar issue and held as under:

"It is true that the appellant did not prefer any appeal to the District Court against the original decree but in the first appeal he was a party respondent. But that apart, in the second appeal itself Mohammad Arif had joined as co-appellant along with his vendor, Mohammad Ahmed. *On the death of Mohammad Ahmed all that was required to be done was that the appellant who was on record should have been shown as a legal representative inasmuch as he was the transferee of the property in question and at least as an intermeddler was entitled to be treated as legal representative of Mohammad Ahmed. He being on record the estate of the deceased appellant qua the property in question was represented and there was no necessity for application for bringing the legal representatives of the deceased appellant on record.* The appeal in the circumstances could not be regarded as having abated and Mohammad Arif was entitled to prosecute the appeal."

(emphasis supplied)

In *Ghafoor Ahmad Khan v. Bashir Ahmed Khan* (supra),

this Court reversed the order of Allahabad High Court which had dismissed the second appeal preferred by the appellant as having abated on the ground of non-impleadment of the heirs of the sole respondent by observing that during his life time, the respondent had transferred the property (subject matter of appeal) to his wife by way of gift and as such the case would fall under Order XXII Rule 10 CPC.

Reference may also be made to the Division Bench judgment of Calcutta High Court in *Haradhone v. Panchanan* AIR 1943 Calcutta 570. That was a case under Bengal Tenancy Act, 1885. The proprietor of the land, Sir Bejoy Chand Mehtab filed suit for settlement of rent in respect of the tenure. The defendants contested the suit by saying that the lands constituted their niskar holding and that the same were wrongly recorded as liable to be assessed to rent under the plaintiff. The Assistant Settlement Officer decreed the plaintiff's claim. He held that the tenancy was not a niskar one and it was liable to be assessed to rent. Learned special Judge, who heard the appeal preferred by the defendants' confirmed the finding recorded by the Assistant Settlement Officer on the issue of nature of the property but set aside the decree so far as it settled the amount of rent and remanded the case to the Assistant Settlement Officer. Learned special Judge also held that the defendants were no longer in possession of the suit land. The defendants challenged the appellate judgment by filing an appeal before the High Court. During the pendency of the appeal, the plaintiff granted a putni, which included the suit lands to Panchanan Palit. The putnidar applied for impleadment as a party in the appeal and his prayer was granted. Thereafter, the original plaintiff died, but no substitution was made in his place. It was argued before the High Court that the appeal abated against the plaintiff because his legal representatives were not brought on record. The Division Bench of the High Court held that after giving up the estate in a permanent putni lease, the proprietor of the estate ceased to be the landlord of

all subordinate tenures and he did not have the right to institute a proceeding under Section 105 of the Act. The High Court then referred to Order XXII Rules 2 and 10 and held as under:

> "The position of the parties after the creation of the putni in this case therefore became as follows: *(1) The putni having been created pendente lite the defendants-appellants were entitled to prosecute their appeal as against the plaintiff Maharaja alone ignoring the transfer pendente lite; the transferee pendente lite would have have been bound by the ultimate result of the litigation. (2) The defendants-appellants were entitled also to bring on record the transferee pendente lite under Order 22, R.10, Civil P.C., in the place of the Maharaja plaintiff-respondent; (3) Had the proceedings been instituted after the creation of the putni, the Maharaja plaintiff would not have been competent to institute the proceeding under S. 105 of the Act. This shows that the interest of the plaintiff involved in the suit came to or devolved upon the holder of the putni within the meaning of O. 22, rule 10, C.P.C, (4) The relief awarded by the decree appealed from was that the tenancy was not a rent free one but was liable to assessment of rent; and this being the nature of the relief involved in the appeal, it was the immediate landlord having permanent interest who was vitally concerned with it, and not the superior landlord who had permanently leased out his interest. In our opinion, therefore, the right to appeal survived the deceased plaintiff and it did survive against the putnidar respondent alone within the meaning of order 22, rule 2, C.P.C. We, therefore, hold that the appeal is competent without the legal representative of the deceased Maharaja being brought on the record."*
>
> (emphasis supplied)

The judgments on which reliance has been placed by Shri Balakrishnan are clearly distinguishable. In *State of Punjab v.*

Nathu Ram (supra), this Court held that where the appeal preferred by the State Government against an award passed by the arbitrator under the Land Acquisition Act in favour of two brothers stood abated against one brother on account of non-impleadment of his legal representatives, the same did not survive against the other brother because the award was joint and indivisible. After taking note of the provisions contained in Order XXII Rule 4 and Order I Rule 9, the Court observed:

> "(6) The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."

In *Madan Naik v. Hansubala Devi* (supra), this Court was called upon to consider the correctness of an order passed by

the learned Single Judge of Patna High Court who set aside dismissal of an application made by the appellant in the matter of abatement of the appeal and remitted the matter to the lower appellate Court for disposal of the appeal on merits. While approving the order of the learned Single Judge, this Court referred to Order XXII Rules 4 and 11 CPC and observed:

> "Order 22 Rule 11 of the Code of Civil Procedure read with Order 22 Rule 4 makes it obligatory to seek substitution of the heirs and legal representatives of deceased respondent if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought the appeal will abate. Sub-rule (2) of Rule 9 of Order 22 enables the party who is under an obligation to seek substitution to apply for an order to set aside the abatement and if it is proved that he was prevented by any sufficient cause from continuing the suit which would include an appeal, the court shall set aside the abatement. Now where an application for setting aside an abatement is made, but the court having not been satisfied that the party seeking setting aside of abatement was prevented by sufficient cause from continuing the appeal, the court may decline to set aside the abatement. Then the net result would be that the appeal would stand disposed of as having abated. It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of Order 22 is envisaged; the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under Order 22 Rule 9 CPC for setting aside the abatement."

In *Amba Bai v. Gopal* (supra), this Court considered whether non impleadment of the legal representatives of the defendant in a suit for specific performance was sufficient to deny them right to contest the matter at the stage of execution. The facts of that case were that the suit filed by Laxmi Lal for specific performance against one Radhu Lal was dismissed

by the trial Court but was decreed by the appellate Court. During the pendency of the second appeal preferred by Radhu Lal, plaintiff Laxmi Lal died and his legal representatives were brought on record. However, the legal representatives of Radhu Lal who too died before the dismissal of the appeal were not brought on record and this fact was not brought to the notice of the High Court. When the legal representatives of Laxmi Lal filed execution case against the legal representatives of Radhu Lal, an objection was raised on the latter's behalf that the judgment rendered by the High Court was nullity. The trial Court rejected the objection. The revision preferred by the legal representatives of Radhu Lal was allowed by the High Court and it was held that the decree passed in the second appeal was a nullity as it had been passed against a dead person. The High Court accepted the theory of merger and ruled that the execution proceedings were liable to be dismissed. This Court reversed the order of the High Court and held:

> "In the instant case, there is no question of the application of the doctrine of merger. As the second appellant Radhu Lal died during the pendency of the appeal, and in the absence of his legal heirs having taken any steps to prosecute the second appeal, the decree passed by the first appellate court must be deemed to have become final. By virtue of the order passed by the first appellate court, the plaintiff's suit for specific performance was decreed. Failure on the part of the legal heirs of Radhu Lal to get themselves impleaded in the second appeal and pursue the matter further shall not adversely affect the plaintiff decree-holder as it would be against the mandate of Rule 9 Order 22 of the Code of Civil Procedure. The impugned order is, therefore, not sustainable in law and the same is set aside and the appeal is allowed. The executing court may proceed with the execution proceedings."

In *Amar Singh v. Lal Singh* (supra), this Court held that where more than one person was entitled to property covered

under the Will, the relief is joint and inseparable and if the appeal stood abated against the first respondent, the same shall stand abated against the remaining respondents as well. In *Umrao v. Kapuria* (supra), the learned Single Judge of Lahore High Court held that where legal representatives of the successful plaintiff were not brought on record, the whole appeal stood abated.

16. In none of the aforementioned cases, a question similar to the one raised in this appeal was examined and decided. Therefore, the proposition laid down therein cannot be made basis for declaring that the second appeal preferred by respondent Nos.1 and 2 stood automatically abated due to non-impleadment of the legal representatives of Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar, despite the fact that the appellant, who represented the estate of the deceased in his capacity as a purchaser had not only challenged the judgment of the trial Court by filing an appeal but also contested the second appeal.

17. The next issue which needs consideration is whether the restriction enshrined in clause 11 of the Will executed by Ramakkal Amal can be declared as void on the ground that it violates the rule against perpetuity. This rule has its origin in the Duke of Norfolk's case of 1682. That case concerned Henry, 22nd Earl of Arundel, who had tried to create a shifting executory limitation so that one of his titles would pass to his eldest son (who was mentally deficient) and then to his second son, and another title would pass to his second son, but then to his fourth son. The estate plan also included provisions for shifting the titles many generations later, if certain conditions were to occur. When the second son, Henry, succeeded to one title, he did not want to pass the other to his younger brother, Charles. The latter sued to enforce his interest. The House of Lords held that such a shifting condition could not exist indefinitely and that tying up property too long beyond the lives of people living at the time was wrong. In England, the rule

against perpetuity was codified in the form of the Perpetuities and Accumulations Act, 1964 and in the latest report of the British Law Commission, a new legislation has been recommended. (http://www.lawcom.gov.uk)

18. In India, the rule against perpetuity has been incorporated in Section 114 of the Indian Succession Act, 1925 which reads thus:

> "114. *Rule against perpetuity.*– No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

However, as will be seen hereinafter, the principle enshrined in the aforesaid section does not have any bearing on this case.

19. In *Ram Baran Prasad v. Ram Mohit Hazra* (supra), this Court considered whether covenant of pre-emption contained in an arbitration award violates the rule against perpetuity and whether the same is binding on assignees or successor-in-interest of the original contracting parties. The factual matrix of that case was that two brothers, Tulshidas Chatterjee and Kishorilal Chatterjee owned certain properties in the suburbs of Calcutta. In 1938, Kishorilal sued for partition of the properties. The matter was referred to arbitration. The arbitrators gave award, which was made rule of the court. Under the award, two of the four blocks into which the properties were divided by the arbitrators were allotted to Tulshidas and the remaining two blocks to Kishorilal. In the award there was a clause to the following effect:

> "We further find and report with the consent of and approval of the parties that any party in case of disposing

> or transferring any portion of his share, shall offer preference to the other party, that is each party shall have the right of pre-emption between each other."

After the arbitration award became rule of the court, Tulshidas sold some of the portion of his properties to Nagendra Nath Ghosh. This was done after Kishorilal refused to pre-empt the same. Later on, Kishorilal sold his two blocks to Rati Raman Mukherjee and others. The Mukherjees sold the property to the plaintiff-respondents. Nagendra Nath also sold the property to defendant No.1. Thereupon, the plaintiffs filed suit for pre-empting the transaction between Nagendra Nath Ghosh and defendant No.1. The trial Court held that the covenant of pre-emption was not hit by the rule against perpetuities and was enforceable against the assignees of the original parties to the contract. Accordingly, a decree was granted to the plaintiffs. The defendants took the matter in appeal to the Calcutta High Court which was dismissed. Before this Court, it was argued that the covenant for pre-emption was merely a personal covenant between the contracting parties and was not binding against successors-in-interest or the assignees of the original parties to the contract. While rejecting the argument, the Court referred to various clauses of the award and observed:

> "It is obvious that in these clauses expression "parties" cannot be restricted to the original parties to the contract but must include the legal representatives and assignees of the original parties and there is no reason why the same expression should be given a restricted meaning in the pre-emption clause."

The Court then considered whether covenant of pre-emption offends the rule against perpetuities and is, therefore, void and not enforceable. After noticing the definition of "perpetuity" given by Lewis, the Court held that the rule against perpetuity concerns rights of property only and does not affect the making of contracts which do not create interest in property. The Court then referred to Sections 14 and 54 of the Transfer

of Property Act and observed as under:

> "The rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because Section 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

The Court further held that the covenant of pre-emption was not violative of the rule against perpetuity and could not be declared as void.

The same view was reiterated in *Shivji v. Raghunath* (1997) 10 SCC 309. In that case, the Court found that the restriction contained against alienation of the property was not absolute and held that the same was not violative of the rule against perpetuity. After noticing the ratio of the judgment in *Ram Baran Prasad v. Ram Mohit Hazra* (supra), the Court held:

> "……when a contract has been executed in which no interest in praesenti has been created, the rule of perpetuity has no application. As a result, the agreement is in the nature of a pre-emptive right created in favour of the co-owner. Therefore, it is enforceable as and when an attempt is made by the co-owner to alienate the land to third parties."

20. Reverting to the case in hand, we find that by executing Will dated 22.9.1951, Smt. Ramakkal Ammal created life interest in favour of her two sisters with a stipulation that after their death, their male heirs will acquire absolute right in 'A' and 'B' properties respectively subject to the condition that if either of them want to sell the property then they shall have to sell it to other sharers only as per the prevailing market value and not to strangers. The restriction contained in clause 11 was not absolute inasmuch as alienation was permitted among male heirs of the two sisters. The object of incorporating this

restriction was to ensure that the property does not go out of the families of the two sisters. The male heirs of Savithri Ammal and Rukmani Ammal did not question the conditional conferment upon them of title of the properties. Therefore, the appellant who purchased 'B' property in violation of the aforesaid condition cannot be heard to say that the restriction contained in clause 11 of the Will should be treated as void because it violates the rule against perpetuity.

21. In re. MACLEAY 1875 M. 75, a similar question was considered and answered in negative. The facts of that case were Margarette Mayers, by her will, after a gift to her brother Henry on condition that he settled it on his wife and children, and the gift of a like sum to his sisters, made the following devise:-

> "I give to my dear brother John the whole of the property given to me by my dear aunt Clara Perkins, consisting of the manor of Bletchingley, in the county of Surrey, and the Pendell Court Mansion, with the land belonging to it, on the condition that he never sells it out of the family."

The testatrix then gave legacies to her nephews and nieces named in the Will, and after a legacy to a servant, gave the residue of her estate and effects to her "dear brothers" and "dear sisters." John Perkins Mayers, the devisee under the Will contracted with Sir George Macleay for the sale to him of the property comprised in the devise, with a proviso that the intending purchaser should be at liberty to apply for registration of the hereditaments in the Office of Land Registry, and that in the event of its being found impossible to obtain such registration, the contract should be void. In the course of investigation of the title, a doubt arose whether in view of the condition enshrined in the Will, a marketable title existed in favour of the vendor. The Registrar made a reference to the Court under Section 6 of the Transfer of Land Act. It was suggested that the restriction contained in the Will was void being repugnant to the quality of the estate. Sir G. Jessel, M.R.

referred to several earlier judgments and observed:

> "The law on the subject is very old, and I do not think it can be better stated that it is in Coke upon Littleton, in Sheppard's Touchstone, and other books of that kind, which treat it in the same way. Littleton says (1): "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Then he says (2): "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." So that, according to Littleton, the test is, does it take away all power of alienation? I think it is fair to make one remark, which is made in the case of Muschamp v. Bluet (3), cited in Jarman on Wills (4), and adopted by Lord Romilly in the case I am going to refer to, of Attwater v. Attwater (5) – that it must not, in fact, take away all power, because, if you say that he shall not alien except to A. B., who you know will not or cannot purchase, that would be in effect restraining him from all alienation, and, as is very well said in many cases, and is said in a passage in Coke to which I am about to refer, you cannot do that indirectly which you can do directly. I had occasion to refer, in the case of Jacobs v. Brett (6), to a practice which was said to prevail in the Court of Common Pleas, and where I said it never could have been considered by that Court as being intended as the infringement of so salutary a rule. The condition, therefore, whatever it may be must not really take away all power, either by express words or by the indirect effect of the frame of the condition. That is the effect of the

rule as laid down by Littleton. Then Coke says (1): "If a feoffment in fee be made upon condition that the feoffee shall not infeoff J. S. or any of his heirs, or issues, & e. this is good, for he doth not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. An in this case, if the feoffee infeoof J. N. of intent and purpose that he shall infeoof J. S., some hold that this is a breach of the condition, for quando aliquid prohibetur fieri, ex director prohibetur et per obliquum." That was Coke's notion: and I hope it has not altogether departed from our Courts. Then he says: "If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law may be prohibited by condition, be it malum prohibitum or malum in se," and there he stops.

So that, according to the old books, Sheppard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form.

Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the

sense of there being only one persons to buy; the will shews there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restrain on alienation, and unless Coke upon Littleton has been overruled or is not good law, this is a good condition.

It is said that the very point occurred in *Doe v. Pearson* (1) and *Attwater v. Attwater* (2), and it appears to me that the point did occur in both those cases. In Doe v. Pearson the gift was a gift in fee upon this special proviso and conditions, "that in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children." Here it is "family", which is a larger term. In the next place, here it is "sell" only, there it was "dispose", which is probably the largest term known to the law. So that the power of alienation was very much more restricted in Doe v. Pearson than it is in the case before me. But the full Court there held, after a very long and elaborate argument, Lord Ellenborough giving judgment and going into the authorities very carefully, that the condition was good; and he says (3): "As to the first, we think the condition is good; for, according to the case of Daniel v. Ubley (4), though the Judges did not agree as to the effect of a devise", and so forth, "yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken." Now

that is a stronger case still; because, as Lord Ellenborough and the other Judges of the Queen's Bench read Daniel v. Ubley (1), all the Judges agreed, n the time of Sir W. Jones, that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else; it was limited. There Mr. Justice Doderidge said (2) "He conceived she had the fee, with condition, that if she did alien, that then she should alien to one of the children," which is a very limited class; and he finally concluded by saying that "her estate was a fee with a liberty to alienate it if she would, but with a condition that if she did alienate, the she should alienate to one of her sons." So that the case of Daniel v. Ubley is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the Judges gave an opinion that it would be good, and following that old authority, Lord Ellenborough and the Judges of the Queen's Bench, in Doe v. Pearson (3), in the year 1805, held that the condition was valid.

Now taking that altogether, seeing that he has no quarrel with Doe v. Pearson (2), seeing that he takes it that Coke's assertion is good law, the key to that judgment must be found in the latter observations, where he says: "It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale;" and, so read, it does not conflict with the older authorities to which I have had occasion to refer. I must consider that case, recognizing, as it does, those older authorities as being good law, to have proceeded on the particular wording of that will, and more especially on the latter clause. I do not say that the clause does have the same effect on my mind that it had upon the mind of my

predecessor; but still it is useless to criticize a question of construction when you come to the conclusion that the Judge is intending not to lay down a new rule of law, but is simply construing the particular instrument before him.

Therefore, I consider that the case of *Attwater v. Attwater* (3) does not affect the law of the case, and that this being a limited restriction upon alienation, the condition is good."

(emphasis supplied)

22. In *Mohammad Raza and others v. Mt. Abbas Bandi Bibi* (supra), the Privy Council confirmed the judgment of the Chief Court of Oudh which had ruled that when a person is allowed to take property under a conditional family arrangement, he cannot be heard to complain against the restriction on alienation of the property outside the family. The appellant before the Privy Council was a purchaser of the property belonging to Smt. Sughra Bibi which she got in furtherance of compromise arrived at between the parties in a suit brought against her cousin. The Privy Council held that even though it may not be possible to hold that Sughra Bibi took nothing more than a life estate, the restriction against alienation to strangers was valid. The relevant portions of that judgment are extracted below:

"……But assuming in the appellants' favour that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to "a stranger". Their Lordships have no doubt that "stranger" means anyone who is not a member of the family, and the appellants are admittedly strangers in this sense. Unless therefore this restriction can for some reason be disregarded, they have no title to the properties which can prevail against the respondent.

On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that Raghunath Prasad Singh's case (1) is of no assistance to the appellants, for there the restriction against alienation was absolute and was attached to a gift by will. It is in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them.

The law by which this question must be judged is their Lordships think prescribed by S.3, Oudh Laws Act, 1876, and failing the earlier clauses of the section which seem to have no application, "the Courts shall act according to justice, equity and good conscience," which has been adopted as the ultimate test for all the provincial Courts in India. Is it then contrary to justice, equity and good conscience to hold an agreement of this nature to be binding? Judging the matter upon abstract grounds, their

Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title, through a direct breach of this agreement, could hardly support their claim by an appeal to those high sounding principles and it must be remembered in this connection that family arrangements are specially favoured in Courts of equity. But apart from this it seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer inter vivos, be regarded as repugnant: see S.10 of the Act. In view of the terms of this section, and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience."

(emphasis supplied)

23.We may now notice two judgments in which the nature of the right of pre-emption has been considered. In *Bishan Singh v. Khazan Singh* AIR 1958 SC 838, this Court while interpreting the provisions of Punjab Pre-Emption Act, 1913 referred to the judgment of Mahmood J., in Gobind Dayal v. Inayatullah ILR 7 Allahabad 775 and summed up law relating to right of pre-emption in the following words:

"(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the

property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

24. In *Zila Singh v. Hazari* (supra), this Court again considered the nature of the right of pre-emption under the Punjab Act and observed:

"…….. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statute. In other words, the statutory right of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt."

25. In the light of the above, we shall now consider whether clause 11 of the Will executed by Smt. Ramakkal Ammal is violative of the rule against perpetuity. If that clause is read in conjunction with clauses 4 and 10 of the Will, it becomes clear that two sisters of the testator, namely, Savithiri Ammal and Rukmani Ammal were to enjoy house properties jointly during their life time without creating any encumbrance and after their death, their male heirs were to get the absolute rights in 'A' and 'B' properties. The male heirs of two sisters could alienate their respective shares to other sharers on prevailing market value. It can thus be said that Smt. Ramakkal Ammal had indirectly conferred a preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sisters. This was in the nature of a right of pre-emption which could be enforced by male heir of either sister in the event of sale of property by the male heir of other sister. If the term 'other

sharers' used in clause 11 is interpreted keeping in view the context in which it was used in the Will, there can be no manner of doubt that it referred to male heirs of other sister. The only restriction contained in clause 11 was on alienation of property to strangers. In our view, the restriction which was meant to ensure that the property bequeathed by Smt. Ramakkal Ammal does not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity evolved by the English Courts or the one contained in Section 114 of the Indian Succession Act, 1925. As a corollary, we hold that the trial Court and the High Court did not commit any error by relying upon clauses 10 and 11 of the Will for granting relief to respondent Nos.1 and 2.

26. The argument of the learned counsel for the appellants that the restriction enshrined in clause 11 was limited to the shares of the male heirs of two sisters sounds attractive in the first blush but a careful and conjoint reading of clauses 4, 10 and 11 makes it clear that the testator had intended to prevent transfer of property to anyone other than the heirs of her two sisters. In terms of clause 4, the two sisters were to enjoy the house property jointly without encumbering the same during their lifetime. After their death, the male heirs of Savithri Ammal were to get 'A' property in equal shares and male heirs of Rukmani Ammal were to get 'B' property subject to the condition specified in clause 11 which envisages that in case of alienation, the male heirs of either sister had to sell the property to other sharers as per the prevailing market value and not to strangers. Since the intention of the testator was to impose a restriction on alienation of property, clauses 10 and 11 cannot be interpreted in a manner which would permit violation of that condition.

27. We also do not find any substance in the argument of Shri Balakrishnan that in view of the compromise decree passed in O.S. No.473/1981, Rukmani Ammal became owner of the property in her own right and respondent Nos.1 and 2

were not entitled to invoke the Will executed by Smt. Ramakkal Ammal for questioning the sale deed executed in favour of the appellant. The record of the case does not show that any such plea was raised in the written statement filed in O.S. No.226/1983. From the impugned judgment it is not clear that any such argument was raised before the High Court. Therefore, it is extremely doubtful that whether the appellant can be allowed to raise such a plea first time before this Court. Moreover, for the reasons best known to him, the appellant did not produce before the trial Court, copy of the compromise decree passed in O.S. No.473/1981 and without going through the same it is not possible to hold that Rukmani Ammal had acquired independent right to sell the suit property to the appellant.

28. In the result, the appeal is dismissed. However, the parties are left to bear their own costs.

K.K.T. Appeal dismissed.

M/S. RASHTRIYA CHEMICALS & FERTILIZERS LTD.
v.
M/S. CHOWGULE BROTHERS & ORS.
(Civil Appeal No. 5286 of 2006)

JULY 7, 2010

[AFTAB ALAM AND T.S. THAKUR, JJ.]

Contract –Work contract – Initially granted for one year – Extendable on the same terms and conditions except the statutory increase in the wages of dock labourers – Extension of contract – Contractor claiming enhanced amount on account of escalation by statutory increase in the wages of labourers during the extended period of contract – It also claimed an amount towards final payment due and payable – Arbitrators by majority decision allowed the claim of contractor – Single Judge of High Court setting aside the award – Division Bench upholding the award – Held: Contractor was not entitled to the claim on account of escalation due to statutory increase in wages of laboureres – The relevant clause of the contract did not envisage escalation on the basis of the revision post commencement of the extended period – Arbitrators have no jurisdiction to make an award against the specific terms of the contract – However, contractor is entitled to the claim towards final payment – Arbitration.

Appellant-Company invited tenders initially for a period of one year (from 15.1.1983 to 14.1.1984). As per Clause 2.03 of the Tender Notice, the contract was extendable at the option of the appellant for a further period of one year on the same terms and conditions except statutory increases in the wages of Dock Labourers.

Respondent's tender was accepted by appellant and

work was granted for the period ending on 14.1.1984. In October, 1983, the appellant in terms of Clause 2.03 extended the contract for a further period of one year ending on 14.1.1985. The extension was accepted by the respondent-company asking the appellant to consider the revised wages of the Dock Labourers, which came about during the period of one year. Appellant replied that Clause 2.03 provided for considering increases on account of statutory revisions made upto 15.1.1984 and not the increase under negotiations or those granted at a later date with retrospective effect. It called upon the respondent-company on such basis to furnish documentary evidence regarding increase in wages upto 15.1.1984.

The dispute was referred to a panel of three arbitrators. Two awards were passed by the arbitrators. Majority award decided in favour of the respondent-company. Appellant filed arbitration petition. Single Judge of High Court allowed the petition, setting aside the award holding the same contrary to clause 2.03 of tender notice. The Court also held the claim barred by time. Division Bench of High Court set aside the order of Single Judge restoring the majority award passed by the two arbitrators. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1.1 Single Judge of the High Court was correct in holding that the award made by the Arbitrators to the extent it directed payment of the additional amount was unsustainable. The Division Bench, however, fell in error in taking a contrary view and holding that the interpretation placed by the Arbitrators was a plausible interpretation. [Para 15] [974-F-G]

1.2 The Note to clause 2.03 of NIT envisages that on

the completion of the first year and at the beginning of the extended contract period, the rates applicable shall have to be determined by reference to the revisions that have already come into effect as on the date of the commencement of the extended period. It is manifest from a reading of the Note that once an option is exercised, the rate applicable to the extended period shall stand revised taking into consideration the revision of wages if any. Any such revision must of necessity be made as on the date of the commencement of the extended period. Once that is done, the said rate would remain firm till the end of the second year. The contract does not, envisage settlement or revision of the rate by reference to any stage post commencement of the extended period. Even otherwise a contract for the extended period could become effective only if rates applicable to that period are settled or are capable of being ascertained. Rates actually determined or determinable by reference to 15th January, 1984 i.e. the date when the extended period commenced, could include revision in wages made upto that date. Any revision in the wages of the dock labourers which the M.D.L.B. may have ordered subsequent to 15th January, 1984 would have no relevance even if such revision was made retrospectively from the date of the commencement of the extended period. The Note makes it abundantly clear that revision granted retrospectively would be of no consequence whatsoever. [Para 12] [973-A-F]

1.3 While accepting the extension of the contract, the respondent-contractor had simply referred to the statutory revision in the wages by M.D.L.B. during the 'last year'. Since the letter of acceptance is of 7th December, 1983 the statutory revision which the contractor wanted to be taken into consideration were revisions before 1983 and not those made at any time after the extended period

of contract. The appellant's letter dated 27th January, 1984 sent in reply to the letter dated 7th December, 1983 made it clear to the respondent that Clause 2.03 of the NIT did not envisage escalation on the basis of the revision subsequent to 15th January, 1984 even if such revisions were already being discussed or negotiated by the Dock Workers with the M.D.L.B. [Paras 13 and 14] [973-G-H; 974-A, C-D]

2. An Arbitrator cannot make an award contrary to the terms of the contract executed between the parties. While it is true that the courts show deference to the findings of fact recorded by the Arbitrators and even opinions, if any, expressed on questions of law referred to them for determination, yet it is equally true that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties. [Para 16] [974-H; 975-A-B]

Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor ***(1999) 8 SCC 122;*** *Bharat Coking Coal Ltd. v. Annapurna Construction* **(2003) 8 SCC 154;** *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd***. (2004) 9 SCC 619;** *Associated Engineering Co. v. Government of Andhra Pradesh and Anr.* **AIR 1992 SC 232;** *Jivarajbhai Ujamshi Sheth and Ors. v. Chintamanrao Balaji and Ors.* **AIR 1965 SC 214;** *State of Rajasthan v. Nav Bharat Construction Co.* **AIR 2005 SC 4430;** *Food Corporation of India v. Surendra, Devendra and Mahendra Transport Co.* **(2003) 4 SCC 80, relied on.**

*W.B. State Warehousing Corporation and Anr. v. Sushil Kumar Kayan and Ors***. (2002) 5 SCC 679, referred to.**

3. Before the Arbitrators, the respondent had quantified the claim at Rs.27,91,984.29 on account of escalation of the rates consequent upon statutory increases in the wages of M.D.L.B. during the extended

period of contract. A further sum of Rs.9,88,713.20 on account of escalation in the wages of other categories of workers was also made on the same basis. In addition, a claim for the recovery of Rs.8,63,953/- towards the final payment due and payable to the claimant with interest @ 18% p.a. on the same was also made. The entitlement of the respondent to claim any amount on account of escalation consequent upon the increase in the wages of M.D.L.B. workers is not established. The first two claims on account of escalation could not, therefore, have been allowed by the Arbitrators nor could the incidental claim for payment of interest on that claim be granted. However, there was no real justification for disallowing the claim made by the respondents representing the balance amount due to the claimant towards its final bill, especially when the counter-claim made by the appellant has been rejected and the said rejection was not questioned before the High Court. The valid part of the award can be saved by severance from the invalid part. The appeal is allowed in part and to the extent that the award made by the Arbitrators shall stand set aside except to the extent of a sum of Rs.8,63,953/- which amount shall be payable to the respondent-contractor with the interest @ 9% p.a. from 1st April, 1985 till the date of actual payment thereof. [Paras 22, 23 and 24] [977-C-H; 978-A-C]

Case Law Reference:

(1999) 8 SCC 122	**Relied on**	**Para 16**
(2002) 5 SCC 679	**Referred to**	**Para 18**
(2003) 8 SCC 154	**Relied on**	**Para 19**
(2004) 9 SCC 619	**Relied on**	**Para 20**
AIR 1992 SC 232	**Relied on**	**Para 21**
AIR 1965 SC 214	**Relied on**	**Para 21**

AIR 2005 SC 4430	**Relied on**	**Para 21**
(2003) 4 SCC 80	**Relied on**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5286 of 2006.

From the Judgment & Order dated 05.04.2006 of the High Court of Judicature at Bombay in Appeal No. 884 of 1997 in Arbitration Petition No. 19 of 1993 in Award No. 127 of 1992.

Shyam Divan, M.P. Savla, Jay Savla, Vasuman Khandelwal for the Appellant.

S. Ganesh, Atul Desai, Pratap Venugopal, Surekha Raman, Deepti, K. J. John & Co. for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR J. 1. This appeal by special leave is directed against an order dated 5th April 2006 passed by the High Court of Bombay whereby Appeal No.884 of 1997 has been allowed, the order passed by a learned Single Judge of that Court set aside and the majority award passed by the arbitrators restored.

2. The appellant, a Government of India undertaking invited tenders for allotment of clearing, forwarding, handling and stevedoring jobs at Mormugao Port initially for a period of one year commencing from 15th January 1983 upto 14th January 1984 but extendable at the option of the appellant for a further period of one year on the same terms and conditions except statutory increases in the wages of Dock labourers referred to in Clause 2.03 of tender notice. In response, the respondent submitted a tender which was accepted culminating in the issue of a work order dated 10th January 1983 in its favour. It is common ground that the appellant by its communication dated 13th October 1983 exercised the option available to it in terms

of Clause 2.03 of the NIT and extended the contract for a further period of one year ending 14th January 1985.

3. The extension aforementioned was accepted by the respondent in terms of its communication dated 7th December 1983 in which it was inter-alia pointed out that statutory revisions in the wages of Mormugao Dock Labour Board (for short M.D.L.B.) that had come about during the period of one year need be considered while extending the contractual period. In response, the company by its letter dated 27th January 1984 pointed out that Clause 2.03 of Schedule II of N.I.T. provided for increases on account of statutory revisions made upto 15th January 1984 alone to be considered for purposes of granting rate escalation. Increases in wages that may have been under negotiations or those granted on a later date with retrospective effect could not consequently be considered, said the appellant. The respondent–Company was on that basis called upon to furnish documentary evidence regarding increase if any in wages allowed by the M.D.L.B. upto 15th January 1984 without waiting for issuance of any fresh circulars.

4. It is not the case of the respondents that any revision in wages effective as on 15th January, 1984 was demonstrated before the appellant at any time before the commencement of the extended contractual period. What was alleged by the respondent was that pursuant to a settlement between the M.D.L.B. and the Dock workers the respondent had incurred an additional amount of Rs.24.74 lakhs towards the increase in the wages payable to such workers. A claim for reimbursement of the said amount was accordingly made by the respondent-company in terms of a legal notice served upon the appellant on its behalf, which claim was refuted by the appellant on the strength of Clause 2.03 of Schedule II to the notice inviting tenders forming part of the contract between the parties. The appellant asserted that the rates at which the contract was initially awarded had to remain firm throughout the period of one year from the date of award and were not subject

to any escalation whatsoever. Rates for the extended period were also similarly to remain firm throughout the extended period subject to any statutory revision upto 15th January, 1984 being taken into consideration. Any subsequent increase in the wages payable to the Dock labourers granted retrospectively by the M.D.L.B. was according to the appellant wholly inconsequential.

5. Denial of the claim made by the respondent thus gave rise to a dispute which was in terms of the contract referred to a panel of three Arbitrators for adjudication. Before the Arbitrators, the appellant disputed the claim on merits as also on the ground that the same was barred by limitation. The Arbitrators examined rival contentions urged before them but failed to arrive at a unanimous decision on the true and correct interpretation of Clause 2.03. Two awards, therefore, came to be made, one by Shri R.P. Bhatt who dismissed the claim and the other by M/s R.C. Cooper and N.A. Modi who held the respondents entitled to recover from the appellant a lump sum amount of Rs.61,73,067.90. It is noteworthy that while the award made by Shri R.P. Bhatt was a reasoned Award that made by the other two Arbitrators was not.

6. Aggrieved by the majority Award, the appellant filed Arbitration Petition No. 19 of 1993 before the High Court of Bombay for setting aside the same. A Single Judge of the High Court of Bombay (S.N. Variava, J. as His Lordship then was) allowed that prayer and set aside the award holding that the same was contrary to clause 2.03 of the NIT forming part of the contract executed between the parties. Even the plea of limitation succeeded before the learned Single Judge who held that the claim made by the respondents was barred by time. Undeterred the respondents assailed the said order before a Division Bench of the High Court in Appeal No.884 of 1997 which allowed the appeal, set aside the order passed by the Single Judge and restored the majority Award made by the two Arbitrators. The High Court took the view that the interpretation

placed upon Clause 2.03 of the contract between the parties by the majority of the arbitrators was a logical interpretation which could provide a sound basis for the Award made by them.

7. Appearing for the appellant, Shri Shyam Divan did not pursue the challenge to the validity of the Award on the ground that the claim made by the respondent was barred by limitation. The solitary point that was urged by the learned counsel was that the High Court had committed an error while interpreting Clause 2.03 of the contract. Mr. Divan contended that a plain reading of Clause 2.03 made it amply clear that the rates stipulated under the contract were to remain firm for the first year notwithstanding any revision in the wages payable to the dock workers of M.D.L.B. For the second year also the rates were to remain firm, subject only to the condition that statutory revisions, if any, of the wages would be taken into consideration. What was according to Mr. Divan evident from a plain reading of Clause 2.03 was that only such statutory revisions as were ordered upto the date of commencement of the contractual period were relevant for the purpose of such consideration. Any revision made subsequent to the commencement of the contractual period even if retrospective in its application would have had no relevance for the extended period. Inasmuch as the Division Bench had taken a contrary view and set aside the order of the learned Single Judge, it had not only committed a mistake that was evident but also ignored the principles governing the construction of documents.

8. Appearing for the respondents Mr. Ganesh, learned senior counsel on the other hand contended that the power of this Court to interfere in an Arbitral Award under Sections 30 and 33 of the Arbitration Act, 1940 was very limited. He contended that just because an interpretation different from the one given by the Arbitrators in support of their award was equally plausible did not make out a case for interference by the Court. Arbitrators being Judges chosen by the parties the

view expressed by them would bind the parties no matter the same is found to be erroneous and no matter an alternative view was equally or even more plausible. He urged that Clause 2.03 of NIT was rightly interpreted by the Division Bench of the High Court which did not call for any interference by this Court.

9. The validity of the award made by the Arbitrators rests entirely upon a true and correct reading of Clause 2.03 of the Contract. That clause is in the following words:

> "2.03: It is hereby agreed that if the Company gives one month's notice to extend the contract for a further period of one year from the expiry or the period mentioned in Clause 2.01, the contractor shall be bound to continue to do the work and render services on the same terms and conditions, as contained herein, during such extended period, except for the statutory increase in the wages of Dock Labour allowed by the Mormugao Dock Labour Board, for which documentary evidence shall have to be furnished by the contractor.....
>
> ……..
>
> Note: The rates indicated against first and 2nd year above have been taken from MDLE'S Circulars from time to time. But the rates at which the contact is initially awarded shall remain firm throughout the period of one year from he date of award and shall not be subject to any escalation whatsoever. Similarly, the rates allowed for the extended period of one year, if any, after considering the statutory increase, if any, in the wages of Dock Labour will also remain firm throughout the extended period of one year and shall not be subject to any escalation whatsoever, irrespective of any subsequent increase in the wages of Dock Labour allowed retrospectively by the Mormugao Dock Labour Board."

10. A careful reading of the above especially the Note

appended to Clause 2.03 (supra) leaves no manner of doubt that the rate at which the contract was initially awarded was to remain firm throughout the period of one year from the date of the award of the contract. What is significant is that for the first year the said rate was unalterable regardless of any escalation, revision or other statutory increases made during that period. Shri Ganesh, learned counsel for the respondents also fairly conceded that insofar as the first year of the contract was concerned the rates were not subject to any revision and were to remain firm. If that be so, the question is how far is that principle altered by the later half of the Note which deals with the rates applicable during the extended period of the contract. There are three different aspects which stand out from a reading of that part of the Note to Clause 2.03. Firstly, the second part of the Note dealing with the rates applicable to the extended period starts with the word 'Similarly'. By using that expression the Note draws an analogy between the firmness of the rates applicable during the first year and those applicable for the extended period of second year. The sentiment underlying the Note is that the parties intend to keep the applicable rates firm not only for the first year but also for the second year.

11. The second aspect which emerges from a plain reading of the Note is that the rates for the second year had to be fixed by taking into consideration the statutory increases, if any, in the wages payable to the Dock labourers which rate once fixed was also to remain firm and impervious to any escalation. The only difference between the first and the second year rates thus is that the rates were firm even for the second year but the same had to be fixed taking into consideration the statutory increases in the wages of the dock labourers.

12. The third aspect which in our opinion puts all doubts about the true intention of the parties to rest is that any subsequent increase in the wages of the dock labourers would not result in any escalation of the rates even when such revision

is allowed retrospectively by the M.D.L.B. What the Note in our opinion envisages is that on the completion of the first year and at the beginning of the extended contract period, the rates applicable shall have to be determined by reference to the revisions that have already come into effect as on the date of the commencement of the extended period. It is manifest from a reading of the Note that once an option is exercised the rate applicable to the extended period shall stand revised taking into consideration the revision of wages if any. Any such revision must of necessity be made as on the date of the commencement of the extended period. Once that is done the said rate would remain firm till the end of the second year. The contract does not, in our opinion, envisage settlement or revision of the rate by reference to any stage post commencement of the extended period. Even otherwise a contract for the extended period could become effective only if rates applicable to that period are settled or are capable of being ascertained. Rates actually determined or determinable by reference to 15th January, 1984 the date when the extended period commenced, could include revision in wages made upto that date. Any revision in the wages of the dock labourers which the M.D.L.B. may have ordered subsequent to 15th January, 1984 would have no relevance even if such revision was made retrospectively from the date of the commencement of the extended period. The Note makes it abundantly clear that revision granted retrospectively would be of no consequence whatsoever.

13. There is another angle from which the matter can be viewed. As to how the parties understood Clause 2.03 is also an important factor that needs to be kept in mind. While accepting the extension of the contract, the respondent-contractor had simply referred to the statutory revision in the wages by M.D.L.B. during the 'last year'. Since the letter of acceptance is of 7th December, 1983 the statutory revision which the contractor wanted to be taken into consideration were revisions before 1983 and not those made at any time after the

extended period of contract. This position is clear from the following lines appearing in the letter of acceptance dated 7th December, 1983 :

> "However, we would like to inform you that there are lot of statutory revisions in the wages of Mormugao Dock Labour Board during last 1 year which you will have to consider while extending our contractual period. In this connection, the undersigned will call on your office to discuss the same personally in near future and we expect your cooperation in this regard."

14. The appellant's letter dated 27th January, 1984 sent in reply to the above made it clear to the respondent that Clause 2.03 of the NIT did not envisage escalation on the basis of the revision subsequent to 15th January, 1984 even if such revisions were already being discussed or negotiated by the Dock Workers with the M.D.L.B. The following passage from the said communication makes the position abundantly clear:

> "A copy of clause 2.03 of Schedule II of N.I.T. is enclosed. From this, it will be very clear that whatever increases that have been allowed by M.D.L.B. upto 15.1.84, can only be considered for the escalation purposes, and not those increases in wages which are under negotiations, for which M.D.L.B. circulars will be issued subsequently after 15.1.84, with retrospective effect."

15. The learned Single Judge of the High Court was, in the light of the above, correct in holding that the award made by the Arbitrators to the extent it directed payment of the additional amount was unsustainable. The Division Bench, however, fell in error in taking a contrary view and holding that the interpretation placed by the Arbitrators was a plausible interpretation.

16. That brings us to the question whether an Arbitrator can make an award contrary to the terms of the contract executed

between the parties. That question is no longer *res integra* having been settled by a long line of decisions of this Court. While it is true that the Courts show deference to the findings of fact recorded by the Arbitrators and even opinions, if any, expressed on questions of law referred to them for determination, yet it is equally true that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties. Reference may be made, in this regard, to the decision of this Court in *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor,* (1999) 8 SCC 122 where this Court observed :

> " …….. that it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action……"
>
> …… It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error…."

17. It was further observed:

> **"…..**Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement….."

18. In *W.B. State Warehousing Corporation & Anr. v. Sushil Kumar Kayan & Ors.* (2002) 5 SCC 679, again this Court observed:

> **"**……. If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction…."

19. In *Bharat Coking Coal Ltd. v. Annapurna Construction* (2003) 8 SCC 154, this Court reiterated the legal position in the following words:

> **"**There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

20. In *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.* (2004) 9 SCC 619 also this Court took the similar view and observed:

> **"**An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The

jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

21. Reference may also be made to the decisions of this Court in *Associated Engineering Co. v. Government of Andhra Pradesh & Anr.* (AIR 1992 SC 232), J*ivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors.* (AIR 1965 SC 214), *State of Rajasthan v. Nav Bharat Construction Co.* (AIR 2005 SC 4430), Food Corporation of India v. Surendra, *Devendra & Mahendra Transport Co.* (2003) 4 SCC 80, which sufficiently settle the law on the subject.

22. That leaves us with the question whether the valid part of the award can be saved by severance from the invalid part. Before the Arbitrators the respondent-Chairman had quantified the claim at Rs.27,91,984.29 on account of escalation of the rates consequent upon statutory increases in the wages of M.D.L.B. during the extended period of contract. A further sum of Rs.9,88,713.20 on account of escalation in the wages of other categories of workers such as Tally Clerks, Stichers, Foreman, Asst. Foremen, Supervisors etc. was also made on the same basis. In addition, a claim for the recovery of Rs.8,63,953/- towards the final payment due and payable to the claimant with interest @ 18% p.a. on the same was also made.

23. In the light of the discussions in the earlier part of this order the entitlement of the respondent to claim any amount on account of escalation consequent upon the increase in the wages of M.D.L.B. workers is not established. The first two claims mentioned above on account of escalation could not, therefore, have been allowed by the Arbitrators nor could the incidental claim for payment of interest on that claim be granted. The question then is whether there is any lawful justification for disallowing the only other claim made by the respondents representing the balance amount due to the claimant towards its final bill. The only defence which the appellant had offered to that claim was based on the law of limitation. That defence

having been withdrawn by Mr. Divan, we see no real justification for disallowing the said claim especially when the counter-claim made by the appellant has been rejected and the said rejection was not questioned before the High Court. In fairness to Mr. Divan we must record that he did not seriously oppose the severance of the award made by the Arbitrators so as to separate the inadmissible part of the claim based on an interpretation of Clause 2.03 from the admissible part.

24. In the result we allow this appeal but only in part and to the extent that the award made by the Arbitrators shall stand set aside except to the extent of a sum of Rs.8,63,953/- which amount shall be payable to the respondent-contractor with the interest @ 9% p.a. from 1st April, 1985 till the date of actual payment thereof.

25. The parties to bear their own costs through out the proceedings.

K.K.T. Appeal partly allowed.

UNION OF INDIA & ORS.
v.
JAGDISH PANDEY & ORS.
(Civil Appeal No. 365 of 2007)

JULY 8, 2010

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

Service law – Disparity in pay scale – Tower Wagon Drivers in Railways – Claim of running allowance as paid to goods train drivers – Granted by High Court – Competent Authority withdrawing the higher pay scales granted to TWDs in comparison to goods train drivers since higher pay scales granted inadvertently – Challenge to – Order by Competent Authority set aside by tribunal as also High Court – On appeal, held: Pay scale is a legitimate right of employee and except for valid and proper reasons cannot be varied, that too only in accordance with law – On facts, no justifiable reasons existed – Union of India did not place any material before Forum/Courts to show that TWDs and goods train drivers were different and distinct classes and were entitled to receive different pay scales – It never pleaded essential basis for justifying payment of different pay scales to two categories of drivers-TWDs and goods train drivers – More so, they could not raise vague averments for the first time before this Court, without any supporting data or documents.

Pleadings – When to be raised – Held: Specific pleadings are to be raised before the first forum for adjudication of dispute – They are the basis of the case of respective parties even before appellate/higher Courts – Parties would be bound by such pleadings, subject to right of amendment.

The respondents are/were working as Tower Wagon Drivers under the Railways. They filed writ petition

seeking the running allowance. The High Court allowed the writ petition. The Railways paid running allowance to the respondents. Thereafter, the Railways passed an order that they granted higher pay scales to respondents inadvertently and the said scale is withdrawn. The respondents challenged the order passed by the Railways. The tribunal allowed the application and set aside the order issued by the Railways. The High Court upheld the order. It held that at all relevant time Tower Wagon Drivers are being treated equivalent to Goods Train Drivers, thus there is no reason for treating them differently now. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. There is no legal infirmity in the judgment of the tribunal and the High Court. [Para 12] [992-E]

1.2. The tribunal specifically noticed that after acceptance of Vth Pay Commission Report by the Government, TWDs were given the salary in the pay scale of Rs. 5000-8000 w.e.f. 1.1.1996 and in the letter dated 15.4.1993 the concerned authorities noticed the disparity created even between the TWDs i.e. in Sealdah division out of 32 TWDs, 24 were getting pay scale of Rs. 1350-2200 (unrevised) and remaining 8 were getting the pay scale of Rs. 1320-2040 and it directed a uniform pay scale of Rs. 1350-2200 should be given to all the TWDs. No material was produced to show as to what were the reasons or material on the basis of which the authorities had decided to discontinue the pay scale of Rs. 1350-2200 to these respondents. The reasoning and discussion in the order of the tribunal clearly shows that the action on the face of it was arbitrary. The order of the tribunal was confirmed by the High Court and the appellants made no effort to place anything on record to show that they were different and distinct classes and were entitled to receive different pay scales. Even in the

order dated 09.08.2002, the tribunal specifically noticed that it was not even averred that eligibility criteria for the post of TWDs was different than that for the goods driver and their duties were substantially different. In other words, either before the tribunal or before the High Court, the Union of India never pleaded the essential basis for justifying payment of different pay scales to two categories of drivers i.e. TWDs on the one hand and goods train drivers on the other. There has to be a substantial difference in method of recruitment, eligibility, duties and responsibilities before substantial disparity in scale can be justified. [Para 8] [990-A-F]

1.3. As far as recording of finding of facts is concerned, factual disputes can hardly be raised before this Court and in any case for the first time. Despite this the Union of India failed to place any material to substantiate its decision before the Forum/Courts. The judgment of the High Court, in relation to running allowances attained finality. At that time no other issue was raised by Union of India that they are different and distinct posts with different pay scales and as such identical running allowances could not be paid. In fact, the judgment of the High Court has duly been implemented now for years together without objection. Not only this, same pay scale as that of the goods train driver has been paid to these respondents for years and there appears to be no justification on record for unilateral withdrawal of such a scale. Pay scale is a legitimate right of an employee and except for valid and proper reasons it cannot be varied, that too only in accordance with law. None of these justifiable reasons exist in the instant case. The impugned order itself does not give any reason. The expression 'erroneously' used in the order can hardly justify withdrawal of such an existing right. [Para 8] [990-G-H; 991-A-C]

1.4. The respondents had specifically pleaded and even placed on record certain orders in which in certain divisions the post of TWD is inter-changeable with goods driver. Orders have also been placed on record to show that in different divisions TWDs are getting different scales and the Railway Board, as such, has not passed any final order which is uniformly applicable to all the divisions of the Railways in India. The appellants disputed the same. The appellants also attempted to file certain documents on record to show that the duties of both these posts are different and even recruitment criteria is different. This contention cannot be raised for the first time before this Court. It was expected of the Union of India to raise all these issues before the appropriate forum i.e. the tribunal and justify the same. Even before this Court, these averments have been made without any supporting data or documents to substantiate such a plea. No comparative chart of the duties and responsibilities of these two posts, recruitment rules specifying eligibility or selection criteria and working conditions have been placed on record. The vague averments made to that effect cannot persuade to disturb the concurrent findings recorded by the tribunal as well as by the High Court. [Para 9] [991-C-G]

1.5 The parties are expected to raise specific pleadings before the first forum for adjudication of the dispute. Those pleadings are the basis of the case of the respective parties even before the appellate/higher Courts. The parties would be bound by such pleadings, of course, subject to the right of amendment allowed in accordance with law. In the instant case, no such amendment has been carried out even before the High Court and it will be unfair for this Court to get into the controversy of factual matrix of the case at this stage of the proceedings, particularly, when there exists no justification whatsoever on record as to why even these

averments were not made before the tribunal and not even before the High Court, despite the fact that the tribunal had specifically made comments in this regard in its judgment. Even before this Court but for bald averments no documents, data or cogent material has been placed for appropriate adjudication of the rights of the parties. [Para 10] [991-H; 992-A-D]

1.6 Most of the respondents in the instant appeal have already retired from service and there exist no justification for effecting any recoveries from their salaries as they have already worked and received their salaries as granted by the Union of India itself. [Para 11] [992-D-E]

Chandraprakash Madhavrao Dadwa v. Union of India **(1998) 8 SCC 154;** *Shyam Babu Verma v. Union of India* **(1994) 27 ATC 121, referred to.**

Case Law Reference:

(1998) 8 SCC 154	**Referred to.**	**Para 3**
(1994) 27 ATC 121	**Referred to.**	**Para 3**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 365 of 2007.

From the Judgment & Order dated 02.03.2005 of the High Court at Calcutta in W.P.C.T. No. 697 of 2002 and W.P.C.T. No. : 79 of 2003.

Pramod Swarup, Asha G.Nair, Arvind Kr. Sharma, B. Krishna Prasad for the Appellants.

Jetender Singh, S.K. Sabharwal for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The Union of India being aggrieved from the judgment and order of a Division Bench of

the Calcutta High Court dated 2nd March, 2005 dismissing, the Writ Petition filed by the Union of India against the order of the Central Administrative Tribunal, Calcutta, (hereinafter referred to as 'the Tribunal') dated 18th January, 2002, has filed the present appeal under Article 136 of the Constitution of India. The Tribunal vide its judgment had allowed the application filed by the respondents herein and had set aside the order dated 22nd February, 2001 issued by the Union of India.

2. The facts giving rise to the present appeals are that the respondents are/were working as Tower Wagon Drivers (for short 'TWD') under the Eastern Railways. They were promoted to the said post between the period 1979-1981. These respondents claimed running allowance @ 120 k.m. per day while on duty in terms of para 3.12 of the New Running Allowance Rules - structuring of the cadre. This was not paid to them resulting in the filing of a Writ Petition by them before the High Court of Calcutta. This Writ Petition was allowed by the High Court and the Eastern Railways were directed to pay 'running allowance' to the respondents. It may be noticed that while disposing of that Writ Petition being Civil Petition No. 4143 of 1988 and C.O. No. 1812 (W) of 1984 the Court passed the following Order:

> "After hearing the Learned Advocates and considering their submissions, we feel that a happy solution has been arrived at. We thus, after bearing them direct that with four months from today, the petitioners will be paid at the rate of 120 kilo meter per day while on duty in terms of paragraph 3.12 of the New Running Allowance Rules – structuring of cadre. We also keep it on record that while making such payment, authorities will be able and entitled to adjust the amount, which has already been received by the employees concerned on the basis of the works, which they have done. The time, we directed, was suggested by Mr. Chakrabarty on instructions from Mr. C.B. Chowdhury, Deputy Chief Electrical Engineer, Eastern Railway, who was present in Court."

3. After this allowance had been paid to the respondents, the Eastern Railways passed an order dated 22nd February, 2001 stating that they were granted higher pay scales inadvertently and the said scale is withdrawn as well as for recovery of amounts paid in excess of the amounts which ought to have been paid to the respondents in the lower scale. The correctness of this order was questioned by the respondents before the Tribunal, submitting that they were granted the pay scale of Goods Driver vide IVth Pay Commission w.e.f. 1.1.1986. They continued to draw the prescribed pay scale which was subsequently revised to Rs.5,000 - 8,000/- w.e.f. 1.1.1996 in terms of Vth Pay Commission. The order was arbitrary as the function and duties of the TWDs were similar to that of the Goods Driver and these posts were treated to be inter-changeable by the department which passed such orders of transfer from time to time. Thus, they prayed that they be permitted to withdraw the same pay scale. This application was contested by Eastern Railways on behalf of the Union of India and it was stated that the scale was granted by inadvertent error and they are not entitled to the pay scale of Rs.1350-2200/- w.e.f. 1.1.1986 and also that they are not equivalent to the Goods Drivers. The matter was examined at some length by the Tribunal. It was noticed that vide Annexure 'E' to that application dated 15th April, 1993, the Eastern Railways itself has stated that all TWDs should be given the grade of Goods Drivers i.e. Rs.1350-2200/- (unrevised). There is no Railway Board's circular or order directing that TWDs are not entitled to the pay scale of the Goods Drivers and they are not justified in taking decision to grant lower pay scales. The respondents had also relied upon the judgment of this Court in the case of *Chandraprakash Madhavrao Dadwa v. Union of India,* [(1998) 8 SCC 154] and *Shyam Babu Verma v. Union of India,* [(1994) 27 ATC 121].

4. Referring to the pleadings of the parties and the record available before the Tribunal, the Tribunal did not accept the contention of the Eastern Railways that it was by mistake that

higher pay scale was given to the respondents as they were getting the same pay scales right from the year 1959. The Railways had hardly produced any records before the Tribunal to justify its decision in down grading the pay scale of the respondents and directing the consequential recoveries. It will be useful to refer to reasoning given by the Tribunal at this stage itself:

> "12. In view of the clear averments made in the OA, which have not been specifically rebutted by the respondents, as already stated above, and in view of the Railway Board's letter issued in implementation of the Calcutta High Court's order, by which the Tower Wagon Drivers were placed in the category of Goods Drivers for all purposes, the applicants were certainly entitled to have the salary in the pay scale of Rs.1350-2200/- w.e.f. 1.1.1986 and as a matter of fact, they have been paid salary in the same pay scale till the impugned order was issued.
>
> 13. It may also be pointed out that pursuant to the acceptance of the 5th Pay Commission Report by the Government, the Tower Wagon Drivers were given the salary in the pay scale of Rs.8000-8000/- w.e.f. 1.1.1996. In the letter dated 15.4.1993 (Annexure E), the Sr. DLD/TRD/Sealdah, intimated to the Sr. DPC/Sealdah that in Sealdah Division, out of 32 Tower Wagon Drivers, 24 Tower Wagon Drivers were getting the pay scale of Rs.1350-2200/- and the remaining 8 Tower Wagon Drivers were getting the pay scale of Rs.1320-2040/- and according to him, all the Tower Van Drivers may be given the uniform pay scale of Rs.1350-2200/-. It seems that two different pay scales for Tower Van Drivers were prescribed because of the fact that prior to 1986, there were two different pay scales at the ratio of 60% and 40% for Goods Drivers as mentioned above. Be that as it may, it is evident that in Sealdah Division also, the Tower Wagon Drivers were given the pay scale of Rs.1350-2200/- w.e.f 1.1.1986.

It is different thing that the order of giving pay scale of Rs.1350-2200/- was withdrawn by the respondents after filing of this O.A.

14. It is not understood on what basis, the respondents decided to discontinue to pay the salary to the Tower Wagon Drivers in the pay scale of Rs.1350-2200/-. There could be a situation if the Tower Wagon Drivers were not considered as part of the "Running Staff" and, therefore, their service conditions would be different. Once they have been treated as part of the "Running Staff" and they are also performing the job of driving the Tower Vans/Wagons, there cannot be any justification not to treat them at par with the lower grade of Goods Drivers in the railway.

15. It is not the case where the respondents claim that the pay scale of the Tower Wagon Drivers has been re-fixed on the basis of some Expert Committee Report. It is obvious that the pay scale of Rs.1350-2200/- was given to the applicants on the basis of some Expert Committee Report. It is obvious that the pay scale of Rs.1350-2200/- was given to the applicants on the basis of the decision that they were at par with the Goods Drivers. Now if the respondents seek to place the applicants in the lower pay scale, the burden lies on them to show the basis of taking such decision adverse to the interest of Tower Wagon Drivers."

5. As already noticed, the challenge to the above order was not accepted by the High Court and both the issues raised before the High Court, namely that the case of the Railway was not considered properly by the Tribunal on merits and secondly, it had no jurisdiction to examine the said circular as the order was passed by the Divisional Railway Manager outside the jurisdiction of the Tribunal were rejected and while upholding the order of the Tribunal, the High Court of Calcutta held as under:

"Considering the aforesaid, it is apparent that at all relevant time Tower Wagon Drivers are being treated as equivalent to Goods Train Drivers. There is no reason shown for treating them now differently. Contention of authorities refusing to treat the Tower Wagon Drivers equivalent to driver of Goods Train, cannot be accepted. If the Tower Wagon Drivers are continuously being treated as running staff and equivalent to drivers of goods trains; drivers there is no reason shown for which Tower Wagon Drivers cannot be refused to be treated as equivalent to the same grade as earlier was being done for a long period. The impugned judgments have dealt with the relevant aspects appropriately and there is no reason to interfere with the same."

6. The above decision of the High Court is impugned in the present appeal. The basic contention raised on behalf of the Union of India before this Court is that the job, duties, responsibilities and even essential training required for TWDs are not comparable to those of the good train drivers. In addition, the contention is also that the scales were granted inadvertently and now the competent authority, after due application of mind, has passed the order granting lower scales to the TWDs in comparison to goods train drivers.

7. In order to examine the merits of these contentions, which obviously are disputed by the respondents, it will be appropriate to refer to the order impugned itself which reads as under:

"Eastern Railway

Estt. Office Order No. 199/02/Misc.C of 2001

(22.02.01)

With the approval of the competent authority the following order are issued to have immediate effect –

The pay of the following T.W. Drivers of Dhanbad

Division was fixed in scale S. 1350-2900 (RP) w.e.f. 01.01.1996 in IVth PC in the scale Rs. 1350-2200/- (R.P.) and scale Rs. 5000-8000/- (RSRP) erroneously for which they were not entitled.

As such their pay scale is revised to S.1320-2040 (RSRP) w.e.f. 01.01.1986 in IV P.C. and Rs. 4500-7000/- (RSRP) w.e.f. 01.01.1996 in Vth P.C.

xxx xxx xxx

The staff concerned should be intimated accordingly"

8. The respondents in the present appeal had challenged the validity of the above order before the Tribunal on various grounds including that they have always been placed at parity with the goods driver, they have been given similar scales and there was no reason, whatsoever, for altering the pay scale to the prejudice of the respondents, which was in force for a considerable time. It will be useful for us to notice the findings recorded by the Tribunal. In paragraph 8 of its judgment the Tribunal noticed that both the parties have not placed on record any material to indicate as to what was the pay scale provided for the TWDs pursuant to the various Pay Commission Reports. The Tribunal specifically noticed and recorded the finding that for the last 40 years, i.e. right from 1959 the respondents were being paid the same pay scale as goods drivers. There was no disparity of pay scales between TWDs and goods drivers after Union of India and Railways had accepted recommendations of the IInd, IIIrd, IVth and even of Vth Pay Commissions. The Tribunal also specifically noticed vague denials of the Union of India and that such denials were hardly substantiated by any cogent material. Reliance was placed upon the judgment of the Calcutta High Court in relation to the grant of running allowance. In that Writ Petition, the only dispute raised by the parties related to the grant of running allowance and the Union of India did not raise the issue of disparity in pay scale. This order of the High Court had attained finality. We

have already referred to the findings recorded by the Tribunal where it is specifically noticed that after acceptance of Vth Pay Commission Report by the Government, TWDs were given the salary in the pay scale of Rs. 5000-8000 w.e.f. 1.1.1996 and in the letter dated 15.4.1993 the concerned authorities noticed the disparity created even between the TWDs i.e. in Sealdah division out of 32 TWDs, 24 were getting pay scale of Rs. 1350-2200 (unrevised) and remaining 8 were getting the pay scale of Rs. 1320-2040 and it directed a uniform pay scale of Rs. 1350-2200 should be given to all the TWDs. Another reason that weighed with the Tribunal was that no material has been produced to show as to what were the reasons or material on the basis of which the authorities had decided to discontinue the pay scale of Rs. 1350-2200 to these respondents. The above reasoning and discussion in the order of the Tribunal clearly shows that the action on the face of it was arbitrary. This order of the Tribunal was confirmed by the High Court and the respondents made no effort to place anything on record to show that they were different and distinct classes and were entitled to receive different pay scales. Even in the order dated 9th August, 2002 the Tribunal specifically noticed that it was not even averred that eligibility criteria for the post of TWDs was different than that for the goods driver and their duties were substantially different. In other words, either before the Tribunal or before the High Court the Union of India never pleaded the essential basis for justifying payment of different pay scales to two categories of drivers i.e. TWDs on the one hand and goods train drivers on the other. There has to be a substantial difference in method of recruitment, eligibility, duties and responsibilities before substantial disparity in scale can be justified. As far as recording of finding of facts is concerned, factual disputes can hardly be raised before this Court and in any case for the first time. Despite this the Union of India has failed to place any material to substantiate its decision before the Forum/Courts. The judgment of the Calcutta High Court, in relation to running allowances, has attained finality. At that time no other issue was raised by Union of India that they are different

and distinct posts with different pay scales and as such identical running allowances could not be paid. In fact, the judgment of the Calcutta High Court has duly been implemented now for years together without objection. Not only this, same pay scale as that of the goods train driver has been paid to these respondents for years and there appears to be no justification on record for unilateral withdrawal of such a scale. Pay scale is a legitimate right of an employee and except for valid and proper reasons it cannot be varied, that too only in accordance with law. None of these justifiable reasons exist in the present case. The impugned order itself does not give any reason. The expression 'erroneously' used in the order can hardly justify withdrawal of such an existing right.

9. We may also notice that the respondents had specifically pleaded and even placed on record certain orders in which in certain divisions the post of TWD is inter-changeable with goods driver. Orders have also been placed on record to show that in different divisions TWDs are getting different scales and the Railway Board, as such, has not passed any final order which is uniformly applicable to all the divisions of the Railways in India. Of course, this has been disputed by the appellants. The appellants have also attempted to file certain documents on record to show that the duties of both these posts are different and even recruitment criteria is different. We are afraid that this contention cannot be raised for the first time before this Court. This was expected of the Union of India to raise all these issues before the appropriate forum i.e. the Tribunal and justify the same. Even before us, these averments have been made without any supporting data or documents to substantiate such a plea. No comparative chart of the duties and responsibilities of these two posts, recruitment rules specifying eligibility or selection criteria and working conditions have been placed on record. The vague averments made to that effect cannot persuade this Court to disturb the concurrent findings recorded by the Tribunal as well as by the High Court.

10. It is a well settled rule that parties are expected to raise

specific pleadings before the first forum for adjudication of the dispute. Those pleadings are the basis of the case of the respective parties even before the appellate/higher Courts. The parties would be bound by such pleadings, of course, subject to the right of amendment allowed in accordance with law. In the present case, no such amendment has been carried out even before the High Court and it will be unfair for this Court to get into the controversy of factual matrix of the case at this stage of the proceedings, particularly, when there exists no justification whatsoever on record as to why even these averments were not made before the Tribunal and not even before the High Court, despite the fact that the Tribunal had specifically made comments in this regard in its judgment. Even before this Court but for bald averments no documents, data or cogent material has been placed for appropriate adjudication of the rights of the parties.

11. During the course of arguments this was also brought to our notice that most of the respondents in the present appeal have already retired from service and there exist no justification for effecting any recoveries from their salaries as they have already worked and received their salaries as granted by the Union of India itself.

12. For the reasons afore stated, we find no legal infirmity in the judgments of the Tribunal and the High Court. While dismissing this appeal we make it clear that this judgment will not affect the right of Union of India to pass an appropriate order in relation to the pay scales applicable to any class of its employees including the respondents afresh and in accordance with law. We do hope that if such an order is passed it will be upon proper application of mind and after taking into consideration appropriate material and/or data.

13. The appeal is dismissed leaving the parties to bear their own costs.

N.J. Appeal dismissed.

MALAYALA MANORAMA CO. LTD.
v.
ASSTT. COMMISSIONER, COMMERCIAL TAXES & ANR.
(Civil Appeal No. 2267 of 2007)

JULY 08, 2010

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

Kerala General Sales Tax Act, 1963:

s.5(3) – Printing of newspaper – Ink purchased for use in the manufacture/printing of newspapers – Declaration furnished by assessee under Form 18 – Authorities issued notice imposing penalty on the ground that printing newspaper did not amount to manufacture and therefore declaration under Form 18 was not correct – Plea of assessee that s.5(3) was amended on 1.4.2000 and the amended section did not contemplate any manufacturing activity – Held: Material amendment were carried out in s.5(3) – Despite the amendments, the format of Form 18 was not amended – High court did not deal with these legal issues – Matter remitted to High Court for consideration afresh.

Assessee purchased printing ink for use in printing newspapers during the year 2001-02. The purchase was effected by issuing Form 18 under the Kerala General Sales Tax Act, 1963. In terms of Section 5(3) of the Act, assessee was liable to pay only concessional rate for that period.

The Assistant Commissioner issued a notice for imposition of penalty on the ground that the process of printing of newspapers did not involve manufacturing process and thus the declarations furnished by the assessee under Form 18 were not correct. It was specifically pleaded by the assessee that the provisions

of Section 5(3) of the Act were amended by the Finance Act, 2000 with effect from 01.04.2000 deleting the provision that manufactured items shall be taxable and, therefore, the issuance of notice was not proper. It was also stated that the amended section did not contemplate any 'manufacturing' activity and the word used was 'production'.

The Assistant Commissioner held that the concession was applicable only to 'goods' and newspaper was not 'goods' within the meaning of Section 2 of the Act. Assessee filed writ petition which was dismissed.

In appeal to this Court, appellant-assessee contended that the initiation of the proceedings was based on a provision which had been repealed, non-existent and inapplicable, as such, the entire proceedings and imposition of penalty was unjustified, however, this issue was not dealt with by the High Court. It was further argued that even the alternative submission as to whether the newspaper was covered within the definition of 'goods' and as to what was the effect of the amendment of the provisions of Section 5(3) and particularly, the substitution of the word 'manufacture' by the word 'production' was not correctly examined. The conclusion of the High Court on the matter in issue was primarily with reference to the un-amended provisions and on an erroneous impression of law that despite amendment, the 'goods' would still not include 'newspapers'.

Disposing of the appeal and remitting the matter to High Court, the Court

HELD: There is no dispute to the fact that the material amendments were carried out in the provisions of Section 5(3) of the Kerala General Sales Tax Act with

effect from 01.04.2002. The existing 1st proviso to Section 5(3)(i) was deleted as well as the expression 'or uses the same in the manufacture of any goods which are not liable to tax in this Act' in Section 5(3)(i) was also deleted. Despite these amendments, as it appears from the record before the Court, format of Form No. 18 was not amended consequently. However, the High Court did not dwelve upon those legal issues which were the core issues involved in the case. [Para 9] [999-D-F]

Aspinwall & Co. Ltd. v. Commissioner of Income Tax, Ernakulam **(2001) 7 SCC 525;** *Collector of Central Excise v. Ballarpur Industries Ltd.* **(1989) 4 SCC 566;** *Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer* **(1994) 93 Sales Tax Cases;** *Whirlpool Corporation v. Registrar of Trade Marks* **(1998) 8 SCC 1;** *State of H.P. & Ors. v. Gujarat Ambuja Cements Ltd.* **(2005) 6 SCC 499 – referred to.**

Case Law Reference:

(2001) 7 SCC 525	**referred to**	**Para 6**
(1989) 4 SCC 566	**referred to**	**Para 6**
1994) 93 Sales Tax Cases 95	**referred to**	**Para 6**
(1998) 8 SCC 1	**referred to**	**Para 6**
(2005) 6 SCC 499	**referred to**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2267 of 2007.

From the Judgment & Order dated 02.08.2006 of the High Court of Kerala at Ernakulam in WA No. 1035 of 2006.

T.R. Andhyarjuna, R. Venkataramani, S.Sukumaran, Anand Sukumar, Bhupesh Pathak, K. Rajeev for the Appellant.

M.L. Varma, R. Sathish for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. M/s. Malayala Manorama Co. Ltd., Kottayam, purchased printing ink for Rs. 1,00,03,050/- from M/s. Quality Ink Manufacturing, Kottayam during the year 2001-2002. The ink so purchased was to be used for printing newspapers by the said firm. This firm filed Form No. 18 under the Kerala General Sales Tax Act, 1963 (for short 'the Act') for purchase of raw material for use in the manufacture of 'finished goods' i.e. newspaper and in terms of Section 5 (3) of the Act they were liable to pay only concessional tax at the rate of 3% for that period.

2. There was no dispute at any point of time that this concern was engaged in printing of newspapers. However, the Department felt that no manufacturing was involved in the process of printing of newspapers and, as such, purchase of printing ink effected by issuing Form No. 18 was not the correct statement in terms of the statutory provisions of the Act. The case of the Department was that the declarations thus furnished by the firm were not accurate, according to law and there was misuse of statutory forms. This resulted in issuance of a notice for imposition of penalty under Section 45 (A) of the Act providing an opportunity to the firm to respond thereto and file its objections, if any. It was proposed to impose a penalty of Rs. 18,19,208/- on the said assessee, being double the amount of tax due on the purchase turnover.

3. The reply to the notice was filed by the assessee firm admitting that printing ink was purchased and that sub-section 3 of Section 5 does not stipulate that there should be manufacture of taxable goods. It was specifically pleaded that the provisions of Section 5 (3) of the Act were amended by the Finance Act, 2000 with effect from 01.04.2000 deleting the provision that manufacture items shall be taxable. The impact of the amendment was such that, according to the assessee firm, the issuance of notice was not proper. It was also stated that amended section does not contemplate any

'manufacturing' activity and the word used was 'production' and there is a clear distinction between the two. The assessee relied upon the judgment of this Court in the case of *Aspinwall & Co. Ltd. v. Commissioner of Income Tax, Ernakulam* [(2001) 7 SCC 525 : (2002) 125 Sales Tax Cases 101 (SC)] wherein it was held that 'manufacture' means use of raw materials for production of goods commercially different from raw materials used. When the end product is a commercially different product, it amounts to manufacturing.

4. The Assistant Commissioner, Commercial Tax, who had issued the notice, came to the conclusion that the concession has been extended to non-taxable goods also and formed an opinion that the concession is applicable only to 'goods' and newspaper was not a 'goods' within the meaning of Section 2 of the Act. While referring to another judgment of this Court in *Collector of Central Excise v. Ballarpur Industries Ltd.* [(1989) 4 SCC 566 : (1990) 77 Sales Tax Cases 282], the said Assistant Commissioner concluded that newspaper was not a 'goods' and, therefore, the declaration was not appropriate and imposed a penalty of Rs. 14,66,256 for the year 2000-2001.

5. The assessee firm did not take recourse to the statutory remedies available under the Act but questioned the very correctness and legality of the issuance of the notice as well as the order passed by the Assistant Commissioner before the High Court of Kerala at Ernakulam, by filing a writ petition under Article 226 of the Constitution of India.

6. This writ petition was contested by the Department which filed detailed counter affidavit. It was specifically pleaded by the Department that for availability of statutory alternative remedy as well as for other reasons and facts stated in the reply, the writ petition itself was not maintainable. The Division Bench of the High Court while considering this primary objection raised by the Department before the High Court, came to the conclusion that as the facts were not in dispute and questions raised were purely legal and are to be tested in view of the

judgment of this Court in the case of *Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer* [(1994) 93 Sales Tax Cases 95 : (1994) 2 SCC 434], *Whirlpool Corporation v. Registrar of Trade Marks* [(1998) 8 SCC 1] as well as the judgment in the case of *State of H.P. & Ors. v. Gujarat Ambuja Cements Ltd.* [(2005) 6 SCC 499 : (2005) 142 Sales Tax Cases 1], the writ petition was maintainable. However, while laying emphasis that the newspaper would not fall within the expression 'goods' under sub-section 3 of Section 5 of the Act, the High Court held that the notice issued was proper as Form No. 18 which gives benefit of concessional rate of tax was factually not correct. While dismissing the writ petition, however, the Bench issued a direction to the assessing authority to examine whether the imposition of penalty at double the rate is justified in the facts and circumstances of the case, within a period of two months from the date of receipt of the copy of the judgment. It is this judgment of the High Court which has been assailed in the present appeal under Article 136 of the Constitution of India.

7. Learned counsel appearing for the appellant with some vehemence argued that the High Court had specifically noticed the contention of the assessee firm that the initiation of the proceedings is based on a provision which had been repealed, non-existent and inapplicable, as such, the entire proceedings and imposition of penalty was unjustified, still the High Court did not deal with this contention at all. It was a pure question of law and would even otherwise have effect on the merits of the case. Non-consideration of the contention and non-recording of any reasons in that regard on merit, would entirely vitiate the order. It is further argued that even the alternative submission as to whether the newspaper was covered under the definition of 'goods' and as to what is the effect of amendment of the provisions of Section 5(3) and particularly, the substitution of the word 'manufacture' by the word 'production' have not been correctly examined. The discussion of the High Court on the matter in issue had primarily proceeded with reference to the un-amended provisions and on an erroneous impression of law

that despite amendment, the 'goods' will still not include 'newspapers'.

8. On the contra, Mr. Verma, learned senior counsel appearing for the Department fairly stated that the amended provisions and their effect have not been considered by the High Court in its judgment under appeal. Even, according to him, the discussion on amendments with particular reference to the word 'production' could have some impact on the alternative submission made by the assessee-respondent. However, he submitted that the matter at best can be remanded to the High Court and the notice cannot be quashed as the contentions will still have to be examined by the competent authority/Courts.

9. Having heard the learned senior counsel appearing for the parties, we are of the considered view that the order under challenge requires interference by this Court. There is no dispute to the fact that the material amendments were carried out in the provisions of Section 5(3) of the Act with effect from 01.04.2002. The existing 1st proviso to Section 5(3)(i) was deleted as well as the expression 'or uses the same in the manufacture of any goods which are not liable to tax in this Act' in Section 5(3)(i) was also deleted. Despite these amendments, as it appears from the record before the Court, format of Form No. 18 has not been amended consequently. However, the fact of the matter remains that the High Court has not dwelt upon these legal issues which are the core issues involved in the present case. In our view, the discussion on the first issue would certainly have some bearing on the alternative argument raised on behalf of the appellant before us. Thus, it may not be possible for this Court to sustain the finding recorded by the High Court in that regard. Of course, we are not ruling out all the possibilities of the High Court arriving at the same conclusion if it is of that view after examining the amendments as well as the submissions made on behalf of the appellant with regard to its alternative submissions. In light of this discussion, we pass the following order :

(a) The impugned order dated 2nd August, 2006 passed by the High Court is hereby set aside.

(b) The matter is remanded to the High Court for consideration afresh in accordance with law on both the aforesaid submissions while leaving all the contentions of the assessee and the Department open for the year 2000-2001, in relation to imposition of penalty under Section 45 (A) of the Act.

(c) The legality and validity or otherwise of the notice dated 16.01.2006 and 17.01.2006 shall be subject to the final decision of the High Court.

10. The appeal is accordingly disposed off without any order as to the costs.

D.G. Appeal disposed of.

MAQBOOL @ ZUBIR @ SHAHNAWAZ AND ANR.
V.
STATE OF A.P.
(Criminal Appeal No. 435 of 2008)

JULY 08, 2010

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

Penal Code, 1860 – s.302 – Conviction by courts below based on evidence of eyewitnesses – Interference with – Held: Not called for as the evidence of eyewitnesses and medical evidence supported the case of prosecution – Entries made in a diary recovered during investigation depicted the plan of the crime, its commission and result – Concurrent finding of courts below that entries in diary provided substantial support to the case of prosecution – Thus, prosecution was able to prove the case beyond reasonable doubt.

Investigation – Lacunae in – Duty of Investigating Officer while investigating a murder case – Held: Investigating Officer is expected to perform his duties with greater caution, sincerity and by taking recourse to appropriate scientific methods for investigating such a heinous crime – Direction to Director General of Police, Andhra Pradesh to examine this aspect and take action in accordance with law.

Prosecution case was that on the night of 2nd August, 1999, the deceased was coming home along with his employee PW-1 and PW-3. The deceased was carrying a bag containing cash. When the deceased reached near his house, one of the accused persons intercepted the deceased and tried to snatch the bag from him. The deceased resisted and the accused fired a shot at him. The wife of deceased (PW-2) and the daughter opened the door and found that deceased was lying injured on the ground. The deceased was taken to

hospital where he died. The trial Court convicted A-1 under Sections 302 and 120-B IPC whereas A-2 to A-8 were convicted under Sections 302/109 and 120B IPC. High Court partly allowed the appeal filed by the accused persons. The conviction of appellants under Section 120-B was set aside, however conviction under Section 302 was maintained. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1. PW1 and PW2 cannot be stated to be interested witnesses and in any case not of the kind that they should be disbelieved merely because they were in employment with the deceased and/or wife of the deceased. The circumstances of a case have to be examined in their normal conduct. It is but natural that the deceased employer who was carrying cash would normally ask some of his trusted employees to come with him. PW1 was working as a salesman. His statement clearly showed that he was fully aware about the facts of the business and had stated that a lorry of spare parts had come on fateful night at about 10.30 P.M. where PW3 and another person were also present. Cash of Rs.40,000/- approximately was in the bag, which the deceased was carrying. PW1 was walking with him, while PW3 was following from behind. He stated that he could easily identify both the persons. This witness had sufficient time to recognize the assailant inasmuch as first the assailant had an altercation with the deceased. His demand for the cash bag containing the cash was resisted by the deceased, whereafter, he shot the deceased, snatched the bag and then waited for the vehicle-motorcycle to come, on which both A1 and A2 fled away from the site. PW2, the wife of deceased clearly stated that on the date of the occurrence, she had switched on the tube lights and the light fell on the main road. She also confirmed that there was illumination from the Nursing Home which was opposite to the house. In the cross-examination, she

specifically denied the suggestion that she could not see the persons who were coming from right side on the road and she stated that the out house was adjacent to the main road. The incident took place at the distance of 300 feet from the house of the owner. After hearing the sound, PW-2 immediately ran towards the body of the deceased and then took him to hospital. Their statements apparently appeared to be correct. They did not exaggerate any facts. Their statements appeared to be truthful description of the events that occurred in their presence or of what they had the knowledge. [Paras 7, 8, 9] [1011-C-H; 1012-A-H; 1013-A-F]

2.1. The statement of the investigating officer has to be read in its entirety. Certainly, the investigating officer failed to conduct the investigation as per the expected standards. The case could have been investigated with greater care, caution and by application of scientific methods, however, it would not give the accused/ appellants any benefit because PW1 was never confronted with his statement under Section 161 Cr.P.C. during her cross-examination with regard to facts. There is no reason to disbelieve PW1, PW3 and other witnesses who said that there was sufficient illumination at the place of occurrence. It was expected of the investigating officer to seize from the place of occurrence such articles or items including the bloodstain earth or empties, which were available even as per his statement. This lacuna in investigation stood completely covered by the statement of the witness, the medical report and the eye-witness version. The evidence of the doctors as well as that of the PW1 clearly established the story of the prosecution. According to the investigating officer, there were few other people and there was a bus stand near the place of occurrence. The Investigating Officer fully corroborated the statement of PW1 and other witnesses. The identification parade was conducted on 29th July,

2000. This identification parade was performed in the jailor's office room and the witnesses were examined by the Magistrate. The Magistrate had required and the jailor then had provided non-suspect persons who were asked to participate in the parade after the accused had expressed his satisfaction, he even was asked to stand in any place in the row with the known-suspects and thereafter PW-1 was brought to the Test Identification Parade and then the accused was identified in accordance with law. The identification parade was closed. Despite the said Test Identification Parade was conducted in accordance with law, the appellants raised objections and stated that they were in illegal confinement of the police and their photographs were shown and the identification parade itself was conducted after such a long time. The said objections cannot be sustained. The accused himself was arrested after one year and it was only thereafter that the investigating officers was able to collect substantial evidence and then after arresting all the concerned accused, the identification parade was conducted. Thus, there was no delay in conducting the identification parade. There was nothing on record to show or prove that these accused were in illegal custody or confinement of the police. In order to prove this plea, they produced four witnesses but they could not bring any records or any other cogent or substantial evidence to prove the alleged case of illegal confinement and/or for that matter that they were shown to the witnesses before the identification parade was conducted by the investigating officer. Both the Trial Court as well as the High Court disbelieved the witnesses of the defence in that regard. [Paras 10, 11, 12] [1015-A-F; 1016-E-G; 1018-B-D]

Siddartha Vashisht @ Manu Sharma v. State **(NCT of Delhi) JT 2010 (4) SC 107 – relied on.**

Musheer Khan v. State of M.P. **(2010) 2 SCC 748 – referred to.**

2.2. The extract of diary which was recovered during the investigation had various entries, which related to the planning of the crime, its commission and result thereof. This aspect was discussed by the Trial Court. The High Court also examined this question in some elaboration. The concurrent finding thus was that these extracts from the diary provided substantial support to the case of the prosecution. The prosecution was able to prove its case beyond reasonable doubt. The gravity of the offence, the manner in which it was committed and the conduct of the accused did not call for any interference by this Court even on the question of quantum of sentence. [Para 15, 16] [1021-E-G; 1022-A-B]

2.3. The Investigating Officer (PW-25) was expected to perform his duties with greater caution, sincerity and by taking recourse to appropriate scientific methods for investigating such a heinous crime. The Director General of Police, Andhra Pradesh is directed to examine this aspect and take action in accordance with law. [Paras 17] [1022-C-D]

Case Law Reference:

(2010) 2 SCC 748	**referred to**	**Para 5**
JT 2010 (4) SC 107	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 435 of 2004.

From the Judgment & Order dated 27.02.2007 of the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1825 of 2004.

Kamini Jaiswal, for the Appellants.

Altaf Fathima, D. Bharathi Reddy for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the Judgment of the High Court of Judicature of Andhra Pradesh at Hyderabad dated 27th February, 2007 wherein the Court passed the following judgment of conviction and order of sentence:

> "Crl. A. No. 1825 of 2004 is allowed in part. The convictions and sentences imposed on A.1 for the offence under Section 302 I.P.C. and Section 3 r/w 25 (1-B) (a) of Arms Act are confirmed. The conviction imposed on A.2 for the offence under Section 302 r/w 109 I.P.C. is modified and he is convicted for the offence under Section 302 r/w 34 I.P.C. and sentenced to suffer imprisonment for life and also to pay a fine of Rs.1,000/- in default, to suffer 6 months simple imprisonment. The conviction and sentence imposed on A.1 and A.2 for the offence under Section 120-B I.P.C. is set aside. So far as A.4 and A.6 are concerned, they are found not guilty for any of the offences under Sections 120-B and 302 r/w Section 109 I.P.C. and accordingly, the convictions and sentences imposed on them for the said offences are set aside. Therefore, A.4 and A.6 shall be set at liberty forthwith if they are not required in any other crime. The fine amount, if any, paid by them shall be refunded.
>
> Crl.A. No.1886 of 2004 is allowed and the convictions and sentences imposed on A.8 for the offences under Sections 120-B and 302 r/w Section 109 I.P.C. are hereby set aside. He shall be set at liberty forthwith, if not required in any other crime. The fine amount, if any, paid by him shall be refunded.
>
> Crl.A. No.2220 of 2004 is allowed and the convictions and sentences imposed on A.3 and A.5 for the offences under Sections 120-B and 302 r/w Section 109

I.P.C. are hereby set aside. They shall be set at liberty forthwith, if not required in any other crime. The fine amount, if any, paid by them shall be refunded."

2. As is apparent from the above judgment of the High Court that it modified the judgment of the Trial Court insofar as conviction of accused No.A2 was concerned. However, it completely acquitted accused A3 to A6 and A8 of all the offences. From the record, it appears that A7 was merely the author of the diary and was charged along with other accused of the offence under Section 396 of the IPC and for that offence, the Trial Court had in fact acquitted all the accused of this charge including A7. At the very outset, we may notice that no appeal has been preferred against their acquittal by the State or the competent authority. Thus, in the present appeal we are only concerned with the appeal of accused Maqbool @ Zubir @ Shahnawaz and Mohd. Feroz Khan @ Feroz referred to as appellants herein.

3. The prosecution had brought before the Court of Session nine accused to face the trial. Out of these, one Azam Ghori is stated to have been killed in an encounter on 6th April, 2000 and consequently proceedings against him came to an end. While other eight accused faced the trial and were finally found guilty and were punished for different offences. A1 was found guilty for offence under Section 302, whereas A2 to A8 for the offence under Section 302/109 IPC. However, they all were acquitted for the charge of an offence under Section 396 IPC but were also punished for 120-B IPC. The facts from the record shows that somewhere in July 1999, Azam Ghori who died during the Trial organized a Tanjeem along with his associates accused A1 to A8, hatched a conspiracy to snatch away the cash bag from one Ramakrishna Rao, the owner of a cycle shop called 'Krishna Cycle Stores', New Bus Stand, Bodhan. In pursuance of the said conspiracy on 2nd August, 1999 accused chalked out plan at Sarbathi Canal Mosque, Bodhan that A1 should snatch the bag of the deceased and

A2 Feroz Khan should drive the vehicle to escape from the scene after commission of the offence and remaining of them i.e. A3 to A9 should watch the movements by taking shelter near the shop and house of the deceased for successful implementation of their plan. A6 Mohd. Abdul Mateen @ Muzaffar had provided his motorcycle while A9 gave his pistol to A1 for the purposes of committing the crime. It was decided that in the event Ramakrishna Rao showed any resistance and did not hand over the bag containing cash, they will shoot him and run away from the place of occurrence. Ramakrishna Rao was in his cycle shop called 'Krishna Cycle Stores' and also had second show collections of the theatre in the evening. He used to come back to his place with cash. On the night of 2nd August, 1999, a lorry loaded with spare parts of Hero Cycle came to the shop of the deceased and the goods were unloaded into the shop by 10.30 P.M. The deceased had second show collection from the theatre which is estimated to be of Rs.40,000/-. After closing the shop, he was proceeding to his house which was about 500 to 600 feet away and his salesman was accompanying him. One Nazar and Hamid were following him and all of them were going on foot. When they were about to reach the house of the deceased that the accused intercepted and demanded the deceased to handover the bag. As already noticed, there was resistance and arguments, resultantly the accused had fired three shots from his pistol, snatched the bag and ran away. When the deceased fell down PW1 one Prasad, PW2, the wife of the deceased and his elder daughter took the deceased to the Government Hospital, Bodhan in an auto and as no doctor available at the Hospital they took the deceased to Santhan Nursing Home where he was declared dead by the doctors. Thereafter, PW1 went to the police station at about 11.50 P.M. and gave complaint to the Sub-Inspector of Police Station. The Inspector was examined as PW23 and a complaint submitted was Ext. P.1. On this basis, an F.I.R. was registered under Section 302 and 379 r/w 34 I.P.C. and Section 25 & 27 of Indian Arms Act

being Ext. P.35. It may be noticed here that as per the evidence on record, the wife and daughter of the deceased were sitting on the first floor of the house and they came to have seen the deceased, PW1 coming to the house as well as his altercation with the accused. They had come down with the key to open the door for the deceased to enter the house however, when they opened the door the firing had taken place and the deceased was lying on the ground.

4. The investigating officer was examined as PW18, who took up the investigation, examined the witnesses and recorded the statement after preparing the sketch of the case of occurrence Ext. P11 and scene of offence panchanama Ext. P10. They were prepared in presence of PW9. The body of the deceased was sent for postmortem. PW14, Dr. B. Santosh conducted the autopsy over the dead body of the deceased and issued postmortem report certificate expressing the opinion as Ext.P15. The cause of death was identified to be internal hemorrhage and shock caused by a fire arm injuries.

5. Test Identification Parade for both the accused was held on 6th July, 2000 and 29th July, 2000 by PW17 and PW20 and relevant proceedings were marked as Ext. P17 and P28 respectively. After completion of the investigation, charge-sheet was filed in the Court. All the accused were subjected to trial. The prosecution examined as many as 26 witnesses and relied on documentary evidence Ex. P1 to Ext. P39. After making their statements under Section 313 Cr.P.C., the accused also examined four witnesses. Ultimately, they were found guilty and awarded sentence by learned Sessions Court as afore-noticed. The judgment of the Sessions Court was partially set aside by the High Court. Dissatisfied from the judgment of the High Court, the present appeal has been filed by the two appellants challenging the legality and correctness of the judgment of the High Court. The arguments advanced on behalf of the appellants are:

(i) The prosecution has not been able to establish the guilt

of the accused beyond any reasonable shadow of doubt. Non production of material evidence, findings being recorded on surmises and their being no direct evidence of conspiracy, the accused were entitled to the benefit of doubt.

(ii) The investigation of the case was so faulty that even important piece of evidence like blood stained earth, empties were admittedly not collected from the place of occurrence and no seizure memos were prepared, as stated by the Investigating Officer. This clearly creates a dent in the case of the prosecution.

(iii) The findings otherwise recorded are based on no evidence and are perverse.

(iv) From the case of the prosecution, it is clear that there was no light at the place of occurrence and the incident being that of 10.30 P.M. the visibility was bound to be NIL and as such, the version of the so called eye-witness was not true.

(v) In fact, the very persons of the eye-witnesses on the site is doubtful. The Identification Parade was conducted contrary to the settled law and in fact, it is no identification parade in the eye of law. The accused were in police custody and accused as well as their photographs had already been shown to the witnesses who were required to identify the appellant in the identification parade which itself was conducted after more than one year of the date of occurrence. Such identification parade could not be the basis of conviction as held by this Court in *Musheer Khan v. State of M.P.* [(2010) 2 SCC 748].

6. There was complete denial of the charge by the appellants having completely denied their involvement and took up a stand that they had been falsely implicated in the crime

and PW1 and PW2 both being interested witnesses, the prosecution case has not been established in accordance with law.

7. Common evidence will have to be discussed for deciding the merit of the submissions made on behalf of the appellant. Thus, we proceed to discuss all these issues together as in any case they are interlinked. First of all, we must record that PW1 and PW2 cannot be stated to be interested witnesses and in any case not of the kind that they should be disbelieved merely because they were in employment with the deceased and/or wife of the deceased. The circumstances of a case have to be examined in their normal conduct. It is but natural that the deceased employer who was carrying cash would normally ask some of his trusted employees to come with him. PW1 was working as a salesman. His statement clearly shows that he was fully aware about the facts of the business and had stated that a lorry of spare parts had come on 2nd August, 1999 at about 10.30 P.M. where PW3 and Hamid were also present. Cash of Rs.40,000/- approximately was in the bag, which the deceased was carrying. PW1 was walking with him, while PW3 was following from behind. The appellant had shown a revolver and had stated that the bag should be given to him and when the deceased questioned the said person and PW1 wanted to interfere, he threatened him saying that if he took a step forward he would be shot. Again, on being questioned by the owner, he shot the owner thrice with the revolver and he fell down. The other person came on a motorcycle to the spot and these persons fled away on the motorcycle. He clearly stated that he could easily identify both the persons. This witness had sufficient time to recognize the assailant inasmuch as first the assailant had an altercation with the deceased. His demand for the cash bag containing the cash was resisted by the deceased, where after, he shot the deceased, snatched the bag and then waited for the vehicle-motorcycle to come, on which both A1 and A2 fled away from the site. It was nobody's case that these two persons were wearing helmets or that their

faces were covered. In other words, there was sufficient time and opportunity for this witness and others to see and recognize both the assailants. About the availability of the light, he had stated that there was one tube light glowing at the house of the owner and there was also light from the illumination of Surya Nursing Home and even during the identification parade, he had identified both the co-accused. He had taken the deceased along with others to the Government Hospital and then to the Nursing Home. In his detailed cross-examination, nothing material could come out. He specifically denied that any photographs were showed to him by the police on the contrary, he received a letter to go to Chanchalguda Jail at Hyderabad to identify the assailant. In his cross-examination, he clearly stated as follows:

> "The distance between the place where my owner fall down and the house of my owner is about 35 feet. The tube light was at the third shutter which pertains to the house of my owner. After one year of the incident I came to know that the persons who are responsible for the murder of my owner were apprehended. I came to know about their apprehension when the police came to me to enquire whether I can identify the assailant."

8. Similarly, PW2, the wife of deceased clearly stated that on the date of the occurrence, she had switched on the tube lights and the light would fall on the main road. She also confirmed that there was illumination from the Nursing Home which is opposite to the house and about the date of incident she made the following statement:

> "On 2.8.1999 at 10.45 p.m. I was sitting by the side of the window. I was waiting for my husband. At about 10.45 p.m. my husband PW.1 and another person came upto my house. When my husband reached my house he had an altercation with one person. At that time PW.1 and another person was there. I saw my husband and I got up with keys

to go down stairs to open the lock. At that time I heard the sound of 'Dam'. I heard that sound. By the time I got down from the house and went to the spot my husband was lying on the road. Hearing my cries, my family members and others gathered there. PW.1 told me that there was a cash of Rs.40,000/- in the bag. When I questioned PW.1 he told me that the said bag was taken away. I can identify the person who had altercation with my husband. The accused are brought near to the witness chair and the witness pointed out A.1 who is standing in the fifth position from the left side and said that A.1 had altercation with her husband. I am seeing A.1 today in the Court after the incident. Police examined me. One motor cycle came to the spot and took away the assailant who shot my husband. One person was riding the motor cycle."

9. In the cross-examination, she specifically denied the suggestion that she could not see the persons who are coming from right side on the road and she stated that the out house is adjacent to the main road. PW3, Nasir Khan fully corroborated the statement of PW1 and that they stayed at Swathi Hotel for taking tea. The incident took place at the distance of 300 feet from the house of the owner. After hearing the sound, she immediately ran towards the body of the deceased and then took him to hospital. Their statements apparently appear to be correct. They have not exaggerated any facts. Their statements appear to be truthful description of the events that occurred in their presence or of what they have the knowledge. As far as PW1 is concerned, he is a witness to the entire incident. No doubt, the investigating officer had appeared as PW18 and according to him after he had taken up the investigation, he was working as inspector in the police station at the relevant time. He had prepared rough sketch of the place of occurrence which was Ext.11 and according to him it was a rainy day. He stated that PW2 had not stated before him that there was sufficient illumination because of tube light and Nursing Home and from the public street light. This witness

has stated that when he went to the place of occurrence, number of people had assembled there. The following extracts of examination-in-chief of this witness, has been relied upon by the learned Counsel appearing for the appellant.

"It is true that PW.2 did not state before me that she would be watching the people who will be coming to her house while sitting at the window during her examination. It is true that PW.2 did not state before me that there was illumination from her house and from the Nursing home and from public street lights.

After taking up investigation firstly, I went to the scene of offence. I reached the scene of offence by about 12.45 A.M. When I went to the scene of offence many people were present there and from among the persons I secured Shivakumar (PW9). PW9 was in the public but I cannot tell exactly as to where he was standing or sitting in the public.

I have not collected anything from the scene of offence as it was drizzling and also as there was public rush at the spot. I have not examined any one at the auto stand. I saw blood stains on the left side of the road while facing towards Nizamabad. The blood stains were found on the edge of the road. It is true that opposite to the house of the deceased there are business shops. In Ext.P10 there is no mention about the existence of tube lights at the scene of offence."

10. While relying upon these extracts of the examination-in-chief and cross-examination of this witness, the learned Counsel appearing for the appellant contended that since the bloodstain earth and nothing else recovered from the premises including the empties of the gun shots. The entire investigation of the case is faulty and cannot be relied upon. The statement of the investigating officer is found to be not supporting the case of the prosecution. The whole case of the prosecution should fall. Firstly, we cannot read these statements out of context and

they must be examined in their entirety. In other words, the statement of the investigating officer has to be read in its entirety and then any conclusion can be drawn. Certainly, this investigating officer has failed to conduct the investigation as per the expected standards and we have no hesitation in observing that the case could have been investigated with greater care, caution and by application of scientific methods. It will not give the accused/appellants any benefit because PW1 was never confronted with his statement under Section 161 Cr.P.C. by the appellant during her cross-examination with regard to the above facts. What she had stated before PW14, would be best recorded in the statement under Section 161 Cr.P.C. That steps having not been taken by the appellant in accordance with law, now, they cannot drive any benefit. Secondly, not only PW2 but even other witnesses have stated that there was sufficient light in and around the place of occurrence because of street light, light from the house of the deceased, bus stand and the Nursing Home. There is no reason for us to disbelieve PW1, PW3 and other witnesses who said that there was sufficient illumination at the place of occurrence and the argument advanced by the appellants hardly has any merit. Yes, it was expected of the investigating officer to seize from the place of occurrence such articles or items including the bloodstain earth or empties, which were available even as per his statement. This lacuna in investigation stands completely covered by the statement of the witness, the medical report and the eye-witness version. Dr. K. Raja Gopal Reddy, Professor and Head of the Forensic Department, Gandhi Medical College who had performed postmortem was examined as PW24 and he stated that his opinion had been sought by the investigating officer. After going through the report and the inquest report, he had stated that the probable weapon used was rifle fire-arm and Ext.P13 was his opinion. In Ext.P15 which is the postmortem report, the injuries have been described as under:

"11.Injuries:

Fire arm:

Entry wounds:

1. Ulnar medical surface of right wrist 2 cms diameter.

2. Oblique 3 cm x 2 cm, below medical end of right clavicle in front of chest.

3. Circular 2 cm diameter below medical end of left clavicle in front of chest.

Exist wounds:

1. Radial lateral surface of right wrist 3 cm diameter.

2. Oblong 4 x 3 cm post surface of right side chest by the side of spine.

3. Circular 3.5 cm, 3 cm below the exist wound No.2."

11. The above evidence of the doctors as well as that of the PW1 clearly establishes the story of the prosecution. According to PW1, the assailants fired through armed shots and as per medical evidence also, there are three injuries and exists injuries on the body of the deceased. We have also noticed that the investigating officer failed to perform his duties appropriately in not recovering the bloodstain earth as well as the empties since they were not in the body of the deceased. According to the investigating officer, there were few other people and there was a bus stand near the place of occurrence. The Investigating Officer fully corroborated the statement of PW1 and other witnesses. Another important factor which has to be noticed is, probably the way this investigating officer has conducted the investigation, that investigation of the case was transferred to CID after some time and, it was CID which completed investigation of the case. PW25 and PW26 have then conducted investigation at a later stage. According to PW25, M. Vankata Rao he had arrested the accused as well as seized certain items vide Ext. P38

including a scooter while Ashok Kumar PW26 claimed that he was working as inspector and as per Memo No. 1214/C12/CID/ 2000 of the Additional DGP, CID this case was given to him for investigation. After the arrest of Mirza Qasim Baig, A.4 and his confessional statement, the systematic investigation was conducted by him and he arrested accused Kameel as well as accused Feroz somewhere on 2nd June, 2000. He even recorded the statement of PW4. On 17th June, 2000, he submitted a requisition before the JFCM for holding Test Identification Parade for identification of both the appellants and he was the main investigating officer who conducted the investigation and arrested the main accused. During investigation a diary/writing was also recovered relating to the activity of the accused particularly, the occurrence in question. The writing was sent for comparison to the Forensic Science Laboratory at Hyderabad and which had expressed an opinion that the persons who wrote the red enclosed writings marked as S1 to S29 also wrote the red enclosed writing marked Q1 to Q378, Q131/1 and Q.122/1. The identification parade was conducted on 29th July, 2000 at 3.30 P.M. vide Ext.P28. This was conducted and completed by 8th Metropolitan Magistrate, Hyderabad. This identification parade was performed in the jailor's office room and the witnesses were examined by the Magistrate. The Magistrate had required and the jailor then had provided non-suspect persons who were asked to participate in the parade after the accused had expressed his satisfaction, he even was asked to stand in any place in the row with the known-suspects and thereafter Y. Krishna Mohan (PW-1) was brought to the Test Identification Parade and then the accused was identified in accordance with law. The identification parade was closed. Despite the above Test Identification Parade having been conducted in accordance with law, the appellants have raised objections to the identification parade and have stated that they were in illegal confinement of the police. Their photographs were shown and the identification parade itself has been conducted after such a long time. While relying upon the case of *Musheer Khan* (supra), it is contended that they

were retained in police custody and that discrepancies discernable in his identification by the witness renders the identification unbelievable and improper.

12. These arguments do not impress us. The accused himself was arrested after one year and it was only thereafter that the investigating officers had been able to collect substantial evidence and then after arresting all the concerned accused, the identification parade was conducted on 27th July, 2000. Thus, there is no delay in conducting the identification parade. There is nothing on record to show or prove that these accused were in illegal custody or confinement of the police. In order to prove this plea, they have produced four witnesses D1 to D4 but they could not bring any records or any other cogent or substantial evidence to prove the alleged case of illegal confinement and/or for that matter that they were shown to the witnesses before the identification parade was conducted by the investigating officer. Both the learned Trial Court as well as the High Court had disbelieved the witnesses of the defence in that regard.

13. Somewhat similar plea was taken in regard to identification, according to the accused they were shown to the witnesses while in custody and their photographs have been taken from their residence which in turn were also shown to the witnesses. This plea was rejected by the Court in a very recent judgment. After discussing the law in some detail in the case of *Siddartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* [JT 2010 (4) SC 107], the Court held as under:

> "113. It is also contended by the defence that since the photographs were shown to the witnesses this circumstance renders the whole evidence of identification in Court as inadmissible. For this, it was pointed out that photo identification or TIP before the Magistrate, are all aides in investigation and do not form substantive evidence. Substantive evidence is the evidence of the witness in the court on oath, which can never be rendered

inadmissible on this count. It is further pointed out that photo identification is not hit by 162 Cr.P.C. as adverted to by the defence as the photographs have not been signed by the witnesses. In support of his argument the senior counsel for Manu Sharma relies on the judgment of *Kartar Singh v. Union of India* [(1994) 3 SCC 569] at page 711 wherein while dealing with Section 22 TADA the Court observed that photo TIP is bad in law. It is useful to mention that the said judgment has been distinguished in *Umar Abdul Sakoor Sorathia v. Intelligence Officer, Narcotic Control Bureau,* [(2000) 1 SCC 138] at page 143 where a Photo Identification has been held to be valid. The relevant extract of the said judgment is as follows:-

"10. The next circumstance highlighted by the learned counsel for the respondent is that a photo of the appellant was shown to Mr. Albert Mkhatshwa later and he identified that figure in the photo as the person whom he saw driving the car at the time of interception of the truck.

11. It was contended that identification by photo is inadmissible is evidence and, therefore, the same cannot be used. No legal provision has been brought to our notice, which inhibits the admissibility of such evidence. However, learned counsel invited our attention to the observations of the Constitution Bench in Kartar Singh v. State of Punjab which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court observed in that contest: (SCC p.711, para 361)

> 361. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provision and accordingly we strike down Section 22 of the Act.

12. In the present case prosecution does not say that they would rest with the identification made by Mr. Mkhatshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at his stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time. It must be borne in mind that the appellant is not a proclaimed offender and we are not considering the eventuality in which he would be so proclaimed. So the observations made in Kartar Singh in a different context is of no avail to the appellant."

Even a Test Identification Parade before a Magistrate is otherwise, is hit by Section 162 of the Code. Therefore, to say that a photo identification is hit by section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in Court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not born out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence

of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.

14. In view of the clear statement of law, we have no hesitation in rejecting the arguments of the appellant in relation to conduct of the identification parade.

15. In the statement under Section 313 Cr.P.C., the accused took a plea of complete denial. According to them, they were asked to come to the police station for interrogation and then were produced in Court. They offered no explanations and as already noticed, they even examined four witnesses in support of their case. As already noticed, nothing material could be established by these defence witnesses, specially, in regard to the present two accused. However, accused had been acquitted by the Court, as the prosecution could not produce any cogent and material evidence except the diary and therefore, the charge of conspiracy under Section 120-B was not proved against them. Vide Ext. P18 & Ext. P19 the accused had been arrested and produced before the Court of competent jurisdiction. The extract of diary which was recovered during the investigation had various entries, which related to the planning of the crime, its commission and result thereof. This aspect has been discussed by the learned Trial Court in para 28 of its judgment. The High Court has also examined this question in some elaboration. The concurrent finding thus has been that these extracts from the diary provide substantial support to the case of the prosecution. On July, 1999 they had conspired and after consultation in Sarbathi Canal Mosque, Bodhan that after closing the show room the deceased goes on foot and nobody is there on the road and that the work has to be done within 2-3 days. These questions have been discussed by the trial court as well as by the High Court in their correct perspective and upon examination of the entire documentary and ocular evidence; we do not find any reason to interfere in the concurrent finding recorded by the Courts.

16. We are of the considered view that the prosecution has been able to prove its case beyond reasonable doubt. The gravity of the offence, the manner in which it had been committed and the conduct of the accused do not call for any interference by this Court even on the question of quantum of sentence.

17. For the manner in which the Investigating Officer (PW-25) had conducted the investigation requires much to be desired. We cannot also ignore the fact that he showed utter carelessness in not collecting the blood stained earth and empties and other material pieces of evidence, which were available at the place of occurrence. The occurrence had taken place late in night i.e. at 10.45 P.M. and hardly there would be such gathering. It was expected of the Investigating Officer to perform his duties with greater caution, sincerity and by taking recourse to appropriate scientific methods for investigating such a heinous crime. Thus we direct the Director General of Police, Andhra Pradesh to examine this aspect and take action in accordance with law.

18. Consequently, the appeal is without any merit and is hereby dismissed.

D.G. Appeal dismissed.

SANATAN NASKAR & ANR.
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 686 of 2008)

JULY 8, 2010

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

Penal Code, 1860 – ss. 302/34, 392 and 411 – Murder and robbery – Unknown miscreants ransacking house of complainant's and committing death of complainant wife – Conviction and sentence u/ss. 302/34, 392 and 411 by court below – Justification of – Held: Justified – Prosecution was able to establish and prove complete chain of circumstances and events – Said circumstances collectively point to the guilt of accused beyond any reasonable doubt.

Code of Criminal Procedure, 1973 – s. 313 – Object and scope of – Discussed.

According to the prosecution case, unknown miscreants caused death of complainant's wife. The assailants also ransacked the rooms of the complainant's house. Investigation was carried out. The appellants were arrested. On basis of the statement of the accused, the wrist watches as well as camera which were looted from the house of the deceased were recovered. The Sessions Judge as well as the High Court convicted and sentenced the accused u/ss. 302/34, 392 and 411 IPC. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1. The doctrine of circumstantial evidence is brought into aid where there are no witnesses to give eye version of the occurrence and it is for the prosecution to establish complete chain of circumstances and events

leading to a definite conclusion that will point towards the involvement and guilt of the accused. [Para 1] [1030-B-C]

2.1 Section 27 of the Evidence Act, 1872 clearly states that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence, in the custody of the police officer, so much of such, information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. [Para 5] [1035-G]

2.2 In the instant case, the handkerchief, that was recovered from the place of occurrence, was subsequently owned by the accused. The fact recorded that he admitted his guilt was not admissible and could not be proved and has rightly been rejected by the trial court in the impugned judgment. The wrist watches and the camera, which were recovered after the statement of the accused was recorded, while in custody, cannot be faulted with as those items have not only been recovered but duly identified by the owners during investigation as well as at the trial stage. PW 13-Investigating Officer, in his statement has referred to the recording of the statement of the accused after they were taken into custody and resultant recoveries of the articles. While referring to the cross examination of PW 13, efforts were made to involve the local witnesses, which he did not succeed and later when the seizure memos were prepared PW8 and PW9 were present. Ext. 18 clearly shows their presence and nothing contrary was suggested to them in their cross examination. Their presence during search and seizure of the house of the accused on two occasions has been completely established by the prosecution. No confessional statement made to the police, as alleged, has been relied upon by the Courts. It is only the objects recovered, in

furtherance to the statement of the accused while in police custody like wrist watches, camera etc., that has been relied upon to by the court to complete the chain of events relating to the crime in question. Thus, any of these acts are not hit by section 27 of the Act. [Para 5] [1035-G-H; 1036-A-F]

Anter Singh v. State of Rajasthan **(2004) 10 SCC 657;** *Salim Akhtar v. State of U.P.* **(2003) 5 SCC 499 – referred to.**

2.3 PW 8 and PW 9 specifically stated that on the date of occurrence they had seen the accused near the place of occurrence. PW5 and PW 6 also stated that the accused were known to the family of the deceased. Most important statement pointing towards the normal practice of the house and likely involvement of the accused is pointed out in the statement of PW6, the daughter-in-law of the deceased. Besides referring to their departure from the house along with others and returning back to the house at about 9.30 P.M., she also stated that she found her mother-in-law, the deceased, lying on the floor and blood coming out of her mouth from the right side. The house was ransacked. She specifically stated that she would be able to identify the wrist watches and the camera and she gave the make of wrist watches and camera. All the articles were identified by her. [Para 7] [1038-A-D]

2.4 The forensic experts had taken the foot prints but the report was not definite as to whether the foot prints found at the site were the foot prints of the accused, however, this fact loses significance for the reason that the Investigating Officer had clearly stated in his evidence that at the place of occurrence, which was later on sealed by him, there were lot of foot prints as number of persons had gathered there. This small discrepancy cannot be of much advantage to the appellants inasmuch immaterial

contradictions or variations are bound to arise in the investigation and trial of the case for various factors attributable to none. [Para 8] [1038-H; 1039-A-C]

State of Haryana v. Ram Singh **2002 CLJ 987 – referred to.**

2.5 The answers by an accused u/s. 313 Cr.P.C. are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of s. 313 Cr.P.C. is wide and is not a mere formality. The object of recording the statement of the accused u/s. 313 Cr.P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made u/s. 313 Cr.P.C. as it cannot be regarded as a substantive piece of evidence. [Para 10] [1040-D-G; 1041-C-G]

Vijendrajit v. State of Bombay **AIR 1953 SC 247 – referred to.**

2.6 It was expected of the accused to provide some reasonable explanation in regard to various circumstances leading to the commission of the crime. He was known to the family along with other accused and by giving just a bare denial or lack of knowledge he cannot tilt the case in his favour. Rather their answers either support the case of the prosecution or reflect the element of falsehood in the statement recorded u/s.313 Cr.P.C. In both these circumstances the court would be entitled to draw adverse inference against the accused. [Para 11] [1042-D-F]

2.7 It cannot be said that the appellants have been falsely implicated. The articles have been duly identified which were recovered from the possession of the accused at their instance. It is also not correct that the court has relied upon the confessions made to the police. Only that much of the relevant fact has been taken into consideration which has resulted in the recovery of the wrist watches, camera etc. and the statement, to the extent they admitted their crime, has not been referred much less relied upon by the courts. [Para 12] [1042-G-H; 1043-A]

2.8 There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. An accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on

the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard. [Para 13] [1043-B-D]

Sharad v. State of Maharashtra **(1984) 4 SCC 116 – referred to.**

2.9 The accused, after having known the entire case of the prosecution, is required to be examined u/s. 313 Cr.P.C. All the material evidence has to be put to the accused and he has to be awarded the fair opportunity of answering the case of the prosecution, as well as to explain his version to the court without being subjected to any cross-examination. The answers given by the accused can be used against him in the trial in so far as they support the case of the prosecution. [Para 15] [1045-E-G]

2.10 In the instant case, the prosecution has been made able to establish and prove complete chain of circumstances and events which if collectively examined, clearly points to the guilt of the accused. [Para 18] [1046-G-H; 1047-A]

2.11 It is in evidence that the entrance door of the house was used to be locked. It was opened only when the visitor to the house press the call bell and such person was duly identifiable to the member of the family, watching from the 1st floor and that the keys were sent down with the help of a thread to enable the visitor to open the outside lock and then to enter the house. Keeping this routine practice adopted by the family of the deceased, it is clear that both the accused could enter the house only by the process indicated above or by break opening the lock of the entrance door. This is nobody's case before the Court that the lock or the door itself was broken by the miscreants who entered the house of the deceased. The only possible inference is that these accused were known to the family, as stated by the

witnesses including PW 6 and they entered the house in the manner afore stated and upon entering the house they ransacked the house and committed the murder of PG and fled away with stolen articles. The stolen articles were subsequently recovered from them and duly identified during investigation and trial. All these circumstances established the case of the prosecution beyond any reasonable doubt. [Para 19] [1047-A-E]

Anant Lagu v. State of Bombay **AIR 1960 SC 500; *Dayanidhi Bisoi v. State of Orissa* AIR 2003 SC 3915 – referred to.**

Sudama Pandey v. State of Bihar **(2002) 1 SCC 679 – distinguished.**

Case Law Reference:

(2004) 10 SCC 657	**Referred to.**	**Para 6**
(2003) 5 SCC 499	**Referred to.**	**Para 6**
2002 CLJ 987	**Referred to.**	**Para 8**
AIR 1953 SC 247	**Referred to.**	**Para 10**
(1984) 4 SCC 116	**Referred to.**	**Para 14**
AIR 1960 SC 500	**Referred to.**	**Para 16**
AIR 2003 SC 3915	**Referred to.**	**Para 17**
(2002) 1 SCC 679	**Distinguished.**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 686 of 2008.

From the Judgment & Order dated 07.02.2005 of the High Court at Calcutta in Criminal Appeal No. 55 of 2001.

B.S. Malik, Mehtab Ahmed Ali Khan for the Appellants.

Avijit Bhattacharjee for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. This case is a typical example, where conviction is entirely based upon circumstantial evidence. It is a settled principle of law that doctrine of circumstantial evidence is brought into aid where there are no witnesses to give eye version of the occurrence and it is for the prosecution to establish complete chain of circumstances and events leading to a definite conclusion that will point towards the involvement and guilt of the accused. The challenge in the present appeal is to the concurrent judgments of conviction passed by the learned Sessions Judge as well as the High Court, primarily, on the ground that the prosecution has been able to establish by leading cogent and reliable evidence and the chain of circumstances leading to the commission of the offence by the accused persons. The challenge, primarily, is that findings of the Court are erroneous in law and on the facts of the case. According to the accused-appellants, the prosecution has not been able to establish the guilt beyond reasonable doubt. Secondly, it is submitted that the confessions, alleged to have been recorded by the police officer on the basis of which recoveries were effected, are contrary to law and, therefore, could not be the basis of the conviction of the appellants. For these reasons the appellants claim acquittal from charge.

2. To examine the merits of these contentions reference to the case of the prosecution and the facts, as they emerged from the record, would be necessary.

3. On 28th April, 1999 at Police Station Jadavpur, a case was registered under Section 302/34 of the Indian Penal Code (hereinafter referred to as 'IPC') against unknown miscreants for causing death of one Smt. Phool Guha, wife of Dr. Ashim Guha, resident of 11/1 East Road within Jadavpur Police Station. This case was registered on the basis of the complaint made by Dr. Ashim Guha (Ext. P.1) which reads as under:

"To
The Officer-in-Charge
Jadavpur, P.S.
Dist.-south 24-Parganas

Sir,

This is to inform you, that on 28.4.99 at aroud 20.15 hrs. myself along with my son Debmalya and daughter-in-law Indira left for Gariahat for some personal work. My wife Smt. Phul Guha was in the house alone at 21.35 hrs. we all returned home and noticed a large gathering in front of our house. I found my wife lying dead inside the room of my daughter-in-law having her tongue prosuded and some marks of bruises could to detected on her body and blood was seen trickled out of the right angle of her mouth. It was also noticed that the assailants after (illegible) the murder of my wife, ransacked both the rooms and the household articles were scattered.

It appeared that the assailants entered through the main door after obtaining the keys and the lock along with the key was found in the stair case.

I, therefore, request you to kindly take necessary action and do the needful to (illegible) the miscreants.

Yours faithfully,
Sd/- Asim Kumar Guha"

As is evident from the above complaint that Dr. Ashim Guha, husband of the deceased, his son Debmalya and daughter-in-law Indira had left for Garihat on 28th April, 1999 at about 8.15 P.M. The deceased was all alone at home. When they returned home at about 9.30 P.M. they found a large gathering in front of the house. Upon entering the house, they found that Phool Guha was lying dead inside the room of her daughter-in-law with tongue protruded and with some marks of bruises on her body and blood trickling out of her mouth. It transpired that the

assailants committed the murder of his wife and had ransacked both the rooms as the household articles were lying scattered. Mrinal Kanti Roy, the Investigating Officer, who was later examined as PW 13, commenced his investigation. He called for experts including dog squad. The photographs were taken. The dog squad was brought to the place of occurrence. After sniffing the place of occurrence, taking the round of the house and also sniffing the handkerchief lying on the face of the deceased, the dogs could not identify anyone present there. Thereafter inquest of the deceased was taken with the help of the relatives. The body was taken to Mominpur Police Morgue by the constable where the post mortem of the deceased was conducted and the report is Ext. 8. From the place of occurrence certain articles were recovered and seizure memos were prepared whereafter both the rooms at the upper floor of the house were locked. The saliva and blood staines, where the body was found, were also seized by scraping floor and separate seizure memo was prepared and marked as Ext. 3. After some enquiry and investigation, the Investigating Officer arrested Sanatan Naskar, Appellant No. 1 on 8th July, 1999 from village Khasiara. He admitted his guilt in commission of the crime as well as identified the handkerchief recovered as his own. During investigation this appellant made a statement, which led to the recovery of wrist watches, which were allegedly looted from the house of the deceased. He also informed about the involvement of accused Mir Ismile, Appellant No. 2, who was arrested on 11th July, 1999 from Jugi Battala and he also, during investigation, made a statement leading to the recovery of two wrist watches as well as camera. The watches were recovered vide recovery memo Ext.6. The camera was recovered on the statement of the said accused from village Jhijrait for which the seizure memo Ext. 5 was also prepared. An attempt was made to recover jewellery from the shop, which was raided, but nothing could be recovered. The Investigating Officer then recorded the statements of number of witnesses, but in particular Jahar Chatterjee @ Kakuji (PW5), Indira Guha (PW6), Ali Anam (PW8) and Biplab Talukdar (PW9)

respectively and after completion of the investigation, a charge sheet under Sections 302/411/34 IPC was filed before the Court of competent jurisdiction. The case was committed to the Court of Sessions by the learned Magistrate vide order dated 28th November, 1999. After trial and recording of the statements of the accused under Section 313 of the Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.') the learned Sessions Judge, by a detailed judgment, convicted both the accused and punished them as under:

> "Both the convicts are produced from J.C. They are given hearing with regard to question of sentence u/s 235(2) Cr.P.C. The convicts are informed that the sentence u/s 302/34 I.P.C. which has been established yesterday is life imprisonment or death penalty and the sentence for committing robbery u/s 392 I.P.C. is imprisonment for 10 years and the sentence for having possession of the looted property u/s 411 I.P.C. is 3 years. The convicts plead mercy. Heard Ld. PP and Ld. defence counsels in this regard.
>
> As the convicts are found guilty u/s 302/34 IPC the minimum punishment is imprisonment for life and this is not a case of rarest of the rare cases and as such the death penalty is not called for. Accordingly, both the convicts are sentenced to R.I. for Life. With regard to offence of robbery u/s 392 IPC the convicts are sentenced to R. Imprisonment for five years. With regard to offence u/s 411 IPC for possessing the looted properties the convicts are sentenced to R. Imprisonment for one year. All the sentences shall run concurrently."

4. Aggrieved from the judgment of guilt and order of sentence dated 6.12.2000, the appellants filed an appeal before the High Court. The High Court declined to interfere with the judgment of the learned trial Court. Even on the question of sentence the High Court found that adequate and just sentence had been awarded. In other words, the High Court even declined

to interfere on the question of quantum of sentence and dismissed the appeal vide order dated 7th February, 2005 giving rise to the filing of the present appeal under Article 136 of the Constitution.

5. Since we have noticed, at the very opening of the judgment, that it is a typical case of circumstantial evidence and the entire challenge to the concurrent judgments is based on the facts that the chain of events has not been completely proved by the prosecution beyond reasonable doubt. Thus, the appellants are entitled to the benefit of doubt on the facts of the present case. Besides challenging the recoveries alleged to have been made from and/or at the instance of the accused, it was contended that the same are hit by the provisions of Section 27 of the Indian Evidence Act (hereinafter referred to as 'the Act'). That being the sole and paramount circumstance, which had weighed with the Courts for convicting the appellants, the judgment under appeal is liable to be set aside. We are of the considered view that the chain of events and circumstances has been quite aptly stated by the trial Court in its judgment which are as follows:

> "Thus, therefore, it is now settled that the deceased died in between 8.15 P.M. to 9.00 PM. No other hypothesis in the alternative can be drawn.
>
> In this regard the chain of circumstances rest on the following clues:-
>
> 1) Presence of a handkerchief with a empty packet of capstan tobacco pouch beside the dead body;
>
> 2) Seizure of camera with cover and two ladies wrist watches from the hideout as laid by both accd. Separately; and
>
> 3) presence of accd. Persons near the PO house at the approximate time of murder;

4) medical evidence by the auto pay surgeon (PW-10) who suggested that the death of the deceased might be resulted from suffocation caused by this handkerchief (produced to him) if pressed against the mouth and nazal cavity with sufficient force and that the scuffling might due to force applied by more than one person;

5) result of chemical examination of the handkerchief.

Regarding time no. 1 the handkerchief was sent for chemical examination and the report is marked as exbt-14 with objection. It appears from the said report that traces of saliva was detected in the item-A (handkerchief) and item-B (floor scrapings) and floor swab in cotton wool. Blood was detected in item-A and B. Regarding the blood group of these items report of the serologist was called for. The report of serologist is marked exbt-14/9. It appears from the said report that the handkerchief cuttings floor scraping and blood soaked in filter paper were stained with human blood but the blood group of those human blood could not be determined as the sample was not sufficient for test for the first two items and item no. 4 viz. blood soaked filter paper was stained with B-group blood.

It however appears from the said report that the blood of the deceased belongs to group-B. So the report of F.S.L. and the serologist do not help the prosecution. So I shall have to rely on the other evidence on record."

The provisions of Section 27 of the Act clearly states that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence, in the custody of the police officer, so much of such, information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. In the present case the handkerchief, that was recovered from the place of occurrence, was subsequently owned by the accused. The fact recorded that he admitted his guilt was not admissible and could

not be proved and has rightly been rejected by the learned trial Court in the impugned judgment. The wrist watches and the camera, which were recovered after the statement of the accused was recorded, while in custody, cannot be faulted with as those items have not only been recovered but duly identified by the owners during investigation as well as at the trial stage. PW13, the Investigating Officer, in his statement has referred to the recording of the statement of the accused after they were taken into custody and resultant recoveries of the articles. The contention is that the confessions extracted by the police officer are illegal and inadmissible, the alleged recoveries made in furtherance thereto and preparation of seizure memos are also unsustainable. In other words, these exhibits cannot be admitted or read in evidence. We may notice, on the contrary, that even the learned trial Court has specifically dealt with this objection. While referring to the cross examination of PW 13, efforts were made to involve the local witnesses, which he did not succeed and later when the seizure memos were prepared PW8 and PW9 were present. Ext. 18 clearly shows their presence and nothing contrary was suggested to them in their cross examination. Their presence during search and seizure of the house of the accused on two occasions has been completely established by the prosecution. No confessional statement made to the police, as alleged, has been relied upon by the Courts. It is only the objects recovered, in furtherance to the statement of the accused while in police custody like wrist watches, camera etc., that has been relied upon to by the Court to complete the chain of events relating to the crime in question. Thus, any of these acts are not hit by the provisions of Section 27 of the Act.

6. Usefully, reference can also be made to the judgments of this Court enunciating the principles under Section 27 of the Act. The Court in *Anter Singh v. State of Rajasthan* [(2004) 10 SCC 657] has held that the first condition necessary for bringing Section 27 into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information

received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that, at the time of the receipt of the information, the accused must be in police custody. The last but the most important condition is that, only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The Court further held as under:

> "The various requirements of the section can be summed up as follows:
>
> (1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
>
> (2) The fact must have been discovered.
>
> (3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
>
> (4) The person giving the information must be accused of any offence.
>
> (5) He must be in the custody of a police officer.
>
> (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
>
> (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

Similar view was taken by this Court in *Salim Akhtar v. State of U.P.* [(2003) 5 SCC 499].

7. Now let us examine certain material facts which would help in understanding the chain of events in its correct perspective. PW 8 and PW 9 have specifically stated that on the date of occurrence they had seen the accused near the place of occurrence. PW5 and PW 6 have also stated that the accused were known to the family of the deceased. Most important statement pointing towards the normal practice of the house and likely involvement of the accused is pointed out in the statement of PW6, Smt. Indira, the daughter-in-law of the deceased. Besides referring to their departure from the house along with others and returning back to the house at about 9.30 P.M., she also stated that she found her mother-in-law, the deceased, lying on the floor and blood coming out of her mouth from the right side. The house was ransacked. She specifically stated that she would be able to identify the wrist watches and the camera and she gave the make of wrist watches and camera i.e. HMT and Titan wrist watches and Paintax camera. All the articles were identified by her as Ex.P.4 and P.5 respectively. About the accused knowing the family as well as how they used to open the entrance door she stated as under:

> "These two accused persons in the lock up were occasionally engaged by us as hired labours for watering the flower tubs at roof top and cleaning the cars and for carrying drinking water. My mother in law also used their rickswa for visits. The accused are identified.
>
> The upper story is used for our residence. The accused persons during their call rang an door bell. The inmate of the house used to come to balcony to identified the coler and in case he appears to be known man, the key in usually lowered by a string when the coler opens then door and on his entering recock the same and returned the key. We observed this system as a safety measure."

8. The forensic experts had taken the foot prints but the report was not definite as to whether the foot prints found at

the site were the foot prints of the accused, however, this fact looses significance for the reason that the Investigating Officer had clearly stated in his evidence that at the place of occurrence, which was later on sealed by him, there were lot of foot prints as number of persons had gathered there. This small discrepancy cannot be of much advantage to the appellants inasmuch immaterial contradictions or variations are bound to arise in the investigation and trial of the case for various factors attributable to none. Reliance was placed by the Court on the judgment of State of *Haryana v. Ram Singh* [2002 CLJ 987] to say that in serious offences it is not fair to extend the rule relating to burden of proof to this extent that justice is the casualty. The appreciation of evidence by the Court can hardly be faulted with. At this stage, reference to the statements of accused under Section 313 Cr.P.C. would also be significant. Accused Sanatan Naskar in answer to Question No. 3 completely denied the knowledge of murder and death of Phool Guha despite the fact that he was known to the family and he was being engaged for different works at the same place. In relation to Question No.13 he answered that that this was not his handkerchief and in contradiction to the same we may refer to Question No. 16 and answer thereof:

> "Q. No. 16 Officer-in-charge stated that dog of Police, first sniffed the hanky and then showed you and he became sure that the handkerchief was yours. What do you say?
>
> A 16. There were losts of people alongwith the Police-Dog. They wiped the swet of my armpit and gave that to the 'Dog'. It came and stated before me."

9. In relation to recovery of the items from him he was questioned by the Court to which he offered the following answer:

> "Q. 27 That witness had stated that on that day at about 1.30 clock in the afternoon he along with the officer-in-charge Anu Alam and you went to the house of Kartick Naskar at Gangaduara. Village boarding in a police jeep and you recovered two wrist watches, one H.M.T. and one Titan Wrist-watch all tied in a packet. Inspector prepared the seizure list in front of this witness and Anuu Alam and you took a copy of the by putting your thumb impression. What do you say?
>
> A. 27 He did not give me any copy and he also did not go with me. I only put my thumb impression in a plain paper at the office."

He further stated that he had been implicated and does not wish to offer any defence.

10. The answers by an accused under Section 313 of the Cr.PC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 of the Cr.PC is wide and is not a mere formality. Let us examine the essential features of this section and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Cr.PC. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.PC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and, besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused

makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) of Cr.PC explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for, any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.PC as it cannot be regarded as a substantive piece of evidence. In the case of *Vijendrajit v. State of Bombay,* [AIR 1953 SC 247], the Court held as under:

> "**(3)**. ……..As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under S.342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under S.342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

11. In the light of the above stated principles it was expected of the accused to provide some reasonable explanation in regard to various circumstances leading to the commission of the crime. He was known to the family along with other accused and by giving just a bare denial or lack of knowledge he cannot tilt the case in his favour. Rather their answers either support the case of the prosecution or reflect the element of falsehood in the statement recorded under Section 313 of Cr.PC. In both these circumstances the Court would be entitled to draw adverse inference against the accused.

12. As already noticed, this is a case of circumstantial evidence. We are not able to accept the contention that the appellants have been falsely implicated in the present case. The articles have been duly identified which were recovered from the possession of the accused at their instance. It is also not correct that the Court has relied upon the confessions made to the police. Only that much of the relevant fact has been taken into consideration which has resulted in the recovery of the articles i.e. wrist watches, camera etc. and the statement, to

the extent they admitted their crime, has not been referred much less relied upon by the Courts. In the case of circumstantial evidence, law is now well settled.

13. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard.

14. A Three Judge-Bench of this Court, in the case of Sharad v. State of Maharashtra [(1984) 4 SCC 116], held as under:

> "152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant v. State of Madhya Pradesh* [AIR 1952 SC 343]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi v. State of Uttar Pradesh* [(1969) 3 SCC 198] and *Ramgopal v. State of Maharashtra* [(1972) 4 SCC 625] It may be useful to extract what Mahajan, J. has laid down in Hanumant case:
>
> > "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any

other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

15. So, the first and the foremost question that this Court has to examine in the present case is, whether the prosecution has been able to establish the chain of event and circumstances which certainly points out towards the involvement and guilt of the accused. Even, before we enter upon adjudicating this aspect of the case, it will be appropriate to narrow down the controversy keeping in view the admissions, if any, made by the appellants. The accused, after having known the entire case of the prosecution, is required to be examined under Section 313 of Cr.PC. All the material evidence has to be put to the accused and he has to be awarded the fair opportunity of answering the case of the prosecution, as well as to explain his version to the Court without being subjected to any cross-examination. As already noticed, the answers given by the accused can be used against him in the trial in so far as they support the case of the prosecution.

16. In the cases of circumstantial evidence, this Court has even held accused guilty where the medical evidence did not support the case of the prosecution. In *Anant Lagu v. State of Bombay* [AIR 1960 SC 500], where the deceased died of

poison, the Court held that there were various factors which militate against a successful isolation of the poison and its recognition. It further noticed that while the circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by them may be most misleading. No doubt, due weight must be given to the negative findings at such examination. But, bearing in mind the difficult task which the man of medicine performs and the limitations under which he works, his failure should not be taken as the end of the case, for on good and probative circumstances an irresistible inference of guilt can be drawn.

17. Similar view was taken by a Bench of this Court in the case of *Dayanidhi Bisoi v. State of Orissa,* [AIR 2003 SC 3915], where in a case of circumstantial evidence the Court even confirmed the death sentence as being rarest of rare case. The Court clearly held that it is not a circumstance or some of the circumstances which by itself, would assist the Court to base a conviction but all circumstances put forth against the accused are once established beyond reasonable doubt then conviction must follow and all the inordinate circumstances would be used for collaborating the case of the prosecution.

18. This Court in *Sudama Pandey v. State of Bihar* [(2002) 1 SCC 679], has stated the principle that circumstances shall form a chain which should point to the guilt of the accused. The evidence led by the prosecution should prove particular facts relevant for that purpose and such proven facts must be wholly consistent with the guilt of the accused. Though in that case the Court, as a matter of fact, found that the prosecution had failed to prove the chain of circumstances pointing towards the guilt of the accused and gave the benefit of doubt to the accused. This judgment cannot be of any assistance to the case of the appellants. In fact, the principle of law stated in that case has been completely satisfied in the present case. The prosecution, in the case in hand, has been able to establish and prove complete chain of circumstances and events, which

if collectively examined, clearly points to the guilt of the accused.

19. We have already noticed that statement of PW 6 along with other prosecution witnesses is of definite significance. It is in evidence that the entrance door of the house was used to be locked. It was opened only when the visitor to the house press the call bell and such person was duly identifiable to the member of the family, watching from the 1st floor and that the keys were sent down with the help of a thread to enable the visitor to open the outside lock and then to enter the house. Keeping this routine practice adopted by the family of the deceased, it is clear that both the accused could enter the house only by the process indicated above or by break opening the lock of the entrance door. This is nobody's case before the Court that the lock or the door itself was broken by the miscreants who entered the house of the deceased. The only possible inference is that these accused were known to the family, as stated by the witnesses including PW 6 and they entered the house in the manner afore stated and upon entering the house they ransacked the house and committed the murder of Phool Guha and fled away with stolen articles. The stolen articles were subsequently recovered from them and duly identified during investigation and trial. All these circumstances established the case of the prosecution beyond any reasonable doubt.

20. For the reasons afore stated the appeal is dismissed.

N.J. Appeal dismissed.

UDAY CHAKRABORTY & ORS.
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 1733 of 2008)

JULY 8, 2010

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

PENAL CODE, 1860:

ss. 304-B and 498-A – Dowry death – Conviction of husband and his relatives –Plea that FIR not containing any allegation of demand of dowry, ingredients of offences charged were not satisfied – HELD: Although the father of the deceased who lodged the complaint in a tragic moment did not elaborate and specified the facts, the subsequent statements of different witnesses have fairly established that the deceased was tortured and harassed for dowry - Execution of ' Chuktiparta' at the time of marriage itself demonstrates that there was a clear intention on the part of accused to take dowry in and as consideration for marriage – The cumulative effect of the documentary and oral evidence clearly shows that the accused have been rightly found guilty of the offence by the High Court – Sentencing.

s.304-B – Expression 'soon before her death' – HELD: Has to be given its due meaning, as the Legislature has not specified any time in the provision – The concept of reasonable time would be applicable – In the instant case, marriage having not survived even for a period of two years, the entire period would be a relevant factor in determining the issue – Doctrines – Concept of reasonable time.

CODE OF CRIMINAL PROCEDURE, 1973:

s.161 – Recording of statements afresh by new Investigating Officer on transfer of investigation to CID –

HELD: Once the direction was given to conduct the investigation afresh, there is no error in the IO examining the witnesses afresh – Penal Code, 1860 – ss. 304-B and 498-A.

SENTENCING:

Quantum of punishment – Seven years RI awarded by High Court to accused for offence punishable u/s 304-B IPC – HELD: The sentence being the minimum under the provision, plea for reduction of sentence has no merit – Penal Code, 1860 – s.304-B.

WORDS AND PHRASES:

Expression 'soon before her death' occurring in s.304-B IPC – Connotation of.

Within two years of the marriage of appellant no. 1, his wife died of burn injuries in her matrimonial home. On the complaint of PW-1, the father of the bride, an FIR was registered and the investigation ultimately culminated in the filing of challan against the husband, the sister-in-law, two brothers-in-law, the father-in-law and the mother-in-law of the deceased for commission of offences punishable u/ss 304-B and 498-A IPC. During the trial, the father-in-law of the deceased died. The trial court convicted the remaining accused of the offences charged and sentenced each of them to 7 years RI. On appeal, the High Court acquitted the sister-in-law and one brother-in-law of the deceased.

In the appeal filed by the convicts, it was primarily contended for the appellants that in the instant case ingredients of the offences punishable u/ss 304-B and 498-A IPC were not satisfied. It was submitted that the complaint lodged by PW-1 did not contain any allegation of demand of dowry and, therefore, there was no basis to prosecute the appellants.

Dismissing the appeal, the Court

HELD: 1.1The cumulative effect of the documentary and oral evidence on record clearly shows that the appellants have been rightly found by the High Court guilty of the offence charged. The father of the girl who lodged the complaint, can hardly be blamed for not lodging an elaborate and specific complaint immediately after the death of his daughter, as it was a tragic moment for him. The subsequent statements of different witnesses have fairly established that the deceased was tortured and harassed for dowry. The Court is of considered view that execution of the "Chuktiparta" itself demonstrates that there was a clear intention on the part of the appellants to take dowry in and as consideration for marriage. Gifts were given at the time of marriage and some items were also agreed to be given subsequent to the marriage. This itself would be an appropriate fact to be taken into consideration and is, in any case, completely in line with the case of the prosecution. The offence u/s 304B read with s.498A IPC is made out and has been proved by the prosecution beyond any reasonable doubt. [para 4 and 5] [1057-D-H]

Hazarilal v. State of Madhya Pradesh **2007 (7) SCR 1081 = (2009) 13 SCC 783;** *and Arulvelu v. State* **2009 (14) SCR 1081 =(2009) 10 SCC 206 – held inapplicable***.*

1.2.The expression 'soon before her death' used in s.304 IPC has to be given its due meaning as the legislature has not specified any time which would be the period prior to death, that would attract the provisions of s. 304-B IPC. The concept of reasonable time would be applicable, which would primarily depend upon the facts of a given case, the conduct of the parties and the impact of cruelty and harassment inflicted upon the deceased in relation to demand of dowry to the cause of unnatural death of the deceased. In the considered view of the

Court, the marriage itself having not survived even for a period of two years, the entire period would be a relevant factor in determining such an issue. [para 4] [1059-B-D]

1.3. It cannot be said that the Investigating Officer (PW-30), who took over the investigation at the subsequent stage upon transfer of investigation to the CID, had no jurisdiction to record fresh statements of witnesses and ought to have relied upon and referred only to the statements recorded u/s 161 Cr. PC by the earlier Investigating Officer. Firstly, it is the settled principle of law that statements u/s 161 Cr.P.C. recorded during the investigation are not substantive piece of evidence but can be used primarily for a very limited purpose, that is, for confronting the witnesses. Secondly, when the case was transferred to CID for investigation, it obviously meant that, in the normal course, the authorities were not satisfied with the conduct of investigation by PW 31 and considered it appropriate to transfer the investigation to a specialized branch i.e. CID. Once, the direction was given to PW 30 to conduct investigation afresh, there is no error of jurisdiction or otherwise committed by him in examining the witnesses afresh and filing the challan u/s 173 Cr PC. [para 6] [1059-G-H; 1060-A-F]

1.4The prayer for reduction of sentence has no merit. The minimum sentence provided for an offence punishable u/s 304B IPC is 7 years of rigorous imprisonment, and that is the sentence awarded by the High Court in the instant case. [para 7] [1060-E-G]

Case Law Reference:

2007 (7) SCR 1081 held inapplicable para 4

2009 (14) SCR 1081 held inapplicable para 4

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1733 of 2008.

From the Judgment & Order dated 18.04.2007 of the High Court at Calcutta in C.R.A. No. 122 of 2003.

Rauf Rahim for the Appellants.

Tara Chandra Sharma for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The learned Additional Sessions Judge, Arambagh convicted all the five accused persons namely, Uday Chakraborthy, Smt. Anandamoyee Chakraborthy (Appellant No. 3), Sukumar Chakraborthy (Appellant No. 2), Smt. Bela Rani Chakraborthy (Bhattacharjee) and Madhab Chakraborthy for an offence punishable under Sections 498A/304B of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced them for 7 years rigorous imprisonment. No separate sentence was awarded under Section 498A of IPC on the ground that the accused persons were awarded sentence for the substantive offence of murder under Section 304B of IPC. Aggrieved from this judgment, the accused persons preferred an appeal before the High Court of Calcutta and the Bench allowed their appeal in part and order of conviction and sentence passed against Madhab Chakraborthy and Bela Rani Chakraborthy (Bhattacharjee) was set aside. However, the conviction and sentence of Uday Chakraborthy, Sukumar Chakraborthy and Smt. Anandamoyee Chakraborthy was confirmed vide its judgment dated 18th of April, 2007. Aggrieved therefrom these three appellants have filed the present appeal before this Court under Article 136 of the Constitution of India praying for setting aside the order of conviction and sentence and for an order of acquittal.

2. Now, we may examine the facts giving rise to the present appeal. One Ms. Mina was married to Uday Chakraborthy on 5th of June 1994. The appellant No. 2 is the brother-in-law while appellant No. 3 is mother-in-law of deceased Mina. According to the case of the prosecution,

Kanailal, the father of the girl, Mina, who was later examined as PW 1 lodged a written complaint to the Officer-in-Charge, Police Station, Arambagh, Hooghly on 19th April, 1996. The complaint reads as under:-

"To
The O.C. Arambagh Police Station,
Arambagh, Hooghly.

Sir,

My humble submission is that, I gave my daughter Mina's marriage with Uday Chakraborty, elder son of Sri Lakshminarayan Chakraborty of village & P.O. Golta, P.S. Arambagh, District Hooghly two years before. Frequently after her marriage her father-in-law, mother-in-law, sister-in-law and the brothers-in-laws used to torture my daughter both physically and mentally, because my son-in-law did not stay at the house. I went to my daughter's house for a few times. I requested her father-in-law, mother-in-law and other members of the family. I arranged for the settlement of the quarrel. After that suddenly on the last 18.4.96 (Eng) she had a feud with her husband Udaychand Chakraboty, father-in-law-Sri, Lakshminarayan Chakraborty, sister-in-law-Belarani Chakborty (Banerjee) and brother-in-law-Sukumar Chakraborty at her father-in-law's house and the aforesaid persons admitted her at Arambagh Subdivisional Hospital after burning her on the last night, and my daughter died at that night only. My firm confidence is that the household members at her in-law's place forcibly burnt my daughter to death. Therefore, I humbly pray before you to arrange for the punishment of such heinous criminals by the law and request reveals the actual reason of the death of my daughter.

Yours faithfully,
Sd/- Kanailal Bhattacharya"

xxx xxx xxx xxx

The couple has not even completed a period of two years of their marriage when, on 18th April, 1996, it was alleged that because of dowry, the accused and other family members tortured Mina physically and mentally and forcibly burnt her. She was taken to hospital in emergency ward and examined by Dr. Subhsh Hazra, PW 29. At that time she was conscious and able to speak. The parents of Mina were informed on that very date. Unfortunately, Mina expired on 19.4.1996 at 5.30 AM. It was noticed on the prescription written by Dr. Subhamoy Sidhanta, PW 19, that the burn was accidental. After receiving the complaint and registering the FIR (Ex.12), K.K. Hazra, the Investigating Officer (PW-31) started inquest proceedings and her body was subjected to post-mortem, which was conducted by Dr. Mona Mukherjee (PW-18), who declared the cause of death, as death due to deep burn injury. On 11.5.1997, the investigation was transferred to another Investigating Officer when PW 31 was transferred from that police station. However, because of certain lacuna in investigation or even otherwise, it appears that on 4th of June 1997, the investigation of the case was transferred to CID and Amol Biswas (PW 30) was appointed as the new Investigating Officer. After investigating the matter and examining number of witnesses, the Investigating Officer filed the charge sheet against 6 persons namely, Uday Chakraborthy (husband), Lakshmi Narayan (father-in-law), Sukumar Chakraborthy (brother-in-law), Madhab Chakraborthy (brother-in-law), Anandmoyee Chakraborthy (mother-in-law) and Bela Rani Chakraborthy (Bhattacharjee) (sister-in-law), in the Court for an offence under Sections 304B and 498A of IPC on 31st October, 2000. The statement of accused persons under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') was recorded in August 2002. During the pendency of the proceedings, accused Lakshmi Narayan had expired and, therefore, proceedings against him abated. The learned Sessions Court found all the five accused persons guilty under Sections 498A/304B of IPC and sentenced them accordingly. Aggrieved therefrom, the accused preferred an appeal in the High Court. The High Court

acquitted two persons and convicted three persons, who have filed the present appeal before this Court.

3. The main argument addressed before this Court by the appellant is that the learned Trial Court as well as the High Court have failed to examine that the ingredients of the offence under Sections 304B and 498A of IPC were not satisfied in the present case and as such they could not be held guilty of the said offences. The complaint lodged by the father of the deceased did not contain any allegation of demand of dowry, therefore, there was no basis whatsoever to prosecute the appellants. The judgments of these courts suffer from basic infirmity of law. In the alternative, it was also contended that the entire family of the appellant has been behind the bars for a considerable time and thus, the appellants could be released on the basis of the sentence already undergone by them. We are unable to find any merit in either of the contentions raised on behalf of the appellants. According to the father of the deceased (PW-1), at the time of marriage he had given the gifts and cash amount which were reduced in writing, however, a sum of Rs. 10,000/- remained to be given subsequently. The statement of PW 1 was fully corroborated by Shyam Sunder, the younger brother of deceased (PW 2), who specifically referred to the recording of "Chuktiparta". There is no dispute raised during the trial and even now that Mina had died because of burn injuries and she caught fire at the matrimonial home. Even, during the course of hearing, there was hardly any dispute that a "Chuktiparta" was written prior to or at the time of marriage. However, according to the appellants there was no reference of the gold chain in that "Chuktiparta". It is the contention of the appellants that the prosecution witnesses have made improvement on their statements subsequently and have added the description of the gold chain. Thus, the story of the prosecution is unbelievable.

4. The marriage itself has survived for a period of less than two years and PW-7, who appeared as prosecution witness,

was working as water carrier during the marriage ceremonies of the parties. The complaint by PW 1, of course, did not refer to particular items, but it was categorically stated in the complaint that after the marriage, the father-in-law, mother-in-law, sister-in-law and brother-in-laws used to torture Mina both physically and mentally because his son-in-law did not stay at the house and he had even tried to settle the issue and according to him, she was forcibly burnt by the appellants. It is true that in the complaint, specific allegations of demand and dowry have not been made, but during the course of investigation these facts have come to light from the evidence on record and from statements of various persons made to that effect. The question of the father (PW-1) having not given correct and detailed information, has been dealt with by the High Court and, in that reference, the following lines have been recorded:

> "Ld. Advocate for the appellants vehemently argued that this claim of demand of dowry by the accused persons is nothing but an afterthought, since there was no such mention in the First Information Report. In this respect, he has placed reliance upon the decision reported in AIR 1975 SC page 1026 *(Ram Kumar Pande-vs.-State of Madhya Pradesh),* wherein it has been held by the Hon'ble Apex Court that omission of important facts, affecting probabilities of the case are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case. So far as the present case is concerned, there cannot be any doubt that there was no mention of the dowry claim in the First Information Report. Naturally, this omission must be treated to be an important factor for judging the veracity of the prosecution case. But whether only because of this omission it can be said that the entire prosecution case should be disbelieved, that is to be considered after considering the other circumstances of the case. So far as this case is concerned, it appears that the First Information Report was lodged by the de facto

complainant, who is the father of the deceased, few hours after the death of the deceased. We can very well imagine the mental condition of the bereaved father while he was dictating the written complaint to another person. In fact, if we look into the evidence of this de facto complainant, then it will appear that he has also stated in his evidence to the effect, "As I was mentally upset so I could not write each and every thing elaborately in the First Information Report like demand of dowry, rest cash of Rs. 10,000/- or gold chain and more dowry or Rs. 20,000/- for the purpose of business by Uday." The explanation as given by the PW 1 in this respect appears to be proper and satisfactory and I think that the ld. Trial Judge was perfectly justified is not giving much importance upon this omission in the First Information Report."

4. The prosecution has examined as many as 31 witnesses including the Investigating Officer, Doctors, servants of the family and relatives of the deceased. The cumulative effect of the documentary and oral evidence on record clearly shows that the appellants have been rightly found guilty of the offence by the High Court. The Learned Counsel appearing for the appellant has not been able to bring to our notice any evidence or piece of material thereof which has not been considered by the Courts below in its correct perspective. The mere fact that "Chuktiparta" does not contain some items of dowry which have been referred by PW 2 in his statement given in the Court, would not give any advantage to the appellants, in the facts of the present case. The father of the girl who lodged the complaint, can hardly be blamed for not lodging an elaborate and specific complaint at that time, as it was a tragic moment for him being the period immediately after the death of his daughter. That time was of pain and agony for him and the accused can not take any advantage of this submission or fact, as the subsequent statements of different witnesses have fairly established on record that she was tortured and harassed for satisfying the demand of dowry. We are of the considered

view that execution of the "Chuktiparta" itself demonstrate that there was a clear intention on the part of the appellants to take dowry in and as consideration for marriage. Gifts were given at the time of marriage and some items were also agreed to be given subsequent to the marriage. This itself would be an appropriate fact to be taken into consideration and is, in any case, completely in line with the case of the prosecution. The learned counsel appearing for the appellants relied upon the case of the *Hazarilal v. State of Madhya Pradesh,* [(2009) 13 SCC 783]. This was a case which fell in the class of cases where, the Court recorded the finding of conviction on the basis of surmises and conjectures. The Trial Court have acquitted accused on the basis, that after giving birth to a child in the normal course she could not have entertained the idea of committing suicide unless she was being harassed. This judgment of the Court has no application on facts and law to the case in hand. The use of expression 'could have been' or drawing of a presumption of a fact does not arise in the present case, as the prosecution has been able to establish its case beyond reasonable doubt. The death, as already noticed, is not disputed and large number of witnesses have made specific allegations of dowry demand and the harassment to which the deceased was being subjected during the short period for which the marriage survived. We are also unable to find any merit in the contention of the learned counsel for the appellants who relied upon the judgment of this Court in *Arulvelu v. State* [(2009) 10 SCC 206], to contend that the findings of the trial court as well as the High Court are perverse finding as they were against the weight of evidence as well as against the evidence itself. There cannot be a dispute with regard to the legal preposition advanced on behalf of the appellant in the facts of the present case, the judgment is hardly of any avail to the appellants. By and large the statement of prosecution witnesses are on similar lines and all the material and crucial aspects stand duly corroborated. Particularly, the statements of the father of the deceased, relatives of the deceased and the Investigating Officer, when examined in their entirety, clearly

established the charge against the appellants. Thus, we have no hesitation in dispelling the argument of the appellants. The offence under Sections 304B read with 498A of IPC is made out in this case and has been proved by the prosecution beyond any reasonable doubt. The period of two years in a marriage itself is a very short period. In fact, the deceased had died in less than two years of marriage. The expression 'soon before her death' has to be given its due meaning as the legislature has not specified any time which would be the period prior to death, that would attract the provisions of section 304B of IPC. The concept of reasonable time would be applicable, which would primarily depend upon the facts of a given case, the conduct of the parties and the impact of cruelty and harassment inflicted upon the deceased in relation to demand of dowry to the cause of unnatural death of the deceased. In our considered view, the marriage itself has not survived even for a period of two years, the entire period would be a relevant factor in determining such an issue.

5. The Court has to examine the cumulative effect of the evidence on record and analyze the same in its true context. Once, the appellant had ensured execution of "Chuktiparta" at the time of marriage then this itself would fully support the version of the prosecution and statement of witnesses that there was demand of dowry. These statements cannot fall outside the zone of consideration for the Courts, in the present case. It cannot be said that the 'Chuktiparta" executed at the time of marriage is not a material and relevant piece of evidence and cannot be relied upon or taken into consideration by the Courts.

6. Learned counsel appearing on behalf of the appellants, with some emphasis, contended that the Investigating Officer (PW-30), who took over the investigation at the subsequent stage upon transfer of investigation to the CID, ought to have relied and referred only to the statements recorded under Section 161 of Cr. PC by the earlier Investigating Officer. In other words, he had no jurisdiction to record fresh statement

of the witnesses. We do not find any force even in this argument. Firstly, for the reason that it is settled principle of law that the statements under Section 161 of Cr.P.C. recorded during the investigation are not substantive piece of evidence but can be used primarily for a very limited purpose that is for confronting the witnesses. If some earlier statements were recorded under Section 161 Cr.P.C. then they must be on the police file and would continue to be part of police file. However, if they have been filed on judicial record they would always be available to the accused and as such no prejudice is caused to anyone. Secondly, when the case was transferred to CID for investigation, it obviously meant that in the normal course, the authorities were not satisfied with the conduct of the investigation by PW 31 and considered it appropriate to transfer the investigation to a specialized branch i.e. CID. Once, the direction was given to PW 30 to conduct the investigation afresh and in accordance with law, we see no error of jurisdiction or otherwise committed by PW 30 in examining the witnesses afresh and filing the charge sheet under Section 173 of Cr.P.C. stating that the appellants and other accused had committed the offence and were liable to face trial under Sections 304B and 498A of IPC. The last contention raised on behalf of the appellant is that the accused, even if found guilty by this Court, could be now released on the basis of sentence already undergone, in other words, the prayer is for reduction of sentence. This contention has no merit and can be noticed only for the purpose of being rejected. The minimum sentence provided under law for an offence under Section 304B of IPC is 7 years of rigorous imprisonment and that is the sentenced awarded by the High Court. Thus, the question of accepting this contention, raised before this Court, does not arise even for consideration.

8. For the aforesaid reasons, we find no merit in the appeal and hence, the appeal is dismissed.

R.P. Appeal dismissed.

KHAZIA MOHAMMED MUZAMMIL

v.

THE STATE OF KARNATAKA AND ANR.

(Civil Appeal Nos. 596 of 2007)

JULY 08, 2010

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

Karnataka Civil Service (Probation) Rules, 1977:

Rule 5(2) – Deemed confirmation – Held: Rule 5(2) provides that competent authority has to examine the suitability of the probationer and upon recording satisfaction issue an order of confirmation – Thus in the absence of specific order, there is no deemed/automatic confirmation – Delay in issuance of order would not entitle the probationer to be deemed to have satisfactorily completed his probation – On facts, Probation period of 2 years and the Probationer-Judicial officer discharged from service after 3 years and 10 months of service on the ground that he was not found suitable for the post – He cannot claim that he is deemed to be confirmed – His service record also did not reflect that he was an officer of outstanding caliber – He had made contradictory statements in his writ petition and mentioned his age as per his convenience – Not a fit case for exercising jurisdiction under Article 136 of the Constitution – Karnataka Judicial Services (Recruitment) Rules, 1983 – Rule 2, item no.2 – Constitution of India, 1950 – Article 136.

rule 5(2) – Discharge order of probationer showed that it was not stigmatic – Held: Since the discharge was simplicitor without causing stigma upon the concerned probationer, holding of formal proceedings under the Karnataka Civil Services (Classification, Control and Appeal) Rules 1957 was not necessary – Service law.

Service law:

Confidential report – Necessity of recording – Discussed.

Judicial service – Appointment – Police verification report – High Courts directed to ensure that the police verification report conducted in accordance with law should be received by the concerned authority, before the order of appointment in the State Judicial Service is issued by the said authority – On facts, name of concerned judicial officer on rowdy list prior to his appointment – Normally a person which such antecedents would not be permitted to join service of the government and particularly the post of a judicial officer – High Court on the administrative side dealt with the matter in a very causal manner and issued appointment order to the concerned judicial officer.

Probation – Purpose of.

High Court:

Non-recording of confidential report of judicial officer – Held: Adversely affects the administration of justice and dilutes the constitutional power and functions of superintendence of High Court – It is constitutional obligation on the High Court to ensure that the members of judicial service of the State are treated appropriately with dignity and without undue delay – Directions passed – Administration of justice – Judiciary – Constitution of India, 1950 – Article 235 – Service law.

The appellant was appointed as District Judge under the Karnataka Judicial Services (Recruitment) Rules, 1983. By Notification dated 24.3.2000, he was discharged from service. The appellant challenged the said Notification by filing writ petition before High Court on the ground that he had put in 3 years, 10 months of service and thus had completed the probation period and that since there was no specific communication issued to him

by the authority extending his probation period, he should be deemed to be confirmed. Appellant also prayed for issuance of mandamus to the Superintendent of Police to strike off his name in the 'rowdy and goonda register' prior to his selection as District Judge maintained by the concerned police station. The High Court dismissed the writ petition holding that the appellant was found not suitable to hold the post and there was no specific order to the effect that he had satisfactory completed the probationary period. It also declined to declare the entries as being without basis. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1. A bare reading of the notification dated 24.3.2000 showed that it was ex-facie not stigmatic. It simply discharged the appellant from service as having been found unsuitable to hold the post of District Judge. Until and unless, the appellant is able to show circumstances supported by cogent material that the said order was stigmatic and was intended to overreach the process of law provided under the rules, there is no occasion to interfere on facts. [Para 3] [1079-E-F]

2. The conduct of the appellant, who is a Judicial Officer, belonging to the Higher Judicial Services of the State is a matter of some concern. Contradictory statements were made in the Writ Petition before the High Court, memorandum of appeal before this Court and even in the rejoinder and further affidavit filed before this Court. Strangely, the High Court had neither contested this case nor pursued it in its correct perspective. Even appearance on behalf of the High Court was not entered upon. Despite specific orders of this Court, the High Court had failed to produce the records and even no responsible officer was present. [Para 4] [1079-G-H; 1080-A-B]

3. Normally, the person, with antecedents such as appellants', would not be permitted to join service of the Government and, particularly, the post of a Judge. The High Court on the administrative side also appeared to have dealt with the matter in a very casual manner. It was expected of the Government as well as the High Court to have the character verification report before the appointment letter was issued. The cumulative effect of the conduct of the appellant in making incorrect averments in the Court proceedings as well as the fact that his name was in the 'Rowdie list' of the concerned Police Station were specific grounds for the Courts not to exercise its discretionary and inherent jurisdiction under Articles 136 and 226 of the Constitution of India in favour of the appellant. These reasons were to be given definite significance, particularly when the High Court had declined to quash the entries against the appellant and inclusion of his name in the 'Rowdie list'. During the course of hearing, the original Confidential Reports of the appellant were filed. There was only one Confidential Report on record for the year 1997 wherein the appellant was graded as 'Satisfactory'. This falsified his claim that he had outstanding service record in regard to disposal of cases and other service related matters. Surprisingly, for all the remaining years, no Confidential Report of this officer, and in fact, many others, as the record reflected were recorded by the High Court. This aspect cannot be overlooked as it was just not a simplicitor question of writing the Confidential Report of a given officer but adversely affected the administration of justice on the one hand and dilutes the constitutional power and functions of Superintendence of the High court, on the other. The records were submitted to the concerned Judge of the High court and no Confidential Reports were recorded. All this demonstrated not a very healthy state of affairs in relation to the recording of Confidential Reports of the officers in the Judicial Services of the State of Karnataka.

The Confidential Report of an officer is a proper document, which is expected to be prepared in accordance with the Rules and practice of the Court, to form the basis while considering the officer for promotion to higher post and all other service related matters, in future. Non-writing of the Confidential Reports is bound to have unfair results. It affects the morale of the members of the service. The timely written Confidential Reports would help in putting an officer at notice, if he is expected to improve in discharging of his duties and in the present days where 25% (now 10%) of the vacancies in Higher Judicial Service cadre are expected to be filled, from out of turn promotions after holding of written examination and interview. Highly competitive standard of service discipline and values are expected to be maintained by the Judicial Officers as that alone can help them for better advancement of their service career. In such circumstances, the significance of proper Superintendence of the High Court over the Judicial Officers has a much greater significance than what it was in the past years. In fact, it is mandatory that such Confidential Reports should be elaborate and written timely to avoid any prejudice to the Administration as well as to the officer concerned. [Paras 5 to 7] [1083-G-H; 1084-A-H; 1085-A-H; 1086-A]

4.1. There can be 'deemed confirmation' after an employee completes the maximum probation period provided under the Rules whereafter, his entitlement and conditions of service are placed at parity with the confirmed employee. Secondly, there can be no 'deemed confirmation' and at best after completion of maximum probation period provided under the Rules governing the employee, the employee becomes eligible for being confirmed in his post. His period of probation remains in force till written document of successful completion of probation is issued by the Competent Authority. What

view has to be taken, would depend upon the facts of a given case and the relevant Rules in force. It will be cumulative effect of these two basics that would determine application of the principle of law to the facts of that case. The specific rules relating to alleged automatic confirmation of the appellant are relevant and the fact that the appellant failed to satisfactorily complete the period of probation or extended period of probation in terms of Rule 5(B) of the Karnataka Civil Service (Probation) Rules, 1977. The Karnataka Judicial Services (Recruitment) Rules, 1983 ought to be read in conjunction with the 1977 Rules as they have duly been adopted by the High Court. The 1977 Rules are specific Rules on the subject in question while 1983 Rules are general Rules and in any case there is no conflict between the two as they seek to achieve the same object in relation to probation and effects thereof in relation to different matters. [Para 9] [1086-E-H; 1087-A-F]

4.2. Not only the Rules but even the principles of service jurisprudence fully recognizes the status of employee as probationer and a confirmed employee. Probationer in terms of Rule 2 (ii) of 1977 Rules means a Government servant on probation. Rules 3 to 6 are the relevant Rules which specifically deal with the period of probation, extension or reduction of period of probation, satisfactory completion of the probation period and discharge of a probationer during the period of probation. No doubt Rule 3 of 1977 Rules states that the period of probation shall be, as may be, provided for in the Rules of recruitment specially made for any service or post, which shall not be less than two years, out of which period extraordinary leave will have to be excluded. The framers of the Rules have introduced proviso to Rule 3, which gives discretion to the Authorities and, in fact, introduced deemed extension in the event, the probationer has appeared for any

examination or result thereof has not been declared within the period of probation and extended period. The Rule, therefore, contemplates deemed extension of probation period where the Authorities have not passed any order for extending or declining to extend the period of probation provided the circumstances stated therein are satisfied. [Paras 10, 11] [1087-G-H; 1088-A-E; 1089-A-H; 1090-D-G]

5. The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the Authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. Once these ingredients are satisfied, the Competent Authority may confirm the employee under Rule 5 of the 1977 Rules. Rule 5(b) empowers the Authority that in the event it is of the view that the period of probation has not been satisfactorily completed or has not passed the special examinations, it may discharge him from service unless the period of probation is extended. Rule 5(2) has been coveted with negative language. It specifically prescribes that a probationer shall not be considered to have satisfactorily completed the probation unless a specific order to that effect is passed. This Rule further clarifies that if there is a delay in issuance of an order under sub-Rule (1), it shall not entitle the probationer to be deemed to have satisfactorily completed his probation. Rule 6 (1) states that the Competent Authority may, at any time, during the period of probation, discharge from service, a probationer on grounds arising out of the conditions, if any, imposed by the Rules or in the order of appointment, or on account of his unsuitability for the service of post. However, the said order of discharge would take effect only after it is confirmed by the next

higher authority. Rule 6(2) specifically excludes the application or holding of formal proceedings under the Karnataka Civil Services (Classification, Control and Appeal) Rules 1957. It says that such course will not be necessary. Item No. 2 of Rule 2 of 1983 Rules states that probation period will be of 2 years and further mandates that during that period of probation, the officer must undergo a training, as may be specified by the High Court. That itself is indicated under the head 'minimum qualifications'. It, therefore, clearly shows that it is not the provision dealing with the probation period, extension and discharge of a probationer during that period but is primarily relatable to the minimum qualifications, which are to be essentially satisfied by the officer concerned before he takes over his appointment as a regular judge. The reference to the probation period has to be examined and interpreted with reference to and in conjunction with 1977 Rules which are the primary Rules dealing with probation. These Rules have admittedly been adopted by the High Court. Under the 1983 Rules, the emphasis is on performance and training during the period of probation. While the significance under the 1983 Rules is on training, under 1977 Rules, all matters relating to probation are specifically dealt with. It would not be permissible to read the relevant part of 1983 Rules to say that it mandates that probation period shall be only for two years and not more. If that was to be accepted, all provisions under Rules 3 to 6 of 1977 Rules will become redundant and ineffective. In fact, it would frustrate the very purpose of framing the 1977 Rules. What will be the period of probation, the circumstances under which it can be extended or reduces and discharge of the Probationer Officer in the event of unsuitability etc. are only dealt with under the 1977 Rules. The 1983 Rules would have to be read harmoniously with 1977 Rules to achieve the real purpose of proper and timely training of Judicial Officers on the one hand and appropriate control over the matters

relating to probation of the officers on the other. [Para 12] [1090-H; 1091-A-G]

State of Punjab v. Dharam Singh **AIR 1968 SC 1210;** *Shamsher v. State of Punjab* **(1974) 2 SCC 834;** *State of Punjab v. Dharam Singh* **AIR 1968 SC 1210;** *Dayaram Dayal v. State of M.P.* **(1997) 7 SCC 443;** *Karnataka State Road Transport Corporation v. S. Manjunath* **(2000) 5 SCC 250;** *High Court of Madhya Pradesh v. Satya Narayan Jhavar* **(2001) 7 SCC 161; Registrar,** *High Court of Gujarat v. C.G. Sharma* **(2005) 1 SCC 132 – referred to.**

6.1. If Rule or Regulation require the competent authority to examine the suitability of the probationer and then upon recording its satisfaction issue an order of confirmation, then the question of automatic confirmation would not even arise. Of course, every authority is expected to act properly and expeditiously. It cannot and ought not to keep issuance of such order in abeyance without any reason or justification. While there could be some other cases where the Rules do not contemplate issuance of such a specific order in writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties, even in those cases it is difficult to attract the application of this doctrine. However, there will be cases where not only such specific Rules, are absent but the Rules specifically prohibit extension of the period of probation or even specifically provide that upon expiry of that period he shall attain the status of a temporary or a confirmed employee. In such cases, again, two situations would rise: one, that he would attain the status of an employee being eligible for confirmation and second, that actually he will attain the status of a confirmed employee. It may not be possible to prescribe a straight jacket formulae of universal implementation for all cases involving such questions. It will always depend upon the facts of a case

and the relevant Rules applicable to that service. [Para 18] [1111-D-H; 1112-A-B]

6.2. The language of Rule 5(2) is a clear indication of the intent of the framers that the concept of deeming confirmation could not be attracted in the present case. This Rule is preceded by the powers vested with the authorities under Rules 4 and 5(1) respectively. This Rule mandates that a probationer shall not be deemed to have satisfactorily completed the probation unless a specific order to that effect is passed. The Rule does not stop at that but further more specifically states that any delay in issuance of order shall not entitle the probationer to be deemed to have satisfactorily completed his probation. Thus, use of unambiguous language clearly demonstrates that the fiction of deeming confirmation, if permitted to operate, it would entirely frustrate the very purpose of these Rules. On the ground of unsuitability, despite what is contained in Rule 5, the competent authority is empowered to discharge, the probationer at any time on account of his unsuitability for the service post. Such discharge has to be simplicitor without causing a stigma upon the concerned probationer. It is difficult for the Court to bring the present case within the class of cases, where 'deemed confirmation' or principle of 'automatic confirmation' can be judiciously applied. The 1977 Rules do not contain any provision which places a ceiling to the maximum period of probation, for example, the probation period shall not be extended beyond a period of two years. On the contrary, a clear distinction is visible in these Rules as it is stated that probation period shall not be less than two years and can be extended by the authority by such period not exceeding half the period. The negative expression is for half the period and not the maximum period totally to be put together by adding to the initial period of probation and to extended period. Even assuming that this period

is of three years, then in view of the language of Rules 5 (1) and 5(2) there cannot be automatic confirmation, a definite act on the part of the authority is contemplated. The act is not a mere formality but a mandatory requirement which has to be completed by due application of mind. The suitability or unsuitability, as the case may be, has to be recorded by the authority after due application of mind and once it comes to such a decision the other requirement is that a specific order in that behalf has to be issued and unless such an order is issued it will be presumed that there shall not be satisfactorily completion of probation period. The Rules, being specific and admitting no ambiguity, must be construed on their plain language to mean that the concept of 'deemed confirmation' or 'automatic confirmation' cannot be applied in the present case. Proviso to Rule 4 shows that where during the period of probation the results of an examination have not been declared which the probationer was required to take, in that event the period of probation shall be deemed to have extended till completion of the act i.e. declaration of result. Applying this analogy to the provisions of Rule 5 unless certificate is issued by the competent authority the probation period would be expected to have been extended as it is a statutory condition precedent to successful completion of the period of probation and confirmation of the probationer in terms of this Rule. [Paras 19, 20] [1113-B-H; 1114-A-G]

7. In the present case, the appellant was appointed to the post by letter dated 9/10th May, 1996 and he reported for his duty on 15th May, 1996. He was on probation for a period of two years. Thereafter, no letter of extension of probation or order stating that the appellant has completed the period of probation successfully in terms of Rule 5(1) was ever issued. Rule 5 (2), therefore, would come into play and till the issuance

of such an order and certificate of satisfactory completion of probation period, the appellant cannot claim to be a confirmed employee by virtue of principle of automatic or deemed confirmation. His services were terminated by order dated 24th March, 2000. It was discharge from service simplicitor without causing any stigma on the appellant. Even prior to his selection as a member of the Higher Judicial Services of State of Karnataka, his name was placed for surveillance in the police records. The original service record of the appellant also did not reflect that he was an officer of outstanding caliber or had done extraordinary judicial work. He was an officer who was not even aware of his date of birth and mentioned his age as per his convenience. In these circumstances, it is a case where in exercise of jurisdiction of this Court under Article 136 of the Constitution of India, interference with the judgment of the High Court is not called for as the same does not suffer from any factual or legal infirmity. [Para 21] [1114-G-H; 1115-A-E]

8. The concerned authorities failed to act expeditiously and in accordance with the spirit of the relevant Rules. Rule 5 (2) of 1977 Rules has used the expression 'as soon as possible' which clearly shows the intent of the rule framers explicitly implying urgency and in any case applicability of the concept of reasonable time which would help in minimizing the litigation arising from such similar cases. It is hoped that all the authorities concerned would take care that timely actions are taken in comity to the Rules governing the service and every attempt is made to avoid prejudicial results against the employee/probationer. It is expected of the Courts to pass orders which would help in minimizing the litigation arising from such similar cases. Timely action by the authority concerned would ensure implementation of rule of fair play on the one hand and serve greater ends of

justice on the other. It would also boost the element of greater understanding and improving the employer employee relationship in all branches of the States and its instrumentalities. The Courts, while pronouncing judgments, should also take into consideration the issuance of direction which would remove the very cause of litigation. Boni judicis est causes litium dirimere. [Para 22] [1115-E-G; 1116-D-G]

Shiv Kumar Sharma v. Haryana State Electricity **Board (1988) Supp. SCC 669, affirmed.**

9. It is really unfortunate that a person, who is involved in the process of judicial dispensation, is dealt with in a manner that for years neither his confidential reports were written nor the competent authority issued an order of satisfactory completion of probation period or otherwise. Another very important aspect is that in the present days of high competition and absolute integrity and even to satisfy the requirements of out of turn promotions by competition it is expected of the High Court to inform the concerned judicial officer as of his drawbacks so as to provide him a fair opportunity to improve. Unfortunately High Court did not maintain the expected standards of proper administration. There is a constitutional obligation on the High Court to ensure that the members of the judicial services of the State are treated appropriately, with dignity and without undue delay. They are the face of the judiciary inasmuch as a common man, primarily, comes in contact with these members of the judicial hierarchy. It is a matter of concern, that timely action on behalf of the High Court would have avoided this uncalled for litigation as it would have been a matter of great doubt whether the appellant could at all be inducted into the service in face of the admitted position that the name of the appellant was stated to be on the rowdy list at the relevant time. [Para 23] [1116-H; 1117-A-E]

10. The judgment of this Court should be placed before the Hon'ble the Chief Justice of Karnataka High Court for appropriate action. It is hoped that steps would be taken to ensure timely recording of the confidential reports of the judicial officers by appropriate authority (which in terms of Chapter VI with particular reference to the provisions of Article 235 of the Constitution is the High Court) and in an elaborate format depicting performance of the judicial officers in all relevant fields, so as to ensure that every judicial officer in the State would not be denied what is due to him in accordance with law and on the basis of his performance; the Secretary of the Union of India, Ministry of Personnel, Public Grievances and Pension as well as all the Chief Secretaries of the States are directed to issue appropriate guidelines, in the light of this judgment, within eight weeks from the date of the pronouncement of this judgment. Further all the High Courts are directed to ensure that 'police verification reports', conducted in accordance with law, are received by the concerned authority before an order of appointment/posting in the State Judicial Service is issued by the said authority. [Para 24] [1117-F-H; 1118-A-C]

Case Law Reference:

AIR 1968 SC 1210	referred to	Para 13
(1974) 2 SCC 834	referred to	Para 13
AIR 1968 SC 1210	referred to	Para 14
(1997) 7 SCC 443	referred to	Para 15
(2000) 5 SCC 250	referred to	Para 15
(2001) 7 SCC 161	referred to	Para 16
(2005) 1 SCC 132	referred to	Para 17
(1988) Supp. SCC 669	affirmed	Para 22

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 596 of2007.

From the Judgment & Order dated 09.07.2004 of the High Court of Karnataka at Banglore in W.P. No.11965 of 2000.

Guru Krishna Kumar, Abhay Kumar, S.R. Setia for the Appellant.

Anil Kr. Mishra, A. Rohen Singh, Sanjay R. Hegde, R.B. Budihal, RG, Karnataka HC for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The appellant, who was a practicing advocate, was appointed as District Judge under the Karnataka Judicial Services (Recruitment) Rules 1983 (for short 'the 1983 Rules') vide Notification No. DPAR 37 SHC 96 dated 9.5.1996. In furtherance to this notification letter of appointment dated 14th May 1996 was issued where after the appellant joined the service on 15th May, 1996. However, vide order dated 20th of May, 1996, the appellant was transferred and posted as 1st Additional City Civil & Sessions Judge, Bangalore City. It is the case of the appellant that he performed his duties with utmost diligence and had an excellent track record. His rate of disposal of the cases was very good. The High Court had scrutinized his performance and neither any adverse remarks were communicated to him nor any memo or show-cause notice was served upon him during the entire period of his service. Initially in terms of the notification/letter of appointment, he was appointed on probation for two years. According to the appellant, he had completed the probation period successfully and there was no specific communication issued to him by the authority extending his probation period. Thus, the appellant would be deemed to be a confirmed judge as per the rules. A Sub-Committee of the Hon'ble Judges constituted by the High Court had recommended to the Full Court in its meetings held on 11th Feburary, 1999 and 15th

October, 1999 for discharge of the appellant from service. It appear that in October 1999, the Registrar General of the High Court addressed a communication to the Chief Secretary of the State seeking the discharge of the appellant in terms of Rule 6 (1) Karnataka Civil Service (Probation) Rules, 1977 on the ground that appellant was not 'suitable for the post'. Pursuant to this recommendation, the Government issued a notification on 24th March, 2000 discharging the appellant from service. According to the appellant, the notification dated 24th March, 2000 was arbitrary, contrary to rules and was unsustainable in law. The appellant had put in 3 years 10 months and 10 days in service as on that date and therefore the appellant was entitled to confirmation. Aggrieved from the said notification dated 24th March, 2000, the appellant filed the Writ Petition in the High Court of Karnataka, Bangalore which came to be registered as Writ Petition No. 11965/2000 and raised various issues including the legal submissions referable to the relevant rules. The High Court vide its judgment dated 9th July, 2004 dismissed the Writ Petition holding that the notification dated 24th March, 2000 did not suffer from any error or illegality & no interference was called for. It will be useful to reproduce the reasoning given by the High Court which reads as follows:-

> " A bare reading of Rule 3 makes it clear that the period of probation shall be fixed as per the rules of recruitment specially made for any service and also that the minimum period of probation shall be two years. Rule 4 deals with the extension of reduction of period of probation. Rule 5 deals with declaration of satisfactory completion of probationary period. Sub-rule (1) (b) of Rule 5 states that the if the appointing authority decides that the probationer is not suitable to hold the post, it may discharge him from service, if the probationary period if not extended. Rule 5(2) makes it clear that there has to be an order declaring the probationer to have completed the probationary period and if there is a delay in issuing such an order, the probationer will not be deemed to have completed the

probationary period. Rule 6(1) provides for discharge of a probationer during the probationary period under the circumstances like the grounds arising out of the conditions, if any, imposed in the rules or in the order of appointment or unsuitability to hold the post. Rule 7 states that when a probationer, whether during or at the end of probation period, is terminated for any misconduct, the termination shall be in accordance with Karnataka Civil Services (Classifications, Control and Appeal) Rules, 1957 (for short 'the 1957 Rules')

In the instant case, the petitioner, who was appointed on probation, though he had worked for 3 years 10 months and 10 days, was not found suitable to hold the post and no order has been passed that he has satisfactory completed the probationary period. Under the circumstances, the argument that Rule 6 (1) of KCSRs cannot be invoked and the petitioner's case falls under Rule 7 of the KCSRs is not sustainable. It is seen that the petitioner has not been removed on misconduct pending probation. So the argument that Rule 7 of the KCSRs has not been considered by this Court and the decisions referred to above are not applicable, it not acceptable in the facts of the given case as Rule 7 deals with termination for misconduct during or at the end of probation period, whereas as stated in the present case on hand, the probationer has been discharged from his services as he is found unsuitable to hold the post and there is no violation of the provisions of the 1957 Rules."

2. Aggrieved from the judgment of the High Court, the appellant has preferred the present appeal to this Court under Article 136 of the Constitution of India. The challenge to the judgment of the High Court as well as notification, dated 24th of March 2000, is on the ground that the appellant could not have remained probationer beyond the period of probation. He had held the office for a period of more than 3 years. After this

period, the appellant will be deemed to have been confirmed and thus his discharge from service is contrary to the rules. A confirmed employee cannot be discharged as probationer and if there is anything against the appellant, the department i.e. High Court/Government, on that plea ought to have conducted departmental enquiry in accordance with rules. Further, it is contended that the action of the High Court and the State Government is arbitrary and without any basis. The service record of the appellant was excellent and there was nothing on the record to justify that the appellant had become 'unsuitable for the post'. On the contrary, the submission on behalf of the respondents is that there cannot be a deemed confirmation. The High Court, in exercise of its power of superintendence as well as under the rules found that the appellant was entirely unsuitable for his retention in service. The service record of the appellant is also such that it does not justify his retention in service being a person under surveillance of Police prior to joining the service. The appellant, being a probationer, has rightly been discharged from service and the Writ Petition has rightly been dismissed by the High Court for valid reasons and judgment of the High Court does not call for any interference. Before we proceed to discuss the merit or otherwise of the rival contention raised before us, at the very outset, we may refer to the impugned notification which reads as under:

"CONFIRM EDIT OF KARNATAKA

No. PPAR 69 SHO 99. … Karnataka Government Secretariat, Vidhan Soudha, Bangalore, Dated 24.3.2000

NOTIFICATION

In exercise of the powers conferred by Rule 6 (1) of the Karnataka Civil Services (Probation) Rules, 1977, I,

V.S. RAMA DEVI, Governor of Karnataka, hereby order that Sri. Kazia Mohammed Muzzammil, Ist Additional City Civil and Sessions Judge, Bangalore City be discharged from service with immediate effect as he is unsuitable to hold the post of District Judge.

Sd/-
(V.S. RANA DEVI)
GOVERNOR OF KARNATAKA
BY ORDER AND IN THE
NAME OF THE GOVERNOR OF
KARNATAKA,

(V.R. TLKAL)

UNDER SECRETARY TO THE
GOVERNMENT DEPARTMENT OF
PERSONNEL AND ADMINISTRATIVE
REFORMS (SERVICES .3)

xxx xxx xxx xxx

3. The bare reading of the above impugned notification shows that it is ex-facie not stigmatic. It simply discharges the appellant from service as having been found unsuitable to hold the post of District Judge. Until and unless, the appellant is able to show circumstances supported by cogent material on record that this order is stigmatic and is intended to over reach the process of law provided under the rules, there is no occasion for this Court to interfere on facts. As far as law is concerned, the question raised is with regard to the applicability of the concept of 'deemed confirmation', to the present case under the service jurisprudence.

4. We may also notice that conduct of the appellant, who is a Judicial Officer, belonging to the Higher Judicial Services of the State is matter of some concern. Contradictory statements have been made in the Writ Petition before the High Court, memorandum of appeal before this Court and even in the rejoinder and further affidavit filed before this Court.

Strangely, the High Court has neither contested this case nor pursued it in its correct perspective. As it appears, even appearance on behalf of the High Court was not entered upon. Despite specific orders of this Court the High Court had failed to produce the records and even no responsible officer was present. This attitude of the respondents in this court compelled the Bench to pass an order dated 20th May, 2010 which reads as under:-

"This case was heard at some length yesterday and was part-heard for today. At the very outset, we must notice that from the record before us, ex-facie, it appears that the appellant before this Court has sworn the false and/or incorrect affidavits. In order to demonstrate our above observation, we must refer to the following details which have been given by the appellant in various affidavits and/or pleadings of the present case, which are as follows:

Date Age	Page (s)	
29.3.2000	46	28/37
23.2.2001	46	51
20.9.2004	50	18
14.10.2006	54	52
22.10.2009	57	4/5 (Appln. for Early Hearing)
30.6.2010	60	-

9.5.1996	Joined Service	E	
20.3.2000	WP	34	15.5.95)
			25.3.2000)

Counter Affidavit 44
By the High Court

As would be evident that if one of the dates given

by the appellant is taken to be correct, he would superannuate on 30th June, 2010, and if another date is taken, he would be only 57 years of age as on 22nd October, 2009. Besides this, he had joined service as per the letter of appointment of 9th may, 1996, but at page 34 of the paper book, he claimed to have joined service on 15th May, 1995, which on the face of it, is not a correct statement of facts. We further note that the case of the appellant is that during the period of his service, no adverse entries had been made in his service record, which has been seriously disputed by the respondents who state that even complaints were received against the appellant.

With some amount of anguish, we must also notice that the High Court appears to be callous about the whole matter. The reply filed on behalf of the High Court does not specifically dispute any of the averments made by the appellant. The reply besides being vague, is intended to benefit the appellant, which is entirely uncalled for. It has become necessary for us to know the correct position of facts before we dwell upon legal submissions raised on behalf of the appellant. This Court vide its order dated 28th April, 2006, had expressed certain doubts and directed that the records should be produced before the Court and records should be made available before this Court at the time of hearing. Despite the fact that this case has been on Board for this entire week and was heard for considerable time yesterday and was part-heard for today, still records are not available. We are unable to appreciate this attitude of the High Court towards this case, pending in the highest Court of the land. We may also notice that yesterday some papers had been shown to us showing that the name of the appellant was placed in the "rowdy" list of the police maintained by the concerned police station and his local activities were being watched. The appellant has filed the writ petition praying for quashing and deletion

of his name from the said list. This fact does not find mention either in the reply filed by the appellant before the High Court. Learned counsel for the appellant submitted that this event was subsequent to the filing of the writ petition. Whatever be the merit or otherwise of that Writ Petition, we fail to understand why this fact was not taken note of and brought to the notice of the High Court when the police gave a verification report about the appellant which was monitored prior to the appointment of the Higher Judicial Services of the State. We find that we are unable to appreciate the conduct of the appellant as well as that of the High Court in the present proceedings and in our view certain directions need to be issued in this regard. Before we issue any such orders or consider the conduct of either of them in accordance with law, we consider it appropriate to require the appellant to file an affidavit explaining the above-mentioned events. The High Court is also at liberty to file affidavit, if any, but the Registrar General of the High Court shall be present in Court with complete records. We are compelled to pass such directions but are left with no alternative in view of the conduct of the parties in the present appeal.

List for further hearing on 28th may, 2010.

Copy of this order be sent to the Registrar General of the High Court of Karnataka by the Registry".

5. Besides the conduct of the parties which is reflected in our above order, it is also very important to notice another facet of this case. It is not in dispute that the appellant had filed a Writ Petition being Writ No. WP No. 16244 of 2000 in the High Court praying for issuance of mandamus to the Superintendent of Police, Karwar to strike off the entries against the name of the appellant, in the 'rowdy and goonda register' prior to his selection as the District Judge, maintained by the concerned Police Station. The Police has sought to justify before the Court the inclusion of the appellant's name in the list and for the

reasons declared in the reply affidavit filed by the State in that case. The stand of the Government in that case was that while keeping in view the antecedents and past activities of the appellant, his name was entered in the Form No. 100 being the Communal Goonda Sheet on 8th January, 1993 under order No. 9/93 dated 2.1.1993 of the then Superintenent of Police, Uttaraka Kannada. The appellant was General Secretary of an organization called Majlis-Isa-o-Tanzim and was in the habit of harbouring criminals, who were involved in serious crimes like murder and communal riots etc. There was a specific charge against the appellant for his delivering provocative communal speeches, which contributed to aggravate communal disturbance in Bhatkal in the year 1993. He was president of the Bar Association, Bhatkal and still used to provoke young people in that institution. Nineteen people were killed and many injured in a group clash. With this background under Rules 65 and 66 of State Interchange Manual the name of the appellant was inducted on the sheet of Register of Rowdies maintained by the Karnataka Police in Form No. 100 in terms of Rule 1059 of the Karnataka Police Manual which is normally treated as confidential. Keeping all these averments in mind and the judgment of the Supreme Court, the High Court vide its order dated 3rd of November 2000 dismissed the Writ Petition and declined to declare the entries as being without basis or arbitrary. The ancillary but an important issue that flows from these facts is as to how and what the Police Verification Report was submitted to the Government/High Court before the appellant was permitted to join his duties as an Additional District Judge? Normally, the person, with such antecedents, will hardly be permitted to join service of the Government and, particularly, the post of a Judge. The High Court on the administrative side also appears to have dealt with the matter in a very casual manner. The averments made in the Writ Petition 16244 of 2000, if it were true, it was a matter of serious concern for the High Court as he was being appointed as an Additional District and Sessions Judge and would have remained as such for a number of years. It was expected of

the Government as well as the High Court to have the character verification report before the appointment letter was issued. The cumulative effect of the conduct of the appellant in making incorrect averments in the Court proceedings as well as the fact that his name was in the 'Rowdie list' of the concerned Police Station are specific grounds for the Courts not to exercise its discretionary and inherent jurisdiction under Articles 136 and 226 of the Constitution of India in favour of the appellant. These reasons have to be given definite significance, particularly when the High Court has declined to quash the entries against the appellant and inclusion of his name in the 'Rowdie list'. Another aspect of this case, to which our attention has been invited, is that for the first time, the High Court has filed the detailed affidavit in this Court after passing of the order dated 20th May, 2010. We failed to understand why appropriate and detailed affidavit was not even filed before the Court. During the course of hearing, we have also called for the original Confidential Reports of the appellant, copies whereof have been filed. The Confidential Reports, which could have been recorded in the case of the appellant as per the rules and regulations, or resolutions of the Full Court of High Court of Karnataka, will be for the years 1996-97, 1997-98 and 1998-99. There is only one Confidential Report on record for the year 1997 wherein the appellant has been graded as 'Satisfactory'. This falsifies his claim that he had outstanding service record in regard to disposal of cases and other service related matters.

6. with some regret and anxiety, we must notice that for all the remaining years no Confidential Report of this officer, and in fact, many others, as the record now reflects, have been recorded by the High Court. We are unable to overlook this aspect, as it is just not a simplicitor question of writing the Confidential Report of a given officer but adversely affects the administration of justice on the one hand and dilutes the constitutional power & functions of Superintendence of the High court, on the other. A note was put up by the Registrar General

before the then Hon'ble Acting Chief Justice that Confidential Report was put up before Hon'ble Chief Justice for recording remarks but that were not recorded and orders were being obtained now in that behalf. However, even thereafter no confidential remarks were recorded. We may also notice that reference was made to the resolution of the Full Court passed in its meeting dated 15th March,1988 which has been referred to in the office note, reads as under:-

> "Resolved that Judicial Officers Annual Confidential Reports shall be recorded in the Proforma at Annexure – 'A' for the period from 1.1.1988 onwards."

7. Even thereafter, the records were submitted to the concerned Judge of the High court and no Confidential Reports were recorded. All this demonstrates not a very healthy state of affairs in relation to the recording of Confidential Reports of the officers in the Judicial Services of the State of Karnataka. The Confidential Report of an officer is a proper document, which is expected to be prepared in accordance with the Rules and practice of the Court, to form the basis while considering the officer for promotion to higher post and all other service related matters, in future. Non-writing of the Confidential Reports is bound to have unfair results. It affect the morale of the members of the service. The timely written Confidential Reports would help in putting an officer at notice, if he is expected to improve in discharging of his duties and in the present days where 25% (now 10%) of the vacancies in Higher Judicial Service cadre are expected to be filled, from out of turn promotions after holding of written examination and interview. Highly competitive standard of service discipline and values are expected to be maintained by the Judicial Officers as that alone can help them for better advancement of their service career. In such circumstances, the significance of proper Superintendence of the High Court over the Judicial Officers has a much greater significance than what it was in the past years. In fact, in our view, it is mandatory that such Confidential

Reports should be elaborate and written timely to avoid any prejudice to the Administration as well as to the officer concerned.

8. We do express a pious hope that Hon'ble Chief Justice of the Karnataka High Court would examine this aspect and take corrective steps. We also do hope that appropriate decisions of the High Court are in place to ensure writing of Annual Confidential Reports in a comprehensive manner at regular intervals and timely. It is a matter which should invite the attention of all concerned without any further delay. We direct the Registry to send a copy of this Judgment to Hon'ble Chief Justice of the Karnataka High Court to invite his kind attention to these aspects.

9. Having discussed in some elaboration the conduct of the appellant as well as his antecedents, now we proceed to examine the merits of the legal controversy raised in the present case on behalf of the appellant in relation to 'deemed confirmation'. The 'deemed confirmation' is an aspect which is known to the service jurisprudence now for a considerable time. Both the views have been taken by the Court. Firstly, there can be 'deemed confirmation' after an employee has completed the maximum probation period provided under the Rules where after, his entitlement and conditions of service are placed at parity with the confirmed employee. Secondly, that there would be no 'deemed confirmation' and at best after completion of maximum probation period provided under the Rules governing the employee, the employee becomes eligible for being confirmed in his post. His period of probation remains in force till written document of successful completion of probation is issued by the Competent Authority. Having examined the various judgments cited at the bar, including that of all larger Benches, it is not possible for this Bench to state which of the view is correct enunciation of law or otherwise. We are of the considered opinion, as to what view has to be taken, would depend upon the facts of a given case and the relevant

Rules in force. It will be cumulative effect of these two basics that would determine application of the principle of law to the facts of that case. Thus, it will be necessary for us to refer to this legal contention in some elucidation. According to the appellant the language of Rule 3 of 1977 Rules provides that the probation period can not be extended beyond 3 years and upon expiry of such period the appellant would be deemed to have been confirmed. To substantiate this contention, the appellant relied upon Rules 3 and 4 of 1977 Rules and Entry 2 of schedule under Rule 2 of 1983 Rules which provide that there shall be two year probation during which period, the officer was to undergo such training, as may be specified by the High Court of Karnataka. Therefore, the submission is that once the maximum period of probation provided under these Rules has expired the officer will stand automatically confirmed and thus is incapable of being discharged under Rule 5(B) of the 1977 Rules. We shall now proceed to discuss the judgments which have been relied upon by the appellant in support of his contentions. On merits these judgments are hardly applicable to the facts of the present case. While examining the cited judgments this Court has to keep in mind the specific rules relating to alleged automatic confirmation of the appellant and the fact that the appellant failed to satisfactorily complete the period of probation or extended period of probation in terms of Rule 5(B) of the 1977 Rules. The 1983 Rules ought to be read in conjunction with the 1977 Rules as they have duly been adopted by the High Court. The 1977 Rules are specific Rules on the subject in question while 1983 Rules are general Rules and in any case there is no conflict between the two as they seek to achieve the same object in relation to probation and effects thereof in relation to different matters.

10. Not only the Rules but even the principles of service jurisprudence fully recognizes the status of employee as probationer and a confirmed employee. Probationer in terms of Rule 2 (ii) of 1977 Rules means a Government servant on probation. Rules 3 to 6 are the relevant Rules which specifically

deal with the period of probation, extension or reduction of period of probation, satisfactory completion of the probation period and discharge of a probationer during the period of probation. The relevant Rules read as under:

"3. Period of Probation:- The period of probation shall be as may be provided for in the Rules of recruitment specially made for any service or post, which shall not be less than two year, excluding the period if any, during which the probationer was on extraordinary leave.

4. Extension or reduction of period:- (1) The period of probation may, for reason to be recorded, in writing, be extended-

(i) by the Governor or the Government by such period as he or it deems fit;

(ii) by any other appointing authority by such period not exceeding half the prescribed period of probation;

Provided that if within the prescribed or extended period of probation, a probationer has appeared for any examination or tests required to be passed during the period of probation and the results thereof are not known before the expiry of such period, then the period of probation shall be deemed to have been extended until the publication of the results of such examinations or tests or of the first of them in which he fails to pass.

(2) The Government may, by order, reduce the period of probation of a probationer by such period not exceeding the period during which he discharged the duties of the post to which he was appointed or of a post the duties of which are in the opinion of the Government, similar (and) equivalent to those of such post.

5. Declaration of satisfactory completion of probation etc.:- (1) At the end of the prescribed or as the case may be

the reduced or extended period of probation the appointing authority shall consider the suitability of the probationer to hold the post to which he was appointed, and-

(a) if it decides that the probationer is suitable to hold the post to which he was appointed and has passed the special examinations or test, if any, required to be passed during the period of probation it shall, as soon as possible, issue an order declaring the probationer to have satisfactorily completed his probation and such an order shall have effect from the date of expiry of the prescribed, reduced or extended period of probation;

(b) if the appointing authority decides that the probationer is not suitable to hold the post to which he was appointed or has not passed the special examinations or special tests. If any, required to be passed during the period of probation, it shall, unless the period of probation is extended under Rule 4, by order, discharge him from service.

(2) A probationer shall not be considered to have satisfactorily completed the probation unless a specific order to that effect is passed. Any delay in the issue of an order under sub-Rules

(1) shall not entitle the probationer to be deemed to have satisfactorily completed his probation.

Note:- In this Rules and Rules 6'discharge' in the case of a probationer appointed from another service or post, means reversion to that service or post.

6. Discharge of a probationer during the period of probation:- (1) Notwithstanding anything in Rules 5, the appointing authority may, at any time during the period of probation, discharge from service a probationer on grounds arising out of the conditions, if any, imposed by

the Rules or in the order of appointment, or on account of his unsuitability for the service of post; but the order of discharge except when passed by the Government shall not be given effect to till it has been submitted to and confirmed by the next higher authority.

(2) An order discharging a probationer under this Rule shall indicate the grounds for the discharge but no formal proceedings under the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957, shall be necessary.

11. Now, let us analyze these Rules. No doubt Rule 3 states that the period of probation shall be, as may be, provided for in the Rules of recruitment specially made for any service or post, which shall not be less than two years (emphasis supplied). Out of which period extraordinary leave will have to be excluded. Thus the Rules contemplate that every service provide Rules relating to probation. But the probation period should not be less than two years. The emphasis of the Rules is that minimum period of probation has to be two years. The period of probation can be extended for reason to be recorded by the Competent Authority by such period not exceeding half of the prescribed period of probation. Interestingly, to this Rule the framers of the Rules have introduced proviso, which gives discretion to the Authorities and, in fact, introduced deemed extension in the event of the probationer has appeared for any exam or result thereof has not been declared within the period of probation and extended period. The Rule, therefore, contemplates deemed extension of probation period where the Authorities have not passed any order for extending or declining to extend the period of probation provided the circumstances stated therein are satisfied.

12. The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the Authorities to pass appropriate orders. In other

words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. Once these ingredients are satisfied the Competent Authority may confirm the employee under Rule 5 of the 1977 Rules. Rule 5(2) places an obligation upon the Authority that at the end of the prescribed period of probation, the Authority shall consider the suitability of the probationer to the post to which he is appointed and take a conscious decision whether he is suitable to hold the post and issue an order declaring that the probationer has satisfactorily competed his period or pass an order extending the period of probation etc. Rule 5(b) empowers the Authority that in the event it is of the view that the period of probation has not been satisfactorily completed or has not passed the special examinations, it may discharge him from service unless the period of probation is extended. Rule 5(2) has been coveted with negative language. It specifically prescribes that a probationer shall not be considered to have satisfactorily completed the probation unless a specific order to that effect is passed. This Rule further clarifies that if there is a delay in issuance of an order under sub-Rule (1), it shall not entitle the probationer to be deemed to have satisfactorily completed his probation. In other words, the framers of the Rules have introduced a double restriction to the concept of automatic confirmation or deemed satisfactorily completion of the probation period. Firstly, the specific order is required to be issued in that regard and secondly, delay in issuance of such orders does not tilt the balance in favour of the employee. Rule 6 (1) states that the Competent Authority may, at any time, during the period of probation, discharge from service, a probationer on grounds arising out of the conditions, if any, imposed by the Rules or in the order of appointment, or on account of his unsuitability for the service of post. However, the said order of discharge would take effect only after it is confirmed by the next higher authority. Rule 6(2) specifically excludes the application or holding of formal proceedings under the Karnataka Civil Services (Classification, Control and Appeal) Rules 1957. It says that such course will not be

necessary. In light of this statutory provision, let us also examine the probation period referred to under item No. 2 of Rule 2 of 1983 Rules. Rule states that probation period will be of 2 years and further mandates during that period of probation, the officer must undergo a training, as may be specified by the High Court. This itself has been indicated under the head 'minimum qualifications'. It, therefore, clearly shows that it is not the provision dealing with the probation period, extension and discharge of a probationer during that period but is primarily relatable to the minimum qualifications, which are to be essentially satisfied by the officer concerned before he takes over his appointment as a regular judge. The reference to the probation period has to be examined and interpreted with reference to and in conjunction with 1977 Rules which are the primary Rules dealing with probation. These Rules have admittedly been adopted by the High Court. Under the 1983 Rules, the emphasis is on performance and training during the period of probation. In other words, the primary purpose of these Rules is only to ensure that the concerned officer undergoes training during the period of probation. While the significance under the 1983 Rules is on training, under 1977 Rules, all matters relating to probation are specifically dealt with. It would not be permissible to read the relevant part of 1983 Rules to say that it mandates that probation period shall be only for two years and not more. If that was to be accepted, all provisions under Rules 3 to 6 of 1977 Rules will become redundant and ineffective. In fact, it would frustrate the very purpose of framing the 1977 Rules. What will be the period of probation, the circumstances under which it can be extended or reduces and discharge of the Probationer Officer in the event of unsuitability etc. are only dealt with under the 1977 Rules. The 1983 Rules would have to be read harmoniously with 1977 Rules to achieve the real purpose of proper and timely training of Judicial Officers on the one hand and appropriate control over the matters relating to probation of the officers on the other. That, in fact, is the precise reason as to why 1983 Rules do not deal specifically with any of the aspects of probation. In view of this

discussion the contention of the appellants has to be rejected.

13. Having referred to the specific Rules on the subject and the entire scheme under the relevant provisions relating to different aspects of probation, let us examine the law and the pronouncements of this Court in some detail. We have already noticed that two views are prevalent. Primarily, the Court has taken the diametrical opposite view. One which accepts the application of the deemed confirmation after the expiry of the prescribed period of probation, while other taking the view that it will not be appropriate to apply the concept of deemed confirmation to the officers on probation as that is not the intent of law. In our opinion, the rules and regulations governing a particular service are bound to have greater impact on determining such question and that is the precise reason that we have discussed Rules 3 to 6 of 1977 Rules in the earlier part of the judgment. What view out of the two views indicated above should be followed in the facts of the present case can be fairly stated only after we have discussed the earlier judgment of the larger as well as equi benches on this aspect. Let us, at the very outset, refer to the Constitution Bench Judgment of this Court in the case of *State of Punjab v. Dharam Singh,* [AIR 1968 SC 1210] In that case the Court was concerned with Rule 6(3) of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961 which fixed certain period beyond which the probation period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation. The view taken by the Court was that there would be confirmation of the employee in the post by implication. We may refer to the following paragraphs of the judgment of this Court:

> "8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to

> have extended the period of probation up to October 1, 1960 by implication. But under the proviso to Rule 6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to Rule 6(3), it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.
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> 9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfil any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960, and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6(3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of

this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court."

Seven Judge Bench of this Court, in the case of *Shamsher vs. State of Punjab* [(1974) 2 SCC 834], was concerned primarily, with the question whether termination during probation could be viewed as a punitive action in some case or always has to be as discharge simplicitor during the said period. The Court expressed the view that no abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination, it can never amount to punishment. In the facts and circumstances of the case if the probationer is discharged on the ground of insufficiecy or for similar reasons without a proper enquiry and without his getting a reasonable opportunity to show cause against his discharge it may in a given case amount to removal from service within Article 311 (2) of the Constitution of India. But while dealing with this principle question the Bench even discussed, at some length, whether a probationer can automatically be confirmed on the expiry of period of probation. The Court considered the earlier judgment of this Court in *Dharam Singh's case* (supra) discussing the case of appellant, who had completed his initial period of two years' probation on 11th November, 1967 and the maximum period of three years' probation on 11th November, 1968 and by reason of the fact that he continued in service after the expiry of the maximum period of probation he became confirmed, was the contention raised before the Bench. In that case the relevant Rule 7 (1) provided that every subordinate Judge, in the first instance, be

appointed on probation for two years but this period may be extended from time to time expressly or impliedly so that the total period of probation does not exceed three years. Explanation to Rule 5 (1) further provided that period of probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on the expiry of his period of probation. The appellant had also placed reliance on *Dharam Singh' case* (supra) to contend that the only view possible was that he would be deemed to have been confirmed. However, on the facts of the case before the Bench the Court held as under:

"Any confirmation by implication is negatived in the present case because before the completion of three years the High Court found prima facie that the work as well as the conduct of the appellant was unsatisfactory and a notice was given to the appellant on October 4, 1968 to show cause as to why his services should not be terminated. Furthermore, Rule 9 shows that the employment of a probationer can be proposed to be terminated whether during or at the end of the period of probation. This indicates that where the notice is given at the end of the probation the period of probation gets extended till the inquiry proceedings commenced by the notice under Rule 9 come to an end. In this background the explanation to Rule 7(1) shows that the period of probation shall be deemed to have been extended impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation. This implied extension where a Subordinate Judge is not confirmed on the expiry of the period of probation is not found in Dharam Singh's case. (AIR 1968 SC 1210) This explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years. The explanation on the contrary means that the provision regarding the maximum period of probation for three years is directory and not mandatory unlike in Dharam Singh case and that

a probationer is not in fact confirmed till an order of confirmation is made.

In this context reference may be made to the proviso to Rule 7(3). The proviso to the rule states that the completion of the maximum period of three years' probation would not confer on him the right to be confirmed till there is a permanent vacancy in the cadre. Rule 7(3) states that an express order of confirmation is necessary. The proviso to Rule 7(3) is in the negative form that the completion of the maximum period of three years would not confer a right of confirmation till there is a permanent vacancy in the cadre. The period of probation is therefore extended by implication until the proceedings commenced against a probationer like the appellant are concluded to enable the Government to decide whether a probationer should be confirmed or his services should be terminated. No confirmation by implication can arise in the present case in the facts and circumstances as also by the meaning and operation of Rules 7(1) and 7(3) as aforesaid.

It is necessary at this stage to refer to the second proviso to Rule 7(3) which came into existence on November 19, 1970. That proviso of course does not apply to the facts of the present case. That proviso states that if the report of the High Court regarding the unsatisfactory work or conduct of the probationer is made to the Governor before the expiry of the maximum period of probation, further proceedings in the matter may be taken and orders passed by the Governor of Punjab dispensing with his services or reverting him to his substantive post even after the expiry of the maximum period of probation. The second proviso makes explicit which is implicit in Rule 7(1) and Rule 7(3) that the period of probation gets extended till the proceedings commenced by the notice come to an end either by confirmation or discharge of the probationer.

In the present case, no confirmation by implication can arise by reason of the notice to show cause given on October 4, 1968 the enquiry by the Director of Vigilance to enquire into allegations and the operation of Rule 7 of the Service Rules that the probation shall be extended impliedly if a Subordinate Judge is not confirmed before the expiry of the period of probation. Inasmuch as Ishwar Chand Agarwal was not confirmed at the end of the period of probation confirmation by implication is nullified."

14. Before we discuss the subsequent judgment to these landmark judgments of this Court it will be quite appropriate to notice that the divergent views by different Benches of this Court and, more so, by different High Courts have been the subject matter of concern and have been noticed again by different Benches of this Court. In the case of *Dayaram Dayal vs. State of M.P.* [(1997) 7 SCC 443]. The Court specifically noticed the two line of rulings pronounced by this Court in its different judgments. At the cost of some repetition, we may notice that one line of judgments held that mere continuation of service beyond the period of probation does not amount to confirmation unless it was so specifically provided. The other line, though in very few cases, but, has been taken by this Court is that where there is provision in the Rules for initial probation and extension thereof, a maximum period of such extension is also provided beyond which it is not permissible to extend probation. However, the Bench dealing with the case of *Dayaram Dayal's case* (supra) did demonstrate that there was not any serious conflict between the two sets of decisions and it depends on the conditions contained in the order of appointment and the relevant rules applicable. Though the Bench in that case held that there was confirmation of the employee and while setting aside the order of termination, granted liberty to hold departmental enquiry in accordance with law. In order to analyze the reasoning recorded by the Bench we may refer to the following paragraphs as they would throw proper insight into the discussion:

"9. The other line of cases are those where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. A question as to its effect arose before the Constitution Bench in *State of Punjab v. Dharam Singh* [AIR 1968 SC 1210]. The relevant rule there provided initially for a one-year probation and then for extension thereof subject to a maximum of three years. The petitioner in that case was on probation from 1-10-1957 for one year and was continued beyond the extended period of three years (in all four years) and terminated in 1963 without any departmental inquiry. A Constitution Bench of this Court referred *Sukhbans Singh v. State of Punjab* [AIR 1962 SC 1711], G.S. *Ramaswamy v. Inspector General of Police* [AIR 1966 SC 175] and *State of U.P. v. Akbar Ali Khan* [AIR1966 SC 1842] cases and distinguished the same as cases where the rules did not provide for a maximum period of probation but that if the rule, as in the case before them provided for a maximum, then that was an implication that the officer was not in the position of a probationer after the expiry of the maximum period. The presumption of his continuing as a probationer was negatived by the fixation of a maximum time-limit for the extension of probation. The termination after expiry of four years, that is after the maximum period for which probation could be extended, was held to be invalid. This view has been consistently followed in Om Parkash Maurya v. U.P. Coop. Sugar Factories' Federation [(1986) Supp. SCC 95]; *M.K. Agarwal v. Gurgaon Gramin Bank* [{1987) Supp SCC 643] and *State of Gujarat v. Akhilesh C. Bhargav* [(1987) 4 SCC 482] which are all cases in which a maximum period for extension of probation was prescribed and termination after expiry of the said period was held to be invalid inasmuch as the officer must be deemed to have been confirmed.

10. The decision of the Constitution Bench in *State of Punjab v. Dharam Singh* [AIR 1968 SC 1210] was accepted by the seven-Judge Bench in *Samsher Singh v. State of Punjab* [(1974) 2 SCC 831]. However it was distinguished on account of a further special provision in the relevant rules applicable in Samsher Singh case. The rule there provided for an initial period of 2 years of probation and for a further period of one year as the maximum. One of the officers, Ishwar Chand Agarwal in that case completed the initial period of 2 years on 11-11-1967 and the maximum on 11-11-1968, and after completion of total 3 years his services were terminated on 15-12-1969. But still Dharam Singh case was not applied because the Rules contained a special provision for continuation of the probation even beyond the maximum of 3 years. The Explanation to Rule 7(1) stated (see p. 852) that the period of probation shall be deemed extended if a Subordinate Judge is not confirmed on the expiry of his period of probation. The Court held (p. 853) that this provision applied to the extended period of probation. It observed: (SCC para 71)

"71. ... This explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years. The explanation on the contrary means that the provision regarding the maximum period of probation for three years is directory and not mandatory unlike in Dharam Singh case and that a probationer is not in fact confirmed till an order of confirmation is made.

(emphasis supplied)"

Thus *Samsher Singh case* while it accepted *Dharam Singh case* is still not covered by that case because of the special Explanation which clearly deemed the probation as continuing beyond the maximum period of probation as long as no confirmation order was passed.

11. Similarly, the case in *Municipal Corpn. v. Ashok Kumar Misra* [(1991) 3 SCC 325 accepted *Dharam Singh case* and the cases which followed it but distinguished that line of cases on account of another special provision in the rules. There the relevant rule provided for a maximum of one year for the extended period of probation but there was a Note under Rule 8(2) of the Madhya Pradesh Government Servants General Conditions of Service Rules, 1961. Rule 8(2) of the Rules and the Note read:

"8. (2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

Note.—A probationer whose period of probation is not extended under this sub-rule, but who has neither been confirmed nor discharged from service at the end of the period of probation shall be deemed to have been continued in service, subject to the condition of his service being terminable on the expiry of a notice of one calendar month given in writing by either side."

It was held by this Court as follows: (SCC p. 328, para 4)

"4. ... Under the Note to sub-rule (2) if the probationer is neither confirmed nor discharged from service at the end of the period of probation, he shall be deemed to have been continued in service as probationer subject to the condition of his service being terminated on the expiry of a notice of one calendar month given in writing by either side." The consequence of the Note was explained further as follows: (pp. 328-29)

"As per sub-rule (6), on passing the prescribed departmental examination and on successful completion of the period of probation, the probationer shall be

confirmed in the service or post to which he has been appointed. Then he becomes an approved probationer. *Therefore, after the expiry of the period of probation and before its confirmation, he would be deemed to have been continued in service as a probationer.* Confirmation of probation would be subject to satisfactory completion of the probation and to pass in the prescribed examinations. Expiry of the period of probation, therefore, *does not entitle him with a right of deemed confirmation.* The rule contemplates to pass an express order of confirmation in that regard. By issue of notice of one calendar month in writing by either side, the tenure could be put to an end, which was done in this case."

(emphasis supplied)

It is clear that the Court distinguished *Dharam Singh, Om Parkash Maurya, M.K. Agarwal, and Akhilesh Bhargava* because of the Note under Rule 8(2), even though the rule itself provided a maximum of one year for extension of probation.

12. Thus, even though the maximum period for extension could lead to an indication that the officer is deemed to be confirmed, still special provisions in such rules could negative such an intention.

13. It is, therefore, clear that the present case is one where the rule has prescribed an initial period of probation and then for the extension of probation subject to a maximum, and therefore the case squarely falls within the second line of cases, namely, Dharam Singh case and the provision for a maximum is an indication of an intention not to treat the officer as being under probation after the expiry of the maximum period of probation. It is also significant that in the case before us the effect of the rule fixing a maximum period of probation is not whittled down by any other provision in the rules such as the one contained in

Samsher Singh case or in Ashok Kumar Misra case. Though a plea was raised that termination of service could be effected by serving one month's notice or paying salary in lieu thereof, there is no such provision in the order of appointment nor was any rule relied upon for supporting such a contention."

15. Similar view was also taken by another Bench of this Court in the case of *Karnataka State Road Transport Corporation vs. S. Manjunath* [(2000) 5 SCC 250]. In that case the employees had claimed that after the expiry of prescribed period of probation they would be deemed to be confirmed employees and their services were not liable to be terminated simplicitor. Regulation 11 (8), which was pressed into service by the Corporation, provided that a person should not be considered to have satisfactorily completed the period of probation unless specific order to that effect is made and the delay in issuance of certificate would not entitle the person to be deemed to have satisfactorily completed the period of probation. This Court, while noticing that Rule 11(8) was applicable to promotees alone because of the expression of 'officiating' having been used, the appellants, before the Court were direct recruits, therefore, covered under Regulation 11 (1) which provides that the probation period shall be for two years extendable by one year and that the period of probation shall not be further extended. In this view of the matter and while referring to the case of Dharam Singh (supra) and *Wasim Beg vs. State of U.P.* [(1998) 3 SCC 321] the Court further noticed that the two view theory expressed in the case of *Dayaram* (supra) was further extended in the case of *Wasim Beg* (supra) and after discussing the entire gamut of law such cases were classified into three categories. After detailed discussion on the subject the Court held as under:

"10. This Court had an occasion to review, analyse critically and clarify the principles on an exhaustive consideration of the entire case-law in two recent decisions

reported in *Dayaram Dayalv. State of M.P.* [(1997) 7 SCC 443] and *Wasim Beg v. State of U.P.* [(1998) 3 SCC 321]. One line of cases has held that if in the rule or order of appointment, a period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed and there is no bar on the power of termination of the officer after the expiry of the initial or extended period of probation. This is because at the end of probation he becomes merely qualified or eligible for substantive permanent appointment. The other line of cases are those where even though there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The Constitution Bench which dealt with the case reported in *State of Punjab v. Dharam Singh*[AIR 1968 SC 1210] while distinguishing the other line of cases held that the presumption about continuation, beyond the period of probation, as a probationer stood negatived by the fixation of a maximum time-limit for the extension of probation. Consequently, in such cases the termination after expiry of the maximum period up to which probation could be extended was held to be invalid, inasmuch as the officer concerned must be deemed to have been confirmed.

11. The principles laid down in Dharam Singh case though were accepted in another Constitution Bench of a larger composition in the case reported in *Samsher Singh v. State of Punjab* [(1974)2SCC831] the special provisions contained in the relevant Rules taken up for consideration therein were held to indicate an intention not to treat the officer as deemed to have been confirmed, in the light of the specific stipulation that the period of probation shall be deemed to be extended if the officer concerned was not confirmed on the expiry of his period of probation. Despite

the indication of a maximum period of probation, the implied extension was held to render the maximum period of probation a directory one and not mandatory. Hence, it was held that a probationer in such class of cases is not to be considered confirmed, till an order of confirmation is actually made. The further question for consideration in such category of cases where the maximum period of probation has been fixed would be, as to whether there are anything else in the rules which had the effect of whittling down the right to deemed confirmation on account of the prescription of a maximum period of probation beyond which there is an embargo upon further extension being made, and such stipulation was found wanting in Dayaram Dayal case.

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14. As indicated by us, the Regulation deals with two different categories of cases — one about the "probation" of an appointee other than by way of promotion and the other relating to "officiation" of a person appointed on promotion. The similarity of purpose and identity of object apart, of such provision, there is an obvious difference and positive distinction disclosed in the manner they have to be actually dealt with. The deliberate use of two different phraseology "probation" and "officiation" cannot be so lightly ignored obliterating the substantial variation in the method of handling such categories of persons envisaged by the Regulations. The mere fact that a reference is made to sub-regulation (3) also in the later part of sub-regulation (8) of the Regulation could not be used to apply all the provisions relating to the category of appointees on "officiation" to the other category of appointees on "probation". The stipulation in sub-regulation (8) of the Regulation when making the passing of an order, a condition precedent for satisfactory completion specifically refers only to the completion of "period of officiation".

Similarly, notwithstanding a reference made to sub-regulation (3) along side sub-regulation (4), in stipulating the consequences of any delay in making an order declaring satisfactory completion, the reference is confined only to deemed satisfaction and completion of "the period of officiation", and not of probation. Sub-regulation (9) of the Regulation insofar as it provides for confirmation as a sequel to declaration, only deals with a promotee to a temporary post and not of the other category. While dealing with the termination of a candidate, not found suitable for the post, sub-regulation (3) of the Regulation envisages such termination being made at any time "within the period of probation", and not at any time after the completion of such maximum period of probation. Consequently, the cases on hand also would fall within the category of cases dealt with in Dayaram Dayal case and Wasim Beg case and the services of the respondents could not be put an end to except by means of departmental disciplinary proceedings, after following the mandatory requirements of law. Therefore, the High Court cannot be faulted for interfering with the orders of termination of the services of the respondent."

Therefore, the appeals referred by the Corporation came to be dismissed as the employee had attained the status of confirmed employee.

16. Now let us examine the other view where the Courts have declined to accept the contention that the employees were entitled to automatic confirmation after expiry of the probation period. In the case of High Court of *Madhya Pradesh vs. Satya Narayan Jhavar* [(2001) 7 SCC 161] a three Judge Bench of this Court reiterated the three line of cases while referring to Rule 24(1) which provided maximum period of probation, examined the question of confirmation of such a probationer depending upon his fitness for such confirmation and his passing of the departmental examination by the higher

standards. Thus declined to accept the principle of automatic or deemed confirmation the Court held as under:

> "11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.
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35 In the case on hand, correctness of the interpretation given by this Court to Rule 24 of the Rules in the case of *Dayaram Dayal v. State of M.P.* [(1997) 7 SCC 443] is the bone of contention. In the aforesaid case, no doubt, this Court has held that a maximum period of probation having been provided under sub-rule (1) of Rule 24, if a probationer's service is not terminated and he is allowed to continue thereafter it will be a case of deemed confirmation and the sheet anchor of the aforesaid conclusion is the Constitution Bench decision of this Court in the case of *State of Punjab v. Dharam Singh* [AIR 1968 SC 1210]. But, in our considered opinion in the case of Dayaram Dayal. Rule 24 of the Rules has not been interpreted in its proper perspective. A plain reading of different sub-rules of Rule 24 would indicate that every candidate appointed to the cadre will go for initial training for six months whereafter he would be appointed on probation for a period of 2 years and the said period of probation would be extended for a further period not exceeding 2 years. Thus, under sub-rule (1) of Rule 24 a maximum period of 4 years' probation has been provided. The aforesaid sub-rule also stipulates that at the end of the probation period the appointee could be confirmed subject to his fitness for confirmation and to his having passed the departmental examination, as may be prescribed. In the very sub-rule, therefore, while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It necessarily stipulates that the question of confirmation can be considered at the end of the period of probation, and on such consideration if the probationer is found suitable by the appointing authority and he is found to have passed the prescribed departmental examination then the appointing authority may issue an order of confirmation. It is too well settled that an order of

confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub-rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of Dayaram Dayal and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of *Dharam Singh.*"

17. This view was followed by another two Judge Bench of this Court in a subsequent judgment relating to judicial officers in Registrar, *High Court of Gujarat vs. C.G. Sharma* [(2005) 1 SCC 132] holding that termination was proper, no opportunity ought need to be granted because it was a matter of pure subjective satisfaction relating to overall performance. Referring to Rule 5(4) of Gujarat Judicial Service Recruitment Rules, 1961 the Court held as under:

"26. A large number of authorities were cited before us by both the parties. However, it is not necessary to go into the details of all those cases for the simple reason that sub-rule (4) of Rule 5 of the Rules is in pari materia with the Rule which was under consideration in the case of *State of Maharashtra v. Veerappa R Saboji* [(1979) 4 SCC 466] and we find that even if the period of two years expires and the probationer is allowed to continue after a period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the Rules, work has to be satisfactory which is a prerequisite or precondition for confirmation and, therefore, even if the probationer is allowed to continue beyond the period of two years as mentioned in the Rule, there is no question of deemed confirmation. The language of the Rule itself excludes any chance of giving deemed or automatic confirmation

because the confirmation is to be ordered if there is a vacancy and if the work is found to be satisfactory. There is no question of confirmation and, therefore, deemed confirmation, in the light of the language of this Rule, is ruled out. We are, therefore, of the opinion that the argument advanced by learned counsel for the respondent on this aspect has no merits and no leg to stand. The learned Single Judge and the learned Judges of the Division Bench have rightly come to the conclusion that there is no automatic confirmation on the expiry of the period of two years and on the expiry of the said period of two years, the confirmation order can be passed only if there is vacancy and the work is found to be satisfactory. The Rule also does not say that the two years' period of probation, as mentioned in the Rule, is the maximum period of probation and the probation cannot be extended beyond the period of two years. We are, therefore, of the opinion that there is no question of automatic or deemed confirmation, as contended by the learned counsel for the respondent. We, therefore, answer this issue in the negative and against the respondent.

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43. But the facts and circumstances in the case on hand are entirely different and the administrative side of the High Court and the Full Court were right in taking the decision to terminate the services of the respondent, rightly so, on the basis of the records placed before them. We are also satisfied, after perusing the confidential reports and other relevant vigilance files, etc. that the respondent is not entitled to continue as a judicial officer. The order of termination is termination simpliciter and not punitive in nature and, therefore, no opportunity needs to be given to the respondent herein. Since the overall performance of the respondent was found to be unsatisfactory by the High Court during the period of probation, it was decided by the

High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simpliciter cannot be said to be violative of Articles 14, 16 and 311 of the Constitution. The law on the point is crystallised that the probationer remains a probationer unless he has been confirmed on the basis of the work evaluation. Under the relevant Rules under which the respondent was appointed as a Civil Judge, there is no provision for automatic or deemed confirmation and/or deemed appointment on regular establishment or post, and in that view of the matter, the contentions of the respondent that the respondent's services were deemed to have been continued on the expiry of the probation period, are misconceived."

18. On a clear analysis of the above enunciated law, particularly, the Seven Judge Bench judgment of this Court in the case of *Samsher Singh* (supra) and three Judge Bench judgments, which are certainly the larger Benches and are binding on us, the Courts have taken the view with reference to the facts and relevant Rules involved in those cases that the principle of 'automatic' or 'deemed confirmation' would not be attracted. The pith and substance of the stated principles of law is that it will be the facts and the Rules, which will have to be examined by the Courts as a condition precedent to the application of the dictum stated in any of the line of the cases afore noticed. There can be cases where the Rules require a definite act on the part of the employer before officer on probation can be confirmed. In other words, there may a Rule or Regulation requiring the competent authority to examine the suitability of the probationer and then upon recording its satisfaction issue an order of confirmation. Where the Rules are of this nature the question of automatic confirmation would not even arise. Of course, every authority is expected to act properly and expeditiously. It cannot and ought not to keep issuance of such order in abeyance without any reason or justification. While

there could be some other cases where the Rules do not contemplate issuance of such a specific order in writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties, even in those cases it is difficult to attract the application of this doctrine. However, there will be cases where not only such specific Rules, as noticed above, are absent but the Rules specifically prohibit extension of the period of probation or even specifically provide that upon expiry of that period he shall attain the status of a temporary or a confirmed employee. In such cases, again, two situations would rise: one, that he would attain the status of an employee being eligible for confirmation and second, that actually he will attain the status of a confirmed employee. The Courts have repeatedly held that it may not be possible to prescribe a straight jacket formulae of universal implementation for all cases involving such questions. It will always depend upon the facts of a case and the relevant Rules applicable to that service.

19. Reverting back to the Rules of the present case it is clear that Rule 3, unlike other Rules which have been referred in different cases, contains negative command that the period of probation shall not be less than two years. This period could be extended by the competent authority for half of the period of probation by a specific order. But on satisfactory completion of the probation period, the authorities shall have to consider suitability of the probationer to hold the post to which he was appointed. If he is found to be suitable then as soon as possible order is to be issued in terms of Rule 5(1)(a). On the other hand, if he is found to be unsuitable or has not passed the requisite examination and unless an order of extension of probation period is passed by the competent authority in exercise of its power under Rule 4, then it shall discharge the probationer from service in terms of Rule 5 (1)(b). At this juncture Entry 2 of schedule under Rule 2 of 1983 Rules would come into play as it is a mandatory requirement that the probationer should

complete his judicial training. Unless such training was completed no certificate of satisfactory completion of probation period could be issued. Obviously, power is vested with the appropriate authority to extend the probation period and in alternative to discharge him from service. The option is to be exercised by the authorities but emphasis has been applied by the framers on the expression 'as soon as possible' they should pass the order and not keep the matters in abeyance for indefinite period or for years together. The language of Rule 5(2) is a clear indication of the intent of the framers that the concept of deeming confirmation could not be attracted in the present case. This Rule is preceded by the powers vested with the authorities under Rules 4 and 5(1) respectively. This Rule mandates that a probationer shall not be deemed to have satisfactorily completed the probation unless a specific order to that effect is passed. The Rule does not stop at that but further more specifically states that any delay in issuance of order shall not entitle the probationer to be deemed to have satisfactorily completed his probation. Thus, use of unambiguous language clearly demonstrates that the fiction of deeming confirmation, if permitted to operate, it would entirely frustrate the very purpose of these Rules. On the ground of unsuitability, despite what is contained in Rule 5, the competent authority is empowered to discharge the probationer at any time on account of his unsuitability for the service post. That discharge has to be simplicitor without causing a stigma upon the concerned probationer. In our view, it is difficult for the Court to bring the present case within the class of cases, where 'deemed confirmation' or principle of 'automatic confirmation' can be judiciously applied. The 1977 Rules are quite different to the Rules in some of the other mentioned cases. The 1977 Rules do not contain any provision which places a ceiling to the maximum period of probation, for example, the probation period shall not be extended beyond a period of two years. On the contrary, a clear distinction is visible in these Rules as it is stated that probation period shall not be less than two years

and can be extended by the authority by such period not exceeding half the period. The negative expression is for half the period and not the maximum period totally to be put together by adding to the initial period of probation and to extended period. Even if, for the sake of argument, we assume that this period is of three years, then in view of the language of Rules 5 (1) and 5(2) there cannot be automatic confirmation, a definite act on the part of the authority is contemplated. The act is not a mere formality but a mandatory requirement which has to be completed by due application of mind. The suitability or unsuitability, as the case may be, has to be recorded by the authority after due application of mind and once it comes to such a decision the other requirement is that a specific order in that behalf has to be issued and unless such an order is issued it will be presumed that there shall not be satisfactorily completion of probation period. The Rules, being specific and admitting no ambiguity , must be construed on their plain language to mean that the concept of 'deemed confirmation' or 'automatic confirmation' cannot be applied in the present case.

20. Another aspect, which would further substantiate the view that we have expressed, is that proviso to Rule 4 shows that where during the period of probation the results of an examination have not been declared which the probationer was required to take, in that event the period of probation shall be deemed to have extended till completion of the act i.e. declaration of result. Applying this analogy to the provisions of Rule 5 unless certificate is issued by the competent authority the probation period would be expected to have been extended as it is a statutory condition precedent to successful completion of the period of probation and confirmation of the probationer in terms of this Rule.

21. In the present case, the appellant was appointed to the post vide letter dated 9/10th May, 1996 and he reported for his duty on 15th May, 1996. He was on probation for a period of

two years. Thereafter, as it appears from the record, no letter of extension of probation or order stating that the appellant has completed the period of probation successfully in terms of Rule 5(1) was ever issued. Rule 5 (2), therefore, would come into play and till the issuance of such an order and certificate of satisfactory completion of probation period, the appellant cannot claim to be a confirmed employee by virtue of principle of automatic or deemed confirmation. His services were terminated vide order dated 24th March, 2000. It was discharge from service simplicitor without causing any stigma on the appellant. We have already discussed in some detail the conduct of the appellant as well as the fact that even prior to his selection as a member of the Higher Judicial Services of State of Karnataka, his name had been placed for surveillance on the of Police Station, Karwar. The original service record of the appellant also does not reflect that he was an officer of outstanding caliber or had done extraordinary judicial work. He is an officer who is not aware of his date of birth and mentioned his age as per his convenience. In these circumstances, we do not feel that, it is a case where in exercise of jurisdiction of this Court under Article 136 of the Constitution of India, we should interfere with the judgment of the High Court as the same does not suffer from any factual or legal infirmity.

22. Before we part with this file, it is required of this Court to notice and declare that the concerned authorities have failed to act expeditiously and in accordance with the spirit of the relevant Rules. Rule 5 (2) of 1977 Rules has used the expression 'as soon as possible' which clearly shows the intent of the rule framers explicitly implying urgency and in any case applicability of the concept of reasonable time which would help in minimizing the litigation arising from such similar cases. May be, strictly speaking, this may not be true in the case of the appellant but generally every step should be taken which would avoid bias or arbitrariness in administrative matters, no matter, which is the authority concerned including the High Court itself. Long back in the case of *Shiv Kumar Sharma Vs. Haryana*

State Electricity Board (1988) Supp. SCC 669] this Court had the occasion to notice that due to delay in recording satisfactory completion of probation period where juniors were promoted, the action of the authority was arbitrary and it resulted in infliction of even double punishment. The Court held as under:

> "While there is some necessity for appointing a person in government service on probation for a particular period, there may not be any need for confirmation of that officer after the completion of the probationary period. If during the period a government servant is found to be unsuitable, his services may be terminated. On the other hand, if he is found to be suitable, he would be allowed to continue in service. The archaic rule of confirmation, still in force, gives a scope to the executive authorities to act arbitrarily or mala fide giving rise to unnecessary litigations. It is high time that the Government and other authorities should think over the matter and relieve the government servants of becoming victims of arbitrary actions."

We reiterate this principle with respect and approval and hope that all the authorities concerned should take care that timely actions are taken in comity to the Rules governing the service and every attempt is made to avoid prejudicial results against the employee/probationer. It is expected of the Courts to pass orders which would help in minimizing the litigation arising from such similar cases. Timely action by the authority concerned would ensure implementation of rule of fair play on the one hand and serve greater ends of justice on the other. It would also boost the element of greater understanding and improving the employer employee relationship in all branches of the States and its instrumentalities. The Courts, while pronouncing judgments, should also take into consideration the issuance of direction which would remove the very cause of litigation. Boni judicis est causes litium dirimere.

23. It will be really unfortunate that a person, who is involved

in the process of judicial dispensation, is dealt with in a manner that for years neither his confidential reports are written nor the competent authority issues an order of satisfactory completion of probation period or otherwise. Another very important aspect is that in the present days of high competition and absolute integrity and even to satisfy the requirements of out of turn promotions by competition it is expected of the High Court to inform the concerned judicial officer of his draw backs so as to provide him a fair opportunity to improve. We certainly notice it with some sense of regret that the High Court has not maintained the expected standards of proper administration. There is a constitutional obligation on the High Court to ensure that the members of the judicial services of the State are treated appropriately, with dignity and without undue delay. They are the face of the judiciary inasmuch as a common man, primarily, comes in contact with these members of the judicial hierarchy. It is a matter of concern, as we are of the considered view, that timely action on behalf of the High Court would have avoided this uncalled for litigation as it would have been a matter of great doubt whether the appellant could at all be inducted into the service in face of the admitted position that the name of the appellant was stated to be on the rowdy list at the relevant time.

24. Although for the reasons afore recorded we find no merit in this appeal and dismiss the same. While dismissing the appeal we feel constrained to issue the following directions:

1. The judgment of this Court shall be placed before the Hon'ble the Chief Justice of Karnataka High Court for appropriate action. We do express a pious hope that steps will be taken to ensure timely recording of the confidential reports of the judicial officers by appropriate authority (which in terms of Chapter VI with particular reference to the provisions of Article 235 of the Constitution is the High Court) and in an elaborate format depicting performance of the judicial officers in all relevant fields, so as to ensure that every judicial officer

in the State will not be denied what is due to him in accordance with law and on the basis of his performance;

2. We direct the Secretary of the Union of India, Ministry of Personnel, Public Grievances and Pension as well as all the Chief Secretaries of the States to issue appropriate guidelines, in the light of this judgment, within eight weeks from the date of the pronouncement of this judgment;

3. We further direct that all the High Courts would ensure that 'police verification reports', conducted in accordance with law, are received by the concerned authority before an order of appointment/posting in the State Judicial Service is issued by the said authority.

With the above directions, the appeal is dismissed. However, the parties are left to bear their own costs.

D.G. Appeal dismissed.

ASHOK KUMAR

v.

STATE OF HARYANA

(Criminal Appeal No. 1489 of 2004)

JULY 8, 2010

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

PENAL CODE, 1860:

s. 304-B r/w s.2 of Dowry Prohibition Act, 1961 – Dowry death – Conviction – Plea that every demand could not be termed as dowry demand – HELD: The expressions 'or any time after the marriage' and 'in connection with the marriage' cover all demands made at the time, before or after the marriage so far they were in connection with the marriage – The expression 'demand for dowry' has to be construed ejusdem generis to the word immediately preceding the expression – The expression 'in connection with the marriage' has to be given a wider connotation – In the instant case, the evidence of prosecution witnesses as also the defence witness satisfied the ingredients of s.304-B – Conviction sustained – Dowry Prohibition Act, 1961 – s.2 – Evidence – Testimony of defence witness – Interpretation of Statutes – Rule of ejusdem generis.

s.304-B – Expression 'soon before her death' – HELD: Cannot be given a narrower meaning – Further, interpretation given should be one which would further the object and cause of the law enacted and avoid absurd result – For want of any specific period, concept of reasonable period would be applicable – In the instant case, there is evidence of demand of money 20-22 days prior to incident and on failure to satisfy the demand, victim subjected to harassment and torture when she reached her matrimonial home 7-8 days prior to her death – Interpretation of statutes – Doctrines – Concept of reasonable period.

s.304-B – Dowry death – Presumption – HELD: The legislature has applied the concept of deeming fiction to provisions of s.304-B – Once prosecution proves its case with regard to basic ingredients of s.304-B, court will presume by deemed fiction that the accused have caused the death of the bride – Interpretation of Statutes – Deeming fiction.

CONSTITUTION OF INDIA, 1950:

Articles 136 and 142 – Exercise of power to award appropriate sentence – Conviction and sentence of ten years RI awarded by courts below u/s 304-B IPC – HELD: Cruelty and harassment to deceased was caused by her mother-in-law and brother-in-law, who were acquitted by High Court – Their acquittal was not challenged – In the facts and circumstances, in order to do complete justice in exercise of power under Article 142, sentence of accused reduced to seven years RI – Penal Code, 1860 – S.304-B - Sentencing.

EVIDENCE:

Statements of witnesses – HELD: Have to be read in their entirety – There may be certain variations in the statements, therefore, they should be appreciated and dealt with upon their cumulative reading – Penal Code, 1960 – s.304-B.

Defence witness – HELD: Defence would be bound by the statement of the witness produced by it – Penal Code, s.304-B IPC.

CODE OF CRIMINAL PROCEDURE, 1973:

s.313 – Recording of statement of accused – HELD: The purpose of the mandatory requirement is to put every incriminating evidence to accused and to give him a fair chance to offer his explanation – However, if the accused makes a false statement, court may draw adverse inference – In the instant case, accused failed to substantiate his statement that the bride was in love with somebody else and

as she was not permitted to marry according to her choice, she committed suicide – Penal Code, 1860 – s.304-B.

s.154 – FIR – Delay in registration – Dowry death – Fifteen hours delay in registration of FIR – HELD: In the circumstances of the case, there is no inordinate or unexplained delay in lodging the FIR – Penal Code, 1860 – s.304-B.

WORDS AND PHRASES:

Expressions 'or any time after the marriage', 'in connection with the marriage' occurring in s.2 of Dowry Prohibition Act, 1961 and 'demand for dowry' used in s.304-B IPC – Connotation of.

The appellant was married on 9.10.1986, and his wife died of burn injuries on 16.5.1988. The prosecution case was that the appellant, his mother and brother harassed and tortured the bride for dowry; that one week prior to the incident the deceased came to her parents and stated that her husband wanted to set up a new business for which he required a sum of Rs.5000/-; that her father could not manage the money due to which the accused burnt her. The trial court convicted all the three accused of the offence charged. On appeal, the High Court acquitted the mother and the brother of the appellant.

It was contended for the appellant that every demand by the husband or his family members could not be termed as 'dowry demand' within the meaning of s.2 read with s.4 of the Dowry Prohibition Act, 1961 and, consequently, the death of the deceased could not be termed as a 'dowry death' within the ambit and scope of s.304-B.

Partly allowing the appeal, the Court

HELD: 1. Explanation to s.304-B IPC requires that the

expression 'dowry' shall have the same meaning as in s.2 of the Dowry Prohibition Act, 1961, i.e. any property or valuable security given or agreed to be given either directly or indirectly by one party to another, by parents of either party to each other or any other person at, before, or at any time after, the marriage and in connection with the marriage of the said parties but does not include dower or mahr under the Muslim Personal Law. The expressions 'or any time after marriage' and 'in connection with the marriage of the said parties'; which were introduced by amendments appear to have been added in s.2 with the intention to cover all demands at the time, before and even after the marriage so far they were in connection with the marriage of the parties. This clearly shows the intent of the legislature that these expressions are of wide meaning and scope and they cannot be given a restricted or a narrower meaning. However, the demand of dowry has to be 'in connection with the marriage' and not so customary that it would not attract, on the face of it, the provisions of the section. [para 10-11] [1133-H; 1134-A-E]

Madhu Sudan Malhotra v. K.C. Bhandari **(1988) Supp. 1 SCC 424;** *State of Andhra Pradesh v. Raj Gopal Asawa* **2004 (3) SCR 32 = (2004) 4 SCC 470;** *Ram Singh v. State of Haryana* **2008 (2) SCR 216 = (2008) 4 SCC 70;** *Satbir Singh v. State of Punjab* **2001 (3) Suppl. SCR 353 =AIR 2001 SC 2828 and** *Appasaheb v. State of Maharashtra* **2007 (1) SCR 164 = (2007) 9 SCC 721, referred to.**

1.2. The courts have also taken the view that where the husband had demanded a specific sum from his father-in-law and upon not being given, harassed and tortured the wife and after some days she died, such cases would clearly fall within the definition of 'dowry' under the Act. [para 13] [1135-A-E]

1.3. The cruelty and harassment by the husband or

any relative could be directly relatable to or in connection with, any demand for dowry. The expression 'demand for dowry' will have to be construed ejusdem generis to the word immediately preceding this expression. Similarly, 'in connection with the marriage' is an expression which has to be given a wider connotation. [para 16] [1136-H; 1137-A-B]

1.4. In the instant case, PW-1, the father of the deceased, stated that six months after the marriage of the deceased, her husband and in-laws started harassing her for insufficient dowry. He further stated that 20-22 days prior to her death the deceased had told him that she was being troubled for a sum of Rs.5000/- which was required by her husband as he wanted to change his business. PW-2 supported the statement of PW-1. PW-3 stated that the husband of the deceased and her in-laws used to ill-treat the deceased and were demanding dowry and; that he informed PW-1 about the death of the deceased due to burn injuries. [para 25] [1144-G-H; 1145-A-G]

1.5. The most important witness was DW-3, the sister of the deceased, aged about 14 years. She was examined as defence witness. She stated that her sister (the deceased) had complained that her husband and in-laws demanded dowry and also used to give her beating; that she came to their home 20 days prior to her death, and told that her in-laws had demanded a T.V. and Rs.5,000/-. This statement of DW-3 in cross-examination, in fact, is clinching evidence. The defence would be bound by the statement of the witness produced by it whatever be its worth. On the face of the evidence adduced by PW-1 read in conjunction with the statement of DW-3, the ingredients of s.304-B IPC have been satisfied. [para 26, 28 and 30] [1146-D-F; 1147-A-H]

1.6. There are certain variations or improvements in the statements of PWs but all of them are of minor nature.

The statements of the witnesses have to be read in their entirety to examine their truthfulness and the veracity or otherwise. It will neither be just nor fair to pick up just a line from the entire statement and appreciate that evidence out of context and without reference to the preceding and subsequent lines. It is always better and in the interest of both the parties that the statements of the witnesses are appreciated and dealt with by courts upon their cumulative reading. [para 28] [1147-B-E]

Devi Lal v. State of Rajasthan **2007 (11) SCR 219 = (2007) 14 SCC 176, relied on.**

2.1. The words 'soon before her death' used in s.304-B IPC cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act. Further, the interpretation given should be one which would avoid absurd results on the one hand, and would further the object and cause of the law so enacted, on the other. [para 14] [1136-F-H; 1136-A-B]

2.2. The concept of reasonable time is the best criteria to be applied for appreciation and examination of such cases. There should be a reasonable, if not direct, nexus between the death and the dowry related cruelty or harassment inflicted on the deceased. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient whereafter the couple

and the family members have lived happily and that it would result in abuse of the said protection. These matters will have to be examined on the facts and circumstances of a given case. In the instant case, there is definite evidence to show that nearly 20-22 days prior to the incident, the deceased had come to her parental home and informed her father about the demand of Rs. 5,000/- and harassment and torture to which she was subjected to by her husband and his relatives. Her father had consoled her ensuring that he would try to arrange for the same and thereafter took her at her matrimonial home 7-8 days prior to her death. [para 15 and 29] [1136-B-G; 1147-F-G]

Tarsem singh .vs. State of punjab **2008 (17) SCR 379 = 2009 AIR 1454 and** *Yashoda v. State of Madhya Pradesh* **(2004) 3 SCC 98, referred to.**

3. The legislature has applied the concept of deeming fiction to the provisions of s.304-B IPC. Once the prosecution proves its case with regard to the basic ingredients of s.304-B, the court will presume by deemed fiction of law that the husband and/or his relatives complained of, have caused the death of the bride. Such a presumption can be drawn by the court keeping in view the evidence produced by the prosecution in support of the substantive charge u/s 304-B.Of course, it would be a rebuttable presumption. [para 18] [1138-A-E]

Kaliyaperumal v. State of Tamil Nadu **2003 (3) Suppl. SCR 1 = AIR 2003 SC 3828, relied on.**

4.1. It is a settled principle of law that dual purpose is sought to be achieved when the courts comply with the mandatory requirement of recording the statement of an accused u/s 313 CrPC. Firstly, every material piece of evidence which the prosecution proposes to use against the accused should be put to him in clear terms; and

secondly, the accused should have a fair chance to give his explanation in relation to that evidence as well as his own versions with regard to alleged involvement in the crime. However, if the statements made by the accused are false, the court is entitled to draw adverse inferences. Further, the provisions of s. 313 (4) Cr.PC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in as evidence for or against the accused in any other enquiry or trial for any other offence for which, such answers may tend to show he has committed. Thus, the use of a statement u/s 313 of Cr.PC as an evidence is permissible as per the provisions of the Code but has its own limitations. Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution. However, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that courts have declared is that conviction of the accused cannot be based merely on the statement made u/s 313 Cr.PC as it cannot be regarded as a substantive piece of evidence. [para 22-23] [1141-G-H; 1143-B-F]

Vijendrajit Ayodhya Prasad Goel v. State of Bombay **AIR 1953 SC 247, referred to.**

4.2. In the instant case, from various answers given by the accused to the court in his statement recorded u/s 313 Cr.P.C., it appears that the death of the deceased by burning is not disputed. However, besides denying the case of the prosecution, the appellant took the stand that he was falsely implicated in the crime. According to him, the deceased was not happy with the marriage inasmuch as she was in love with somebody else and wanted to marry him and, as it was not permitted by her family, she committed suicide. It was for the accused to

prove his defence, but, he has led no evidence in this regard and thus, the Court cannot believe this version put forward by the accused. [para 24 and 30] [1144-C-E; 1145-H; 1146-A-B]

5. There is no inordinate or unexplained delay in lodging the FIR. The incident occurred at 4.00 p.m. on 16.05.1988. The victim died at 9.00 p.m. on the same day. The complainant family got the information of the death from a relative, PW-3. Thereafter, they must have tried to get the body subjected to the postmortem and have the same released for performing the last rites. The FIR was registered at 7.30 p.m. on 17.05.1988 which obviously would mean that the complainant had reached the police station even prior thereto. The conduct of the complainant and the witnesses is in line with the behaviour of a person of common prudence and the facts and circumstances of the case clearly demonstrate proper exercise of due diligence on the part of these witnesses. The FIR cannot be said to have been registered belatedly. Even if the delay is presumed, it is not of such a nature that would entail any benefit to the accused. [para 31] [1048-C-H; 1049-A]

6.1. There being no infirmity in the concurrent judgments of the Sessions Judge and the High Court, there is no reason to interfere with the same in law or on facts. Thus, the conviction of the accused is sustained. [para 32] [1049-B]

6.2. As regards the quantum of punishment, it is not even the case of the prosecution that at the time of occurrence, the accused-appellant was present at home and he failed to protect or save the deceased from burning which caused her death. Besides, the marriage itself has survived for a short period of nearly one and a half years. The cruelty and harassment to the deceased

was stated to have been caused by the mother-in-law and the brother in law of the deceased. They have been acquitted by the High Court for total lack of evidence. Neither the State nor the complainant has preferred an appeal against their acquittal. The accused is aged about 48 years. Keeping in view the facts and circumstances of the case and in exercise of powers under Article 142 of the Constitution of India to do complete justice, the Court is of the considered view that ends of justice would be met by awarding the accused the minimum sentence provided in law, i.e. 7 years of rigorous imprisonment. [para 33] [1049-C-F]

Case Law Reference:

2008 (2) SCR 216	**referred to**	**para 12**
2001 (3) Suppl. SCR 353	**referred to**	**para 12**
(1988) Supp. 1 SCC 424	**referred to**	**para 12**
2004 (3) SCR 32	**referred to**	**para 12**
2008 (17) SCR 379	**referred to**	**para 15**
(2004) 3 SCC 98	**referred to**	**para 15**
2003 (3) Suppl. SCR 1	**relied on**	**para 18**
2007 (1) SCR 164	**referred to**	**para 20**
2007 (11) SCR 219	**relied on**	**para 21**
AIR 1953 SC 247	**referred to**	**para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1489 of 2004.

From the Judgment & Order dated 16.12.2003 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 38-SB of 1989.

Vijay R. Datar, Vinod Jhanji, Jyoti Mendiratta and Balraj Dewan for the Appellant.

Roopansh Purohit and Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Inter alia but primarily the appellant has raised a question of law in the present appeal. The contention is, that every demand by the husband or his family members cannot be termed as 'dowry demand' within the meaning of Section 2 read with Section 4 of the Dowry Prohibition Act, 1961 (for short referred to as 'the Act') and consequently, the death of the deceased cannot be termed as a 'dowry death' within the ambit and scope of Section 304-B of the Indian Penal Code (for short 'the Code') and, as such, the conviction and order of sentence passed against the appellant is liable to be set aside.

2. It is a settled canon of criminal jurisprudence that the question of law has to be examined in light of the facts and circumstances of a given case. Thus, reference to the facts giving rise to the present appeal would be necessary.

3. Vipin @ Chanchal @ Rekha, the deceased and Ashok Kumar, the appellant herein, were married on 9th October, 1986. Harbans Lal, the father of the deceased had given sufficient dowry at the time of her marriage according to his means, desire and capacity. But, the appellant and his family members i.e. Mukesh Kumar, the brother of the appellant and Smt. Lajwanti, the mother of the appellant were not satisfied with the dowry. They allegedly used to harass and maltreat the deceased and used to give her beatings. They had demanded a refrigerator, a television etc. One week prior to the date of occurrence, the deceased came to the house of her father at Kaithal and narrated the story. She specifically mentioned that her husband wanted to set up a new business for which he

required a sum of Rs. 5,000/-. The father of the deceased could not manage the same due to which the appellant and his family members particularly, Lajwanti and Mukesh alleged to have burnt the deceased by sprinkling kerosene oil on her as a result of which the deceased died in the hospital at about 4.00 p.m. on 16.05.1988. The father of the deceased received information of the incident from his sister's son Subhash Chand. Neither the appellant nor his family members informed him about the said demise.

The father of the deceased moved a complaint (Ex. PA) before SI Randhir Mohan who made endorsement (Ex. PA/1) on the basis of which FIR (Ex. PU) was recorded. This was done by SI Randhir Mohan on the basis of ruqa (Ex. PQ) received on 16.05.1988 at about 5.45 p.m. The deceased was brought to the hospital as a burnt case in gasping condition and she expired in casualty. The said officer went to the General Hospital, completed the proceedings under Section 174 of the Criminal Procedure Code (for short 'the Cr.PC') and during those proceedings he recorded the statements of Lajwanti, mother in law of the deceased, Ram Lal, father in law of the deceased, Khem Chand, Harbans Lal and one Arjun Dass. Thereafter, the body was sent for postmortem which was handed over to Hanbans Lal, after the post mortem. The complaint was made by Harbans Lal (PW-1) on 17th May, 1988. Site Plan (Ex. PW) as well as the photographs (Ex. P-14 to P-17) and their negatives (Ex. P-18 to P-21) were prepared by Photographer Satish Kumar (PW-10). Ex. P6 was also taken into possession which was half burnt small tin, containing 3 litres of kerosene oil under Ex. PH which was sealed. Certain other goods like hammer (Ex. PK), broken piece of a wooden door (Ex. P-11), half burnt match stick, match box etc (Ex. P-12) were also taken into possession.

4. After completing the investigation of the case and recording the statements of the relevant witnesses, the Investigating Officer submitted the charge sheet in terms of Section 173 of the Cr.PC. The case was committed to the Court

of Sessions by the learned CJM vide his order dated 18th October, 1988 which framed the charge under Section 304-B of the Code read with Section 34 of the Code. Upon completion of the evidence of prosecution, statement of the accused under Section 313 of Cr.PC was recorded.

5. The learned Trial Court by a detailed judgment dated 13.01.1989/16.01.1989 held all the three accused viz., Ashok Kumar, Mukesh Kumar and Lajwanti, guilty of the offence punishable under Section 304-B of the Code and vide order of the same date, sentenced the accused to undergo rigorous imprisonment for a term of 10 years and to pay a fine of Rs. 1,000/- each and in default of payment of fine, to further undergo rigorous imprisonment for 3 months.

6. Aggrieved by the aforesaid judgment and order of sentence passed by the Trial Court, the accused filed an appeal before the High Court of Punjab and Haryana at Chandigarh, which was partially accepted. Lajwanti and Mukesh, the mother and brother of the accused Ashok Kumar, were acquitted of the offence under Section 304-B of the Code while the conviction of Ashok Kumar, accused was upheld and the order of sentence was also maintained by the High Court.

7. Aggrieved by the judgment of the High Court dated 16th December, 2003, Ashok Kumar, the appellant herein, has filed the present appeal. While impugning the judgment under appeal and besides raising the legal contention afore noticed, it is also contended that the Courts below have failed to appreciate the evidence in its correct perspective. The evidence brought on record clearly show that there was no connection between the death of the deceased and the alleged dowry demands or alleged cruelty. Further, it is contended that there was delay in registration of the FIR and no explanation has been rendered whatsoever in that behalf. The occurrence was dated 16.05.1988 at 4.00 p.m. and the FIR was lodged on 17.05.1988, while the deceased died in the hospital on 16.05.1988. Unexplained and inordinate delay in lodging FIR

(Ex. PU) creates a serious doubt on the case of the prosecution. There were no specific allegations made in the FIR with regard to dowry and the allegations made, in any case, did not specify the basic ingredients of dowry demand. While criticizing the serious contradiction between the statements of prosecution witnesses, it is also contended that the prosecution has failed to prove its case beyond any reasonable doubt particularly, keeping in view the letters written (Ex. DB to DJ), no offence could be established against the accused and, as such, he is entitled to be acquitted.

8. On the contrary, it is argued on behalf of the State that by virtue of cumulative effect of the statements of Harbans Lal, the father of the deceased (PW-1), Krishna Rani, the mother of the deceased (PW-2) and Subhash Chand (PW-3) read in conjunction with documentary evidence and the statement of the Investigating Officer, the prosecution has been able to prove the charge beyond any reasonable doubt. It is contended that one witness, produced by the accused himself, has fully corroborated the case of the prosecution and, as such, the appellant was rightly convicted and sentenced by the Courts below and the judgment under appeal does not suffer from any legal or other infirmity. According to the prosecution, the appeal should be dismissed.

9. At the very outset, we would proceed to deal with the legal submissions made on behalf of the appellant. But before that, we must notice that the appellant was neither charged with the offence under Section 4 of the Act nor he has been found guilty of the said offence. Thus, the submissions have to be examined only from the point of view that the appellant has been convicted for an offence under Section 304-B of the Code and the provisions of the Act are relevant only for examining the merit or otherwise of the contention raised that the expression 'dowry', as per explanation to the provisions of Section 304-B of the Code, has to be given the same meaning as in Section 2 of the Act.

10. The appellant was charged with an offence under Section 304-B of the Code. This penal section clearly spells out the basic ingredients as well as the matters which required to be construed strictly and with significance to the cases where death is caused by burns, bodily injury or the death occurring otherwise than under normal circumstances, in any manner, within 7 years of a marriage. It is the first criteria which the prosecution must prove. Secondly, that 'soon before her death' she had been subjected to cruelty or harassment by the husband or any of the relatives of the husband for, or in connection with, any demand for dowry then such a death shall be called 'dowry death' and the husband or the relative, as the case may be, will be deemed to have caused such a death. Explanation to this section requires that the expression 'dowry' shall have the same meaning as in Section 2 of the Act. The definition of dowry under Section 2 of the Act reads as under :

> "In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly--
>
> (a) by one party to a marriage to the other party to the marriage; or
>
> (b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person,
>
> at or before [or any time after the marriage] [in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.
>
> Explanation II.--The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code (45 of 1860)."

11. From the above definition it is clear that, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly by one party to another, by parents

of either party to each other or any other person at, before, or at any time after the marriage and in connection with the marriage of the said parties but does not include dower or mahr under the Muslim Personal Law. All the expressions used under this Section are of a very wide magnitude. The expressions 'or any time after marriage' and 'in connection with the marriage of the said parties' were introduced by amending Act 63 of 1984 and Act 43 of 1986 with effect from 02.10.1985 and 19.11.1986 respectively. These amendments appear to have been made with the intention to cover all demands at the time, before and even after the marriage so far they were in connection with the marriage of the said parties. This clearly shows the intent of the legislature that these expressions are of wide meaning and scope. The expression 'in connection with the marriage' cannot be given a restricted or a narrower meaning. The expression 'in connection with the marriage' even in common parlance and on its plain language has to be understood generally. The object being that everything, which is offending at any time i.e. at, before or after the marriage, would be covered under this definition, but the demand of dowry has to be 'in connection with the marriage' and not so customary that it would not attract, on the face of it, the provisions of this section.

12. At this stage, it will be appropriate to refer to certain examples showing what has and has not been treated by the Courts as 'dowry'. This Court, in the case of *Ram Singh v. State of Haryana* [(2008) 4 SCC 70], held that the payments which are customary payments, for example, given at the time of birth of a child or other ceremonies as are prevalent in the society or families to the marriage, would not be covered under the expression 'dowry'. Again, in the case of *Satbir Singh v. State of Punjab* [AIR 2001 SC 2828], this Court held that the word 'dowry' should be any property or valuable given or agreed to be given in connection with the marriage. The customary payments in connection with birth of a child or other ceremonies are not covered within the ambit of the word

'dowry'. This Court, in the case of *Madhu Sudan Malhotra v. K.C. Bhandari* [(1988) Supp. 1 SCC 424], held that furnishing of a list of ornaments and other household articles such as refrigerator, furniture and electrical appliances etc., to the parents or guardians of the bride, at the time of settlement of the marriage, prima facie amounts to demand of dowry within the meaning of Section 2 of the Act. The definition of 'dowry' is not restricted to agreement or demand for payment of dowry before and at the time of marriage but even include subsequent demands, was the dictum of this Court in the case of *State of Andhra Pradesh v. Raj Gopal Asawa* [(2004) 4 SCC 470].

13. The Courts have also taken the view that where the husband had demanded a specific sum from his father-in-law and upon not being given, harassed and tortured the wife and after some days she died, such cases would clearly fall within the definition of 'dowry' under the Act. Section 4 of the Act is the penal Section and demanding a 'dowry', as defined under Section 2 of the Act, is punishable under this section. As already noticed, we need not deliberate on this aspect, as the accused before us has neither been charged nor punished for that offence. We have examined the provisions of Section 2 of the Act in a very limited sphere to deal with the contentions raised in regard to the applicability of the provisions of Section 304-B of the Code.

14. We have already referred to the provisions of Section 304-B of the Code and the most significant expression used in the Section is 'soon before her death'. In our view, the expressions 'soon before her death' cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict

construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act. Further, the interpretation given should be one which would avoid absurd results on the one hand and would further the object and cause of the law so enacted on the other.

15. We are of the considered view that the concept of reasonable time is the best criteria to be applied for appreciation and examination of such cases. This Court in the case of *Tarsem Singh v. State of Punjab* [AIR 2009 SC 1454], held that the legislative object in providing such a radius of time by employing the words 'soon before her death' is to emphasize the idea that her death should, in all probabilities, has been the aftermath of such cruelty or harassment. In other words, there should be a reasonable, if not direct, nexus between her death and the dowry related cruelty or harassment inflicted on her. Similar view was expressed by this Court in the case of *Yashoda v. State of Madhya Pradesh* [(2004) 3 SCC 98], where this Court stated that determination of the period would depend on the facts and circumstances of a given case. However, the expression would normally imply that there has to be reasonable time gap between the cruelty inflicted and the death in question. If this is so, the legislature in its wisdom would have specified any period which would attract the provisions of this Section. However, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient whereafter, the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters, of course, will have to be examined on the facts and circumstances of a given case.

16. The cruelty and harassment by the husband or any

relative could be directly relatable to or in connection with, any demand for dowry. The expression 'demand for dowry' will have to be construed ejusdem generis to the word immediately preceding this expression. Similarly, 'in connection with the marriage' is an expression which has to be given a wider connotation. It is of some significance that these expressions should be given appropriate meaning to avoid undue harassment or advantage to either of the parties. These are penal provisions but ultimately these are the social legislations, intended to control offences relating to the society as a whole. Dowry is something which existed in our country for a considerable time and the legislature in its wisdom considered it appropriate to enact the law relating to dowry prohibition so as to ensure that any party to the marriage is not harassed or treated with cruelty for satisfaction of demands in consideration and for subsistence of the marriage.

17. The Court cannot ignore one of the cardinal principles of criminal jurisprudence that a suspect in the Indian law is entitled to the protection of Article 20 of the Constitution of India as well as has a presumption of innocence in his favour. In other words, the rule of law requires a person to be innocent till proved guilty. The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of Section 304-B. Where other ingredients of Section 304-B are satisfied, in that event, the husband or all relatives shall be deemed to have caused her death. In other words, the offence shall be deemed to have been committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of Section 304-B, the Court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the Court keeping in view the evidence produced by the prosecution in support of the substantive charge under Section 304-B of the Code.

18. Of course, deemed fiction would introduce a rebuttable presumption and the husband and his relatives may, by leading their defence and proving that the ingredients of Section 304-B were not satisfied, rebut the same. While referring to raising of presumption under Section 304-B of the Code, this Court, in the case of *Kaliyaperumal v. State of Tamil Nadu* [AIR 2003 SC 3828], stated the following ingredients which should be satisfied :

"4……..

(1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B, IPC).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(4) Such cruelty or harassment was soon before her death."

19. In light of the above essential ingredients, for constituting an offence under Section 304-B of the Code, the Court has to attach specific significance to the time of alleged cruelty and harassment to which the victim was subjected to and the time of her death, as well as whether the alleged demand of dowry was in connection with the marriage. Once these ingredients are satisfied, it would be called the 'dowry death' and then, by deemed fiction of law, the husband or the relatives would be deemed to have committed that offence. The learned counsel appearing for the appellant, while relying upon the case of *Tarsem Singh* (supra), contended that the concept of 'soon before the death' is not attracted in relation to the alleged harassment or cruelty inflicted upon the deceased, in

the facts of the present case. The oral and documentary evidence produced by the prosecution does not suggest and satisfy the essential ingredients of the offence.

20. Similarly, reference was also made to the judgment of this Court in the case of *Appasaheb v. State of Maharashtra* [(2007) 9 SCC 721], to substantiate the contention that there was no co-relation between giving or taking of the property with the marriage of the parties and, as such, the essential ingredients of Section 2 of the Act were missing. Accordingly, it is argued that there was no demand of dowry by the appellant but it was merely an understanding that for his better business, at best, the amounts could be given voluntarily by the father of the deceased. This fact was further sought to be substantiated while referring to the following abstracts of the judgment in the case of *Appasaheb* (supra):

> "6.……The learned trial Judge then sought clarification from the witnesses by putting the following question:
>
> "Question: What do you mean by 'domestic cause'?
>
> Answer: What I meant was that there was a demand for money for defraying expenses of manure, etc. and that was the cause."
>
> In the very next paragraph she stated as under:
>
> "It is not true to suggest that in my statement before the police I never said that ill-treatment was as a result of demand for money from us and its fulfilment. I cannot assign any reason why police did not write about it in my statement."
>
> xxx xxx xxx xxx
>
> 9. Two essential ingredients of Section 304-B IPC, apart from others, are (i) death of woman is caused by any burns or bodily injury or occurs otherwise than under normal

> circumstances, and (ii) woman is subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for "dowry". The explanation appended to sub-section (1) of Section 304-B IPC says that "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.
>
> xxx xxx xxx xxx
>
> 11. In view of the aforesaid definition of the word "dowry" any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said parties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision it has to be strictly construed. Dowry is a fairly well-known social custom or practice in India. It is well-settled principle of interpretation of statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understands to have a particular meaning in it, then the words are to be construed as having that particular meaning. (See *Union of India v. Garware Nylons Ltd. and Chemical and Fibres of India Ltd. v. Union of India*[(1997) 2 SCC 664].) A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood. The evidence adduced by the prosecution does not, therefore, show that any demand for "dowry" as defined in Section 2 of the Dowry Prohibition Act was made by the appellants as what was allegedly asked for was some money for meeting domestic expenses and for

purchasing manure. Since an essential ingredient of Section 304-B IPC viz. demand for dowry is not established, the conviction of the appellants cannot be sustained."

21. On the contrary, the learned counsel appearing for the State while relying upon the judgment of this Court in *Devi Lal v. State of Rajasthan* [(2007) 14 SCC 176], argued that the relatives and, particularly the father of the deceased, had specifically mentioned the acts of harassment and, in any case, the statement of the sister of the deceased, who was produced by the accused as his defence witness, itself clinches the entire issue and, therefore, the offence under Section 304-B of the Code is made out. It was also contended that an absolute accuracy in the statement of witnesses is not a condition precedent for conviction. He relied upon the following dictum of the Court in *Devi Lal's* case (supra) :

> **"25.** Indisputably, before an accused is found guilty for commission of an offence, the court must arrive at a finding that the ingredients thereof have been established. The statement of a witness for the said purpose must be read in its entirety. It is not necessary for a witness to make a statement in consonance with the wording of the section of a statute. What is needed is to find out as to whether the evidences brought on record satisfy the ingredients thereof."

22. Now we may proceed to discuss the evidence led by the prosecution in the present case. In order to bring the issues raised within a narrow compass we may refer to the statement of the accused made under Section 313, Cr.PC. It is a settled principle of law that dual purpose is sought to be achieved when the Courts comply with the mandatory requirement of recording the statement of an accused under this provision. Firstly, every material piece of evidence which the prosecution proposes to use against the accused should be put to him in clear terms and secondly, the accused should have a fair

chance to give his explanation in relation to that evidence as well as his own versions with regard to alleged involvement in the crime. This dual purpose has to be achieved in the interest of the proper administration of criminal justice and in accordance with the provisions of the Cr.P.C. Furthermore, the statement under Section 313 of the Cr.PC can be used by the Court in so far as it corroborates the case of the prosecution. Of course, conviction per se cannot be based upon the statement under Section 313 of the Cr.PC.

23. Let us examine the essential features of this section and the principles of law as enunciated by judgments of this Court, which are the guiding factor for proper application and consequences which shall flow from the provisions of Section 313 of the Cr.PC. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.PC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused

and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any, enquiry or trial but still it is not strictly an evidence in the case. The provisions of Section 313 (4) of the Cr.PC explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in as evidence for or against the accused in any other enquiry or trial for any other offence for which, such answers may tend to show he has committed. In other words, the use of a statement under Section 313 of Cr.PC as an evidence is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.PC as it cannot be regarded as a substantive piece of evidence. In the case of *Vijendrajit Ayodhya Prasad Goel v. State of Bombay* [AIR 1953 SC 247], the Court held as under:

> "3. …….As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

24. From various answers given by the accused to the Court in his statement recorded under Section 313 of the Cr.P.C., it appears that the death of the deceased is not disputed. The allegation with regard to cruelty was denied. However, besides denying the case of the prosecution, the appellant took the stand that he was falsely implicated in the crime. According to him, the deceased was not happy with the marriage inasmuch as she was in love with some other boy and wanted to marry him which was not permitted by her family and that is why she committed suicide. As would be evident from this admitted position, the death of the deceased by burning is not an issue. The limited question was whether the deceased committed suicide simplicitor for the reasons given by the accused or in the alternative, the prosecution story, that it was a dowry death relatable to the harassment and cruelty inflicted upon her by the accused and his family members, is correct.

25. In the postmortem report it was noticed that the cause of death was shock and dehydration which resulted from extensive burn injuries, which were ante-mortem. The postmortem report (Ex. PO) and the body sketch (Ex. PO/1) clearly demonstrate that practically the entire body had been affected by the burn injuries. The prosecution had examined Harbans Lal, the father of the deceased (PW-1), who stated that immediately after the marriage of deceased with the accused, both were living happily and he had given dowry

according to his capacity, but six months after her marriage, her husband and her in-laws started teasing her and giving taunts that she had not brought T.V. and Fridge etc. in the dowry and whenever she used to come to him she mentioned about the same and 20 days prior to her death she had told him that she was being troubled for a sum of Rs. 5,000/- so that her husband could change to a new business and while consoling her, he told her that he would arrange for the money in some time and took her at the house of her in-laws 7-8 days prior to her death. He also stated that Ashok Kumar, the accused, Lajwanti, the mother-in-law of the deceased and Mukesh, brother-in-law of the deceased, used to give her beatings and he had filed the complaint (Ex.PA). Ex.PB and Ex. PC were the letters which he had given to the police, however, this witness was cross-examined and confronted with Ex. PA, where the allegation about T.V. and Fridge etc. had not been recorded. He voluntarily stated that his son-in-law (the accused) used to deal in vegetables but he wanted to change to Kariyana business, and that is why he wanted a sum of Rs. 5,000/-. Smt. Krishna Rani, the mother of the deceased, was examined as PW-2. She admitted that a child was born from the marriage. She had also corroborated the statement of PW 1. According to her, Lajwanti told that the deceased had expired. Subhash Chand (PW-3) stated that he had informed Harbans Lal (PW-1) about the death of the deceased due to burn injuries and stated that they (the husband of the deceased and her in-laws) used to ill-treat the deceased and were demanding dowry. However, he did not refer to the demand of Rs. 5,000/-, as stated by other witnesses. To prove the case Karta Ram, SI (PW-6), Darshan Lal, H.C. (PW-7), Ranbir Mohan, SI (PW-8), the police officials, were also examined by the prosecution apart from Kharati Lal, Kariyana Merchant (PW-4). Dr. Manjula Bansal, Medical Officer, Civil Hospital, Jind (PW-5), was examined to prove the death of the deceased which was caused by burn injuries.

26. The accused had led defence and examined as many

as six witnesses. Dr. Bhushan Aggarwal, Incharge Swami Salagram Ashram Charitable Hospital, Jind (DW-1) was examined to primarily show that a child was born on 30th August, 1987. Vijay Laxmi (DW-3) and Lekh Raj (DW-4) were examined to show that there were no dowry demands and Harbans Lal, the father of the deceased had not complained to them about the same at any point of time. But, the most important witness examine by the accused was Vijay Laxmi (DW-3), who is the daughter of Harbans Lal, aged about 14 years. She mentioned that the letter (Ex. DJ) was written by her and she stated that sometimes Ashok Kumar, the accused used to take the deceased to her father's house. She admitted that two days prior to writing of the letter (Ex. DJ), her sister and sister's son had come to her house and she stated that whatever is written in the letter is correct. But, in her cross-examination, she stated as under:

> "Whenever my sister visited our home after marriage, she would complain that her husband and in-laws demanded dowry and also they used to give her beating. She came to our home 20 days prior to her death. At that time she told that her in-laws etc. were demanded a T.V. and Rs.5,000/-. My father took her to her husband's home. My sister was not suffering from my disease. She was having good health."

27. The above statement of this witness (DW-3) in cross-examination, in fact, is clinching evidence and the accused can hardly get out of this statement. The defence would be bound by the statement of the witness, who has been produced by the accused, whatever be its worth. In the present case, DW-3 has clearly stated that there was cruelty and harassment inflicted upon the deceased by her husband and in-laws and also that a sum of Rs. 5,000/- was demanded. The statement of this witness has to be read in conjunction with the statement of PW-1 to PW-3 to establish the case of the prosecution. There are certain variations or improvements in the statements of PWs

but all of them are of minor nature. Even if, for the sake of argument, they are taken to be as some contradictions or variations in substance, they are so insignificant and mild that they would no way be fatal to the case of the prosecution.

28. This Court has to keep in mind the fact that the incident had occurred on 16.05.1988 while the witnesses were examined after some time. Thus, it may not be possible for the witnesses to make statements which would be absolute reproduction of their earlier statement or line to line or minute to minute correct reproduction of the occurrence/events. The Court has to adopt a reasonable and practicable approach and it is only the material or serious contradictions/variations which can be of some consequence to create a dent in the case of the prosecution. Another aspect is that the statements of the witnesses have to be read in their entirety to examine their truthfulness and the veracity or otherwise. It will neither be just nor fair to pick up just a line from the entire statement and appreciate that evidence out of context and without reference to the preceding lines and lines appearing after that particular sentence. It is always better and in the interest of both the parties that the statements of the witnesses are appreciated and dealt with by the Court upon their cumulative reading.

29. As already noticed, the expression 'soon before her death' has to be accorded its appropriate meaning in the facts and circumstances of a given case. In the present case, there is definite evidence to show that nearly 20-22 days prior to her death the deceased had come to her parental home and informed her father about the demand of Rs. 5,000/- and harassment and torture to which she was subjected to by the accused and her in-laws. Her father had consoled her ensuring that he would try to arrange for the same and thereafter took her at her matrimonial home 7-8 days prior to the incident.

30. On face of the aforesaid evidence read in conjunction with the statement of DW-3, we are convinced that ingredients of Section 304B have been satisfied in the present case. It was

for the accused to prove his defence. He had taken up the stand that the deceased was in love with another boy and did not want to marry the accused and the marriage of the deceased with the accused being against her wishes was the real cause for her to commit the suicide. However, he has led no evidence in this regard and thus, the Court cannot believe this version put forward by the accused.

31. The argument raised on behalf of the appellant that there was inordinate and unexplained delay in registering the FIR is without any substance. The incident occurred at 4.00 p.m. on 16.05.1988 whereafter the family of the deceased was informed. It is a normal conduct of a normal person that the entire concentration would be upon looking after and saving the deceased rather than to run up to the police or other persons instantaneously. Unfortunately, she died at 9.00 p.m. on the same day and the FIR was lodged on the next day i.e. on 17.05.1988. The purpose of raising such a contention is to show and prove that there was a planned effort on the part of the complainant or the prosecution to falsely implicate the accused. Here, such a situation does not exist. We have already noticed that the complaint (Ex.PA) has been lodged resulting in registration of FIR (Ex. PU) at 7.30 p.m. on 17.05.1988 which obviously means that the complainant had reached the police station even prior thereto. The conduct of the complainant and the witnesses is in line with the behaviour of a person of common prudence and the facts and circumstances of the case clearly demonstrate proper exercise of due diligence on the part of these witnesses. Firstly, the complainant family got the information of the death of the deceased from a relative named Subhash Chand (PW-3) and, thereafter, they must have tried to get the body subjected to the postmortem and have the same released for performing the last rites. The incident occurred on 16.05.1988 and the FIR was registered on 17.05.1988, therefore, there was no abnormal or inordinate delay in lodging the FIR in the facts of this case. Even if we presume the delay, it is not of such a nature that would entail

any benefit to the accused. Thus, in our view, there is no inordinate or unexplained delay in lodging the FIR.

32. Having found no infirmity in the concurrent judgments of the learned Sessions Judge and the High Court, we see no reason to interfere in these judgments in law or on facts. Thus, we sustain the conviction of the accused.

33. Coming to the question of quantum of punishment, there are few factors of which we must take note of. It is not even the case of the prosecution that at the time of occurrence, the accused-appellant was present at home and he failed to protect or save the deceased from burning which caused her death. Secondly, the marriage itself has survived for a short period of nearly one and a half year. The cruelty and harassment to the deceased was stated to be caused by Lajwanti, the mother in law of the deceased and Mukesh, the brother in law of the deceased. As already noticed, Lajwanti and Mukesh have been acquitted by the High Court for total lack of evidence. Neither the State nor the complainant has preferred an appeal against judgment of acquittal. The accused is a young person of 48 years. Keeping in view the facts and circumstances of the case and in exercise of powers under Article 142 of the Constitution of India to do complete justice, we are of the considered view that ends of justice would be met by awarding him the minimum sentence provided in law, i.e. 7 years of rigorous imprisonment. Resultantly, the appeal is partially accepted and the accused-appellant is awarded sentence of 7 years rigorous imprisonment for an offence under Section 304-B of the Code.

34. The appeal is disposed off in the above terms.

35. The accused is on bail. His bail bonds and surety stand discharged. He be taken into custody to undergo the remaining period of his sentence.

R.P. Appeal partly allowed.

VIJETA GAJRA
v.
STATE OF NCT OF DELHI
(Criminal Appeal Nos.1182-84 of 2010)

JULY 08, 2010

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Penal Code, 1860:

ss.498A, 406 – FIR lodged against appellant under s.498A and s.406 – Quashing of FIR sought on the ground that appellant was not related to the family of complainant or her husband – Held: Appellant should not be tried for offence under s.498A – Reference to the word 'relative' in s.498A is limited only to the blood relations or the relations by marriage – However, FIR in respect of s.406 is not quashed in view of the allegations made – Protection given to the appellant that no coercive steps be taken against her – Crime against Women.

The complainant filed an FIR against the appellant under Sections 498A and 406 IPC alleging demand of dowry and criminal breach of trust. The FIR also stated about the illicit relations between the appellant and the husband of complainant.

Appellant filed petition under Article 226 of the Constitution read with Section 482 Cr.P.C. for quashing the FIR, which was dismissed.

In appeal to this Court, appellant contended that she did not belong to the family of the complainant or her husband or any of their relatives and that all the allegations against her were palpably wrong.

Disposing of the appeals, the Court

HELD: 1. Reference to the word `relative' in Section 498A, IPC would be limited only to the blood relations or the relations by marriage. There is no question of prosecution of appellant under Section 498A, IPC. Therefore, the FIR insofar as it concerned Section 498A, IPC, would be of no consequence and the appellant should not be tried for the offence under Section 498A, IPC. [Paras 7, 8] [1156-A-C; G-H]

2. There can be no doubt that the allegations made against the appellant were extremely wild and disgusting. However, how far those allegations could be used to meet the requirements for the offence under Section 406, IPC is a moot question. Whatever the form in which the allegations under Section 406, IPC were made, the fact of the matter is that there is an FIR and the Court concerned had taken cognizance thereof. Under these circumstances, the interest of the appellant has to be protected by directing that she should not be required to attend the proceedings unless specifically directed by the Court to do so and that too in the case of extreme necessity. Similarly, no coercive step shall be taken against her. She should be granted bail by the Court trying the case if it decides to try the offence by framing the charge. The Court should be careful while considering the framing of charge. Thus, the appellant should not be tried for offence under Section 498A, IPC. However, the FIR is not quashed altogether in view of the allegations made under Section 406, IPC with the protection that has been granted to the appellant. [Paras 10,11] [1157-D-G]

U. Suvetha v. State By Inspector of Police & Anr. **(2009) 6 SCC 757;** *T. Ashok Pai v. CIT* **(2007) 7 SCC 162;** *Shivcharan Lal Verma & Anr. v. State of M.P.* **(2007) 15 SCC 369, relied on.**

R. Ramanatha Aiyar's Advance Law Lexicon, Volume **4, 3rd Edition, referred to.**

Case Law Reference:

(2009) 6 SCC 757	**relied on**	**Para 7**
(2007) 7 SCC 162	**relied on**	**Para 7**
(2007) 15 SCC 369	**relied on**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1182-84 of 2010.

From the Judgment & Order dated 8.5.2009 of the High Court of Delhi at New Delhi in W.P. (Crl.) No. 1416 of 2008 and Crl. M.A. Nos. 13113 of 2008 and 2665 of 2009.

U.U. Lalit, K.V. Viswananthan, Sanjeev Kumar, Vishal Gupta Kumar Mihir, Khaitan & Co., for the Appellant.

Soli J. Sorabjee, J.S. Attri, Vikram Choudhary, Anand Mishra, Chander Shekhar Ashri, Sandhu, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

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

2. The appellant herein challenges the order passed by the High Court whereby the petition filed by her was dismissed. The said petition was filed under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code for quashing the FIR No. 138/08 dated 07.08.2008 for offences under Section 498A and 406, Indian Penal Code in the Chitranjan Park Police Station.

3. This FIR was lodged by one Gunjan Sujanani, wife of one Rohit Sujanani. It is a long document wherein the complainant Gunjan Sujanani stated about her marriage with

Rohit on 08.07.2003 and he being a resident of Nigeria. It was claimed that before the marriage, Rohit had introduced Gunjan to one Mr. Sham and Mrs. Lavina Daswani as his foster parents and also said that he had two foster sisters, namely, Vijeta Daswani (Vijeta Gajra-the appellant herein) who is a resident of Indore, Madhya Pradesh and the other being one Ms. Ritika Daswani, who resided with her mother in London. There are allegations made about the demand of dowry against the husband as also Mrs. Lavina Daswani. The demand included diamond neckless for Vijeta Daswani/Gajra. There was reference to subsequent behaviour of troubling the complainant on account of the dowry demands. The First Information Report also made some allegations regarding the relations of her husband Rohit Sujanani with Mrs. Lavina Daswani and Vijeta Daswani/Gajra, the present appellant. It was then contended that in December, 2003, when the complainant had gone to Sierra Leone, Vijeta Dasawani/Gajra took away her diamond encrusted heavy gold pendant and chain and earring set on the pretext that she wanted to wear them once and she would keep them at a safe place in her father's house. The complainant also stated that she did not return these ornaments. Further, it was stated that in May, 2004, Mr. Rohit Sujanani and Mrs. Lavina Daswani insisted that the complainant should keep her jewellery in London and claimed that she was slapped by her husband on her refusal. It was further claimed that in November, 2004, the present appellant, Vijeta Gajra got married during which the complainant had to beg for her ornaments for attending the marriage. There was a reference in the FIR to the misbehaviour on the part of Mrs. Lavina Daswani towards her and again the name of the present appellant figured therein. At this time, the complainant claimed that she was pregnant for the first time and yet she was given physical and mental ill treatment because of which she had a mis-carriage. There is a reference to the sexual behaviour of her husband with reference to a pornographic website. It was claimed that the complainant delivered a baby on 08.03.2007. Then there is reference to the

appellant visiting and staying with the complainant's parents for three days and the allegation that her husband was having sexual relations with Vijeta Gajra, the appellant herein and Mrs.Lavina Daswani. There was a reference that during her stay the appellant was wearing the diamond encrusted pendant and gold chain and earring set which she had taken (practically stolen) in Sierra Leone.

4. In the last part of this lengthy FIR, there was a reference to the demand of two crores of rupees having been made by Vijeta and her mother over the phone to the complainant as a cost of peace and marital happiness. There was a reference to a telephonic conversation with Mrs. Lavina Daswani in this regard. There was a further reference to an ugly scene on account of arguments. However, there was also a reference to the presence of the brother of the complainant on account of which further ugly scenes were avoided. It was complained that, thereafter, the complainant and her parents tried to contact Rohit Sujanani and the Daswanis who were avoiding them and not returning jewellery which was with Vijeta Gajra, Lavina Daswani and Rohit Sujanani.

5. This complaint dated 15.04.2008 seems to have been registered as an FIR. It seems that on the basis of this FIR, the appellant was sent a summons under Section 160, Cr. P.C. and she moved the Court of Additional Sessions Judge, New Delhi under Section 438 Cr.P.C. for grant of anticipatory bail. In that application, she had made a reference to the summons asking her to appear on 05.06.2008. It was claimed in the application that the complainant's husband Rohit Sujanani was an employee of appellant's father who has business in Sierra Leone and that he was employed on contract basis for the period of three years in 1994. It was claimed in that application that the appellant had met the complainant last in 2007. It was also stated that the allegations made in the FIR were concocted, false and baseless and she had no connection whatsoever with the family of the complainant or her parents.

She complained that her own marriage was being tried to be destroyed by wild allegations. There was a reference made in this application by the appellant for quashing the summons arising out of the complaint dated 15.04.2008 and also to a Criminal Miscellaneous Petition No. 2153 of 2008. The High Court had passed the order disposing it of since the State's Counsel had agreed to provide copy of the complaint and had further stated that in the event the FIR was registered, the applicant would be informed of this fact and no coercive action would be taken against her till then. In her application there was a statement that she did not even belong to the family of the complainant, her husband or any of their relatives and that all the allegations were palpably false. It was then stated that the writ petition was filed which came to be disposed of by the High Court. It seems that the complainant sought the direction to implead herself in the writ petition-cum-Section 482 Cr.P.C application filed by the appellant.

6. Following are the prayers in the said writ petition under Article 226 of the Constitution of India read with Section 482, Cr.P.C.:

> "(a) Quash the FIR NO. 138/2008 dated 07.08.2008 under Sections 498A/406, IPC at Police Station Chitranjan Park registered against the petitioner;
>
> (b) Direct the police not to take any coercive action against the petitioner in respect of the above said complaint:
>
> (c) Pass such other and further orders which may be deemed fit and proper in the facts and circumstances of the case."

It is on this backdrop that we have to see as to whether it would be expedient to continue the criminal prosecution against the appellant.

7. Shri U.U. Lalit, Learned Senior Counsel, appearing on

behalf of the appellant argued that in U. Suvetha v. State By Inspector of Police & Anr. [(2009) 6 SCC 757], it was specifically held that in order to be covered under Section 498A, IPC one has to be a 'relative' of the husband by blood, marriage or adoption. He pointed out that the present appellant was not in any manner a 'relative' as referred to in Section 498A, IPC and, therefore, there is no question of any allegation against her in respect of the ill-treatment of the complainant. The Court in this case examined the ingredients of Section 498A, IPC and noting the specific language of the Section and the Explanation thereof came to the conclusion that the word 'relative' would not include a paramour or concubine or so. Relying on the dictionary meaning of the word 'relative' and further relying on R. Ramanatha Aiyar's Advance Law Lexicon, Volume 4, 3rd Edition, the Court went on to hold that Section 498A, IPC being a penal provision would deserve strict construction and unless a contextual meaning is required to be given to the statute, the said statute has to be construed strictly. On that behalf the Court relied on the judgment in *T. Ashok Pai v. CIT* [(2007) 7 SCC 162]. A reference was made to the decision in *Shivcharan Lal Verma & Anr. v. State of M.P.* [(2007) 15 SCC 369]. After quoting from various decisions of this Court, it was held that reference to the word 'relative' in Section 498A, IPC would be limited only to the blood relations or the relations by marriage.

8. Relying heavily on this, Shri Lalit contended that there is no question of any trial of the appellant for the offence under Section 498A, IPC. The argument is undoubtedly correct, though opposed by the Learned Counsel appearing for the State. We are of the opinion that there will be no question of her prosecution under Section 498A, IPC. Learned Senior Counsel appearing on behalf of the complainant, Shri Soli J. Sorabjee, also did not seriously dispute this proposition. Therefore, we hold that the FIR insofar as it concerned Section 498A, IPC, would be of no consequence and the appellant shall not be tried for the offence under Section 498A, IPC.

9. That leaves us with the allegation under Section 406, IPC for the offence of criminal breach of trust as there are allegations in respect of the jewellery. We desist from saying anything at this juncture. We also desist from going into the correctness or otherwise of these allegations as they will have to be proved by evidence. Shri Lalit pointed out that on the face of it the allegations are wild and baseless as the appellant herself comes from a wealthy background and is a married lady having settled down in Indore and is also mother of a child. He pointed that the FIR is calculated to destroy her marital life with the wildest possible allegations and, therefore, we should quash the entire FIR as not being bona fide and actuated by malice.

10. There can be no doubt that the allegations made are extremely wild and disgusting. However, how far those allegations can be used to meet the requirements for the offence under Section 406, IPC is a moot question. For obvious reasons, we will not go into that exercise. Whatever the form in which the allegations under Section 406, IPC are made, the fact of the matter is that there is an FIR and the Court concerned has taken cognizance thereof. Under these circumstances, we would only protect the interest of the appellant by directing that she would not be required to attend the proceedings unless specifically directed by the Court to do so and that too in the case of extreme necessity. Similarly, no coercive step shall be taken against her. She shall be granted bail by the Court trying the case if it decides to try the offence by framing the charge. We expect the Court to be careful while considering the framing of charge.

11. We, therefore, hold that the appellant shall not be tried for offence under Section 498A, IPC. However, we desist from quashing the FIR altogether in view of the allegations made under Section 406, IPC with the protection that we have granted to the appellant. With these observations, the appeals are disposed of.

D.G. Appeals disposed of.

PUNJAB STATE ELECTRICITY BOARD & ANR.
v.
ASHWANI KUMAR
(Civil Appeal No. 3505 of 2007)

JULY 8, 2010

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

Electricity Supply Regulations – Clubbing of electricity connections in one premises – Inspection report with regard to complainant's premises – Two connections in different names operating therein with sanctioned load of 52.49 KW and 56.76 KW, thus, the two connections liable to be clubbed – Demand raised from consumers – Challenge to – State Commission as also National Commission set aside the demand raised holding that two distinct persons owned distinct properties and were having independent electric connections, thus could not be termed as same premises – On appeal held: Reasons were not recorded as regard the correctness of inspection report – Ambiguity in the protest raised by consumers to inspection report – Documents produced by consumers were prior to date of inspection – Thus, matter remanded to the Competent Authority, Electricity Board to determine and record findings afresh as to whether it was a case of clubbing or not – Electricity Supply Act, 1948 – Circular CC No. 4 of 1997 dated 08.01.97.

The officers of the Electricity Board conducted inspection of the premises of the respondent. As per the inspection report in the said premises, two different connections were operating with a sanctioned load of 52.49 KW in the name of KD and 56.79 KW in the name of JR, thus the connections were liable to be clubbed. The officers raised a demand of Rs. 3,28,216/- and Rs. 4,56,025/- from the said consumers. The consumers filed a complaint before the District Forum and it dismissed the same. The State Consumer District Redressal

Commission allowed the appeals. It held that they were two distinct persons, owning distinct properties and were having independent electric connections and therefore, the demand raised was not justified. The National Consumer Dispute Redressal Commission upheld the order. Hence the appeals.

Disposing of the appeals, the Court

HELD: 1.1. A bare reading of the Electricity Supply Regulations and the Circular CC No. 4 of 1997 dated 8.1.1997 makes it apparent that the aim of the Electricity Board is to provide single connection in the premises. It is the obligation of the consumer to get the connections clubbed where more than one connection exists in the same premises. This policy is, primarily, meant to encourage single connection as well as consumers to opt for clubbing of their loads and also to facilitate a smooth transmission. Besides this, the most important aspect is the mischief that these provisions ought to suppress. A consumer who gets two meters installed in his premises and in that garb receives bulk supply instead of medium supply clearly makes an attempt to avoid payment of higher tariff. It cannot be disputed that a consumer of a medium supply is subjected to a lower tariff than the one receiving bulk supply. Therefore, the intention is to avoid revenue loss to the Board by circulating the prescribed procedure. These regulations and circulars, thus, cannot be interpreted so as to defeat the very object of suppressing such a mischief in the consumption of electricity. Therefore, if the Electricity Board finds that such mischief is being played, there is nothing in law preventing the Board from treating it as a clubbed connection and impose such tariff and penalty as is permissible in accordance with law. No consumer can be permitted to defeat the spirit of the regulations and take undue advantage of receiving electric supply through different meters in the same premises and with an

intention to defraud the Electricity Board of its genuine dues for supply of electricity. [Para 5] [1168-B-G]

1.2. The documents noticed by the State Commission, show that the consumer had advanced the argument of separate properties, separate ownership and separate connections. However, there is no reason recorded as to why the evidence of the Department i.e. the inspection report is incorrect and cannot be relied upon. There is ambiguity. The District Forum, while relying upon the report, had rejected the complaint which was reversed by the State Forum. These are the findings of facts and they must be recorded in a manner which would clearly establish on record the case of one party or the other in accordance with law. [Para 7] [1170-E-G]

1.3. The documents produced by the consumers related to the period prior to the date of inspection. The inspection of the premises was conducted on 19.06.2002. It was required of the consumers to establish their case for the period, at the time of or subsequent to the date of inspection. There could reasonably be possibility of issues being answered against the consumers. The report prepared by the officers of the Electricity Board is an act done in discharge of their duties and could not be straight away reflected or disbelieved unless and until there was definite and cogent material on record to arrive at such a finding. If two connections are operating in the same premises, in that event, the concept of clubbing and consequential charges and penalty would be attracted. That being so, and particularly, where a National Commission has not adverted to some discussion on the points raised in the appeal, the policy of the Electricity Board and the regulations cannot be rendered otiose. It is the obligation of every bona fide consumer to comply with the requirements and the regulations in the circular and not to abuse the advantage given under the policy of the Electricity Board. If there is a prima facie record to

show that the consumer had attempted to circumvent the circular and with an intention to avoid payment of higher tariff, two connections were being utilized in the garb of different premises, while in fact, it was one and same premises, the penal consequences must follow. [Para 7] [1170-H; 1171-A-E]

1.4. The circular issued and the regulations read with the provisions of the Act, clearly contemplate imposition of penalty and such charges with effect from 01.01.1996. There is no explanation on record as to why the date is effective from 01.01.1996. Even if taking the said date to be correct then the dues, which can be recovered, are the dues payable to the Electricity Board in accordance with law. The notice dated 02.07.2002 was issued on the basis of the inspection report. From the records, it will be a serious question to be specifically answered by the Competent Forum, as to whether the premises in question are two distinct and different premises or it is one in the same. If these are two independent premises owned by two different persons who are consumers of the Board in their own capacity and there is no intention on their part to use these connections collectively and have not violated their sanctioned load, the consequences in law will be different. But, if there is intention to use both connections and avoid higher tariff, the consequences will be entirely different in that case. [Para 7] [1171-E-H; 1172-A-B]

1.5. The inspection report is a document prepared in exercise of its official duties by the officers of the Corporation. Once an act is done in accordance with law, the presumption is in favour of such act or document and not against the same. Thus, there was specific onus upon the consumer to rebut by leading proper and cogent evidence that the report prepared by the officers was not correct. No objections were filed to the said report except some protest, that too, without stating as to what was the

specific protest about, whether the facts recorded in the report were factually incorrect or that the report was received under protest. As is apparent from the reports on record, it bears two signatures of the consumer/ consumer's representatives, one with regard to the preparation of report and other with regard to receiving the copy of the report. The words 'under protest' have been recorded at the bottom of the report. This, itself indicates the ambiguity in the protest raised by the consumers. It, certainly, required a definite finding to be recorded by the Forum. Non-recording of such a finding has prejudicially affected the rights of the parties. [Paras 6 and 7] [1172-B-E; 1170-D-E]

1.6. The matter is remanded to the Competent Authority in the Electricity Board to determine and record the clear findings afresh as to whether it was a case of clubbing or not in accordance with the provisions and observations referred with liberty to the parties to produce any further documents, if they so desire. [Para 8] [1172-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3505 of 2007.

From the Judgment & Order dated 21.2.2006 of the National Consumer Disputes Redressal Commission in Revision Petition No. 284 of 2006.

WITH

Civil Appeal No. 3506 of 2007

Satinder S. Gulati, Kamaldeep Gulati, Dr Kailash Chand for the Appellants.

Nagendra Rai, Rishi Malhotra, Prem Malhotra for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. This appeal is directed

against the Order dated 21st February, 2006 passed by the National Consumer Dispute Redressal Commission (hereinafter referred to as the 'National Commission'), New Delhi where it dismissed the review petition preferred by the Punjab and Haryana State Electricity Board (for short 'Electricity Board') against the Order dated 16th August, 2005. One Ashwani Kumar, respondent herein had filed a complaint before the District Forum alleging that the electric meter bearing No. MS-32/603 was installed in the premises owned and possessed by him in the name of Kartari Devi and Suraj Prakash who had sold the property through Registered Sale deed dated 28th November, 1996 (Ext.C/1) and since the purchase of the property, he has been using the electric meter and connection. On 2nd July, 2002, he had received a Memo from the Electricity Board stating that the said connection had a sanctioned load of 52.49 KW and it was required to be clubbed with electric connection in the name of Janak Raj bearing electric connection No. MS-32/580 with sanction load of 56.79 KW. Reply was submitted by him to the Memo wherein he had stated the above facts. It was further clarified that his property was separate and distinct from property possessed by Sudesh Mahajan and the electric connection in that premises was in the name of Janak Raj. They denied the cross wiring in the property or even that the connection was being commonly used by the parties. Thus, they contested the demand raised by the Electricity Board to the extent of Rs.3,28,216/-.

2. Similarly, in the other case Sudesh Mahajan had filed a complaint claiming a sale in favour of his predecessor in interest on 28th November, 1996. They denied the charges of clubbing and took up the stand that they were independent properties wherein different meters have been installed and as such, the demand of Rs.4,56,025/- and Rs.3,28,261/- was not payable by any of the consumers namely Janak Raj and Kartari Devi or persons claiming through them. To challenge the same, complaints were filed by both which came to be dismissed vide orders dated 2nd June, 2002 and 8th September, 2003 respectively, passed by the District Forum. The appeals were

filed by the private complainants against the Electricity Board before the State Consumer District Redressal Commission, Punjab which came to be registered as Appeal No. 218 and 219 of 2004 respectively. Both these appeals came to be allowed by the State Forum and the demands raised were quashed. A further direction was issued that the amount deposited by the respondents, if any, under the impugned demand notice, the same shall be refunded with interest @ 9% per annum. The State Forum while referring to the documents of sale in favour of the respondents further held that a circular being CC No. 4 of 1997 issued by the Electricity Board on 8th January, 1997 dealt with the subject of running of more than one connection in the same premises. According to the circular, if there were two connections in the same premises they were required to be clubbed for the purposes of payment of tariff. However, the Competent Forum in appeal found that they were two distinct persons, owning distinct properties and were having independent electric connections. Reliance was placed on the fact that the properties have been numbered as 136 and 136-A separately by the Municipal Corporation. The properties were subjected to property tax separately. The result of these two distinct properties was that they could not be termed as same premises under the relevant provisions and therefore, the demand raised was entirely unjustified. The Electricity Board filed appeals before the National Consumer Dispute Redressal Commission, which were dismissed, vide Order dated 21st February, 2006. As already stated, it is a small order and it will be useful to refer to the same at this stage:

> "Heard the Ld. Counsel for the Petitioner. As per the Municipal record, two separate buildings are there. One building admeasuring 554 sq. yards in P-136 owned jointly by Shri Suraj Prakash, Shri Ashwani Kumar, Shri Subhash Chander S/o Shri Tilak Raj and Smt. Raj Rani. Other building admeasuring 504 Sq. Yards is P-136-A owned by the same person. On record there is evidence that Ashwani Kumar is running the business in the name of Ashwani Textiles and he is the proprietor. As against them

there is other textile mill known as Mahajan Handloom Industries owned by Shri Sudesh Mahajan. In this state of circumstances order passed by the State Commission cannot be said to be, in any way, erroneous. Hence, these Revision Petitions are dismissed."

3. The legality and correctness of the order passed by the National Commission is challeged in these appeals. At the very outset, we may notice that the electric supply regulations have been framed in exercise of the powers conferred under Section 49 and Sub Section (j) of Section 79 of the Electricity Supply Act, 1948 (for short referred as 'the Act') and other enabling provisions by the Board. These regulations deal with different aspects, in particular, they deal with providing of one connection in one premises and consumer is required to give an undertaking on a non-judicial stamp paper that no connection already exists in the premises, in which, the connection is being applied in terms of Clause 3.1.1 of the Regulations. Other relevant provisions which have a bearing on the matters in controversy before us, relate to new connection in the same premises, transfer of the premises, where there exists a connection and the obligation on the part of the consumer to get the connection clubbed. Now we may examine those relevant provisions which read as under:

"3.5.2 Whenever, an existing consumer applies for a new connection in the same premises i.e. even having independent shed/unit/piece of land having separate plot no. etc., in his name, it shall normally be not allowed. Such consumer should be asked to apply for extension in existing load. However, if a new connection has been applied in the name of a new firm/company of which the existing consumer is a Director/Partner, the connection will only be allowed if the premises are distinctly and physically separate/portioned so that it is not possible to utilize electricity from one premises to the other and further that in case of one of the connections having been disconnected due to default, it cannot be run from other

connection by making temporary arrangement.

3.5.2.1 Where the premises in question are legally transferred, sold or leased to a new unit and appropriate entry exists in the municipal/ revenue record regarding such transfer, the consumer/applicant should furnish a copy of the registered deed for sale or lease as the case may be. An informal agreement of family partition/ lease etc. will not be acceptable.

3.5.2.2 Where the Punjab Government has allowed the registration of more than one unit/renting out of the premises for setting up industrial units in industrial plots/ sheds in the Focal Points depending on the size of the plot and subject to fulfilment of some conditions laid down for the purpose, in such cases the new connection may be allowed provided such units are in the name of different persons and parts of such sheds/plots being used by different industrialists, are properly demarcated and separated from each other by making suitable partition so that it is not possible to use electricity from one unit to another and in case of one connection having been disconnected due to defaulting amount etc., the same cannot be run from other connection(s) in the adjoining industrial unit(s) by tapping some supply points.

xxx xxx xxx

3.5.7 *Failure to get Connections Clubbed* If a consumer fails to exercise option to get his connections clubbed within the stipulated date or declares that there is only one connection in his premises but later on it is detected that he is having more than one connection in one premises, he shall have to pay higher tariff and surcharge, if applicable w.e.f. 1.1.96.

4. The circular, which has been relied upon by the parties reads as follows:

"In order to encourage the consumers to opt for clubbing

of their loads and also to facilitate a smooth transition, it has been decided that all consumers may be asked to give undertaking for clubbing/conversion of two or more connections in the same premises, wherever existing by 31.1.97. Further action in various situations may be taken as under:

(a) Cases where no change of voltage level is involved;

The cost of clubbing with regard to service Mains, if any, shall be borne by the Board. However, consumer shall be charged higher tariff wherever applicable, from the date of undertaking, which in any case shall have to be given before 31.1.97.

(b) Cases where change of voltage level is involved;

In cases requiring conversion of supply voltage from LT to 11 KV, Board shall carry out the conversion including erection of a new 11/0.4 KV transformer with allied equipment in the first instance and recover the conversion cost in six equal monthly instalments from the consumer.

Note:- Where there is a transformer exclusively feeding the consumer, this may, on the option of the consumer, be sold to him as per the provisions contained in SMI-39.

In both the cases (a) and (b) above, such consumers shall be brought on higher tariff, wherever applicable and any surcharge due to voltage level shall be stopped with effect from the date of undertaking.

The above relaxation shall be applicable to the cases involving voltage level upto 11 KV.

(c) The consumers who do not exercise option by 31.1.97 or those who in the first instance declare that there is only one connection existing in their

premises but later on are detected to be running more than one connection in the same premises, shall have to pay higher tariff and surcharge wherever applicable w.e.f. 1.1.96."

5. The bare reading of the above regulations and circular makes it apparent that the aim of the Electricity Board is to provide single connection in the premises. Not only this, it is the obligation of the consumer, to get the connections clubbed where more than one connection exists in the same premises. This policy is, primarily, meant to encourage single connection as well as consumers to opt for clubbing of their loads and also to facilitate a smooth transmission. Besides this, the most important aspect is the mischief that these provisions ought to suppress. A consumer who gets two meters installed in his premises and in that garb receives bulk supply instead of medium supply clearly makes an attempt to avoid payment of higher tariff. It cannot be disputed that a consumer of a medium supply is subjected to a lower tariff than the one receiving bulk supply. Therefore, the intention, thus, is to avoid revenue loss to the Board by circulating the prescribed procedure. These regulations and circulars, thus, cannot be interpreted so as to defeat the very object of suppressing such a mischief in the consumption of electricity. Therefore, if the Electricity Board finds that such mischief is being played, there is nothing in law preventing the Board from treating it as a clubbed connection and impose such tariff and penalty as is permissible in accordance with law. No consumer can be permitted to defeat the spirit of the regulations and take undue advantage of receiving electric supply through different meters in the same premises and with an intention to defraud the Electricity Board of its genuine dues for supply of electricity.

6. Having referred to these regulations, now we may revert back to the facts of the present case. The officers of the Electricity Board had conducted inspection of the premises in question and prepared an inspection report. As per the inspection report, there is only one plot being Plot No. 136,

Industrial Area-A, Ludhiana and in that Smt. Kartari Devi is stated to be the consumer. She has a sanctioned load of 52.49 KW and the Consumer Account No. was MS-32/603. The other consumer is Shri Janak Raj in the same property having Consumer Account No. MS-32/580 with a sanctioned load of 56.79 KW. In the report, it was noticed as follows:-

> "6. In the connected portion of premises (Aahata) one more connection MS-32/0603 Kartar Devi is installed. The supply of which also comes to this premises and at the moment some load of that connection is found running on this side.
>
> 7. The common wall of both sides has one shutter and one Kainchi Gate. In the half portion of Kainchi Gate a wall of approximately four feet exists. As per Board instructions case of clubbing is made out action be taken."

6. This report was signed by Shakti Jaggi, a representative of the consumer, to whom the copy of the same was given. The Department, vide their letter written to the consumer, had stated that in terms of circular No. 78 of 1995, dated 15th September, 1995 and 4 of 1997, dated 8th January, 1997, the connections were liable to be clubbed on the basis of this inspection report and they were expected to file reply within fifteen days from the date of issue of the notice. In the reply submitted by the consumers, no specific objections were filed to the effect that the inspection was conducted in a prejudicial manner or correct facts had not been noticed and that is why the protest was raised. In any case, it was open to the consumer to file objections to the report at a subsequent stage. Except that, there were two distinct properties and connections, nothing was averred in the reply or before the Forum as to why the officers had reported the facts in their report which justify clubbing of the connections. Thereafter, the demands of Rs.3,28,216/- and Rs.4,56,025/-, as stated above, were raised from these consumers. Both the reports have been received by the consumer's representatives. The demand notices were admittedly received by the consumer as they are the very basis

of the complaints filed by them. The circular being CC No. 4 of 1997, while referring to the scheme of the Electricity Board under Clause (c) of the circular, made it obligatory upon the consumers to exercise the option by 31st January, 1997 and even to those persons where one connection is stated to be existing in the premises but later on are detected to be running more than one connection and they would have to pay higher tariff and surcharge w.e.f. 1.1.1996. The version, put forward by the consumers, is that there were two separate premises and they had produced certain documents before the Forum, which persuaded them to treat these premises as separate. All these documents were prior to the date of inspection and it has been noticed by the Forum that the inspection reports were signed under protest. The reports, which have been placed before us at page Nos. 56 and 59 respectively of the paper book, show that some protest was raised, however, no objections were filed to show what was the protest and what exactly the consumer were objecting to. It, certainly, required a definite finding to be recorded by the Forum. Non-recording of such a finding has prejudicially affected the rights of the parties.

7. The documents (Ext.C1 to Ext.C10), noticed by the State Commission, show that the consumer had advanced the argument of separate properties, separate ownership and separate connections. However, there is no reason recorded as to why the evidence of the Department i.e. the inspection report is incorrect and cannot be relied upon. There is ambiguity. The District Forum, while relying upon the report, had rejected the complaint which was reversed by the State Forum. These are the findings of facts and they must be recorded in a manner which would clearly establish on record the case of one party or the other in accordance with law. The trading accounts filed by the consumer in one of the appeals related to financial year 1991-92, 1992-93, 1993-94 and 1996-97. On behalf of respondents, Subhash Chander, had filed the rent receipts for the period 1st April, 2002 to 30th September, 2002. Primarily, the documents produced by the consumers related to the period prior to the date of inspection. The inspection of the

premises was conducted on 19th June, 2002. It was required of the consumers to establish their case for the period, at the time of or subsequent to the date of inspection. There could reasonably be possibility of issues being answered against the consumers. The report prepared by the officers of the Electricity Board is an act done in discharge of their duties and could not be straight away reflected or disbelieved unless and until there was definite and cogent material on record to arrive at such a finding. It is not disputed before us that if two connections are operating in the same premises, in that event, the concept of clubbing and consequential charges and penalty would be attracted. That being so, and particularly, where a National Commission has not adverted to some discussion on the points raised in the appeal, the policy of the Electricity Board and the regulations cannot be rendered otiose. It is the obligation of every bona fide consumer to comply with the requirements and the regulations in the circular and not to abuse the advantage given under the policy of the Electricity Board. If there is a prima facie record to show that the consumer had attempted to circumvent the circular and with an intention to avoid payment of higher tariff, two connections were being utilized in the garb of different premises, while in fact, it was one and same premises, the penal consequences must follow. The circular issued and the regulations read with the provisions of the Act, clearly contemplate imposition of penalty and such charges with effect from 1st January, 1996. There is no explanation on record as to why the date is effective from 1st January, 1996. Even if taking the said date to be correct then the dues, which can be recovered, are the dues payable to the Electricity Board in accordance with law. The notice dated 2nd July, 2002 (Ext.C/5) was issued on the basis of the inspection report. From the record before us it will be a serious question to be specifically answered by the Competent Forum, as to whether the premises in question are two distinct and different premises or it is one in the same (i.e. only property No. 136 or 136 and 136-A). If these are two independent premises owned by two different persons who are consumers of the Board in their own capacity

and there is no intention on their part to use these connections collectively and have not violated their sanctioned load, the consequences in law will be different. But, if there is intention to use both connections and avoid higher tariff, the consequences will be entirely different in that case. The inspection report is a document prepared in exercise of its official duties by the officers of the Corporation. Once an act is done in accordance with law, the presumption is in favour of such act or document and not against the same. Thus, there was specific onus upon the consumer to rebut by leading proper and cogent evidence that the report prepared by the officers was not correct. As already noticed, no objections were filed to the said report except some protest, that too, without stating as to what was the specific protest about, whether the facts recorded in the report were factually incorrect or that the report was received under protest. As is apparent from the reports on record, it bears two signatures of the consumer/consumer's representatives, one with regard to the preparation of report and other with regard to receiving the copy of the report. The words 'under protest' have been recorded at the bottom of the report. This, itself indicates the ambiguity in the protest raised by the consumers.

8. In the circumstances aforestated, we are of the considered view that the matter requires to be remanded to the Competent Authority in the Electricity Board to determine and record the clear findings afresh as to whether it was a case of clubbing or not in accordance with the provisions and observations afore-referred with liberty to the parties to produce any further documents, if they so desire. The authority shall pass a final order expeditiously. The fate of the notices and consequences thereof shall be subject to the final order that may be passed by the Competent Authority. Parties are at liberty to challenge the order so passed in accordance with law.

9. The appeals are, therefore, disposed off with the above direction while leaving the parties to bear their own costs.

N.J. Appeals disposed of.

AVINASH CHAND & ORS.
v.
CHAIRMAN MARKET COMMITTEE & ORS.
(Civil Appeal No. 8229-8230 of 2003)

MAY 6, 2010

[HARJIT SINGH BEDI AND K.S. RADHAKRISHNAN, JJ.]

AGRICULTURAL PRODUCE MARKET COMMITTEES:

Auctioneers in Market Committees – Working on commission basis – Age of retirement – Instructions issued by Chief Administrator in 1992 reiterating similar instructions of 1982, not to continue the services of auctioneers beyond the age of 60 – Challenged – HELD: The High Court has rightly held that: (1) till the issuance of the instructions in 1982 as reiterated in 1992 there was no maximum age limit laid down for auctioneers who had been engaged on commission basis; (2) the auctioneers were not employees of the Board or the Committees and their services were not governed by any Rules; (3) it was only appropriate in the absence of Rules, that the instructions issued by the Chief Administrator which were in the interest of the Board and the Committees and, therefore, visualised u/s 33(4)(ii) of the Act, should be made applicable to the case of the appellants – It cannot be said that the step taken by the Chief Administrator was arbitrary or without any basis – In the absence of rules, it was open to the Chief Administrator to fix the retirement age – Punjab Agricultural Produce Markets Act, 1961 – s.33(4)(ii) – Punjab Agricultural Produce Markets General Rules, 1962 – r.24(5).

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8229-8230 of 2003.

From the Judgment & Order dated 15.3.2002 of the High

Court of Punjab & Haryana at Chandigarh in C.W.P. No. 7431 of 1993 and CWP No. 12091 of 2000.

Debasis Misra for the Appellants.

Sanjay Singh, Ugra Shankar Prasad for the Respondents.

The following Order of the Court was delivered

O R D E R

1. These appeals by way of special leave are directed against the judgment of the Division Bench of the Punjab and Haryana High Court dated 15th March, 2010 whereby the writ petition challenging the provision of a retirement age for auctioneers in the Market Committee, have been dismissed. The facts are as under:-

2. The appellants, and several others who had filed writ petitions in the High Court, were working as auctioneers on commission basis in the Market Committee, Kaithal since the year 1963-64 as per Rule 24(5) of the Punjab Agricultural Produce Markets General Rules, 1962, (hereinafter for short 'the Rules'). On 3rd November, 1992, the Chief Administrator, Haryana State Agricultural Board addressed a directive to the Chairmen and Secretaries of the Market Committees reiterating a directive dated 26th August, 1982, that the auctioneers on commission basis should not be allowed to work beyond the age of 60 years. As a consequence of the aforesaid instructions, the services of the appellants were terminated on 27th August, 2000 as they had crossed the age of 60 years. The instructions aforesaid were accordingly, challenged before the High Court. On notice, the respondent Marketing Board and the concerned Market Committees controverted the pleas raised in the writ petition. It was pointed out that the appellants and others like them had been engaged on fixed rates on commission basis as per bye-law 28 of the Punjab Market Committee Bye-laws, 1963 and that the

instructions had been issued in conformity with Rule 24(5) ibidem. The High Court, during the course of its judgment observed that Section 33(4)(ii) of the Punjab Agricultural Produce Markets Act 1961, which was applicable to Haryana State as well provided that it was open to the Board to issue instructions in matters which were likely to adversely affect the interests of the Committee or the producers or dealers or any functionaries working in the notified area, and the instructions were thus authorised by statute. The Court also noted that in the arguments made on behalf of the appellants that the instructions of 1992 could not be made retrospectively applicable to their case, it was pointed out that similar instruction had first been issued in the year 1982 (and had only been reiterated in the year 1992) and that in any case the auctioneers were not employees of the Committees or of the Marketing Board. The Court accordingly held that the instructions issued by the Chief Administrator laid down a policy and in the absence of a fixed tenure laid down by instructions or by Statute or Rules it was not open to the appellants to claim that they should be allowed to continue till they remained physically fit. The High Court, accordingly, dismissed the writ petition leading to this appeal. Leave was granted in the year 2003 and the matter has come up today for final disposal. We also notice that although liberty had been given on 6th October, 2003 to request for an early hearing and despite the fact that the matters are on the list, the counsel for the appellant has not appeared before us, although we had waited for him for some time. In the light of the fact that these matters are extremely old, we are not inclined to adjourn them any further.

3. We have gone through the judgment of the Division Bench of the High Court very carefully with the assistance of the learned counsel for the respondent. Certain facts can be culled out from the judgment of the High Court:(1) that till the issuance of the instructions in 1982 as reiterated in 1992 there was no maximum age limit laid down for auctioneers who had

been engaged on commission basis; (2) that the auctioneers were not employees of the Board or the Committees as they were engaged specifically for the purpose of conducting auctions on commission basis and that their services were not governed by any Rules; (3) it was only appropriate in the absence of Rules, that the instructions issued by the Chief Administrator which were in the interest of the Board and the Committees and, therefore, visualised under Section 33 (4)(ii) of the Act, should be made applicable to the case of the appellants; and (4) in the light of the fact that till then, there was no instructions regarding the maximum age of the auctioneers, it was appropriate for the Board to fix the retirement age at par with all government employees who were allowed to continue upto the age of 60 years and in this view of the matter, it could not be said that the step taken by the Chief Administrator was arbitrary or without basis. We endorse the findings of the Division Bench. In the absence of rules, it was open to the Chief Administrator to fix the retirement age and it would be futile for the appellants to contend that they should be allowed to continue to function till they remained physically fit. We thus find no merit in the appeals. Dismissed with no order as to costs.

R.P. Appeals dismissed.