HARI SINGH NAGRA & ORS.
v.
KAPIL SIBAL & ORS.
(T.C. (Crl.) No. 2 of 1997)

JULY 15, 2010

[J.M. PANCHAL AND A.K. PATNAIK, JJ.]

Constitution of India, 1950 – Article 215 – Criminal contempt of court – A message by Senior Advocate-contemnor – Expressing concern about falling standard of legal fraternity – Published in Souvenir of a Literary Association of Advocates – The message not released to press – Souvenir not made available for sale – Excerpts from the message published in Daily News Paper suggesting that the contemnor-Advocate made frontal attack on judiciary – Criminal contempt petition filed before High Court – Transfer of the petition to Supreme Court – Held: The message contributed by the advocate-contemnor to the Souvenir does not bring the administration of justice into disrepute or impair, within the meaning of 'criminal contempt' u/s. 2 (c) of Contempt of Courts Act – No case of criminal contempt is made out either against the advocate-contemnor or other contemnors – Contempt of Courts Act, 1971 – s. 2 (c).

In a Souvenir published by a literary group/ Association of lawyers practicing in Supreme Court, various messages, articles, poems etc. were contributed by members of the Bar and the Hon'ble Judges. Respondent No. 1, a Senior Advocate also sent a message to be published in the Souvenir, which expressed concern about the plight of junior members of the Bar and about the falling standards of legal fraternity. The message was neither released to the press, nor was the Souvenir made available for sale. It was circulated only to its members and other members of the Bar.

Thereafter, when respondent No. 1 filed his nomination for contesting the post of President of Supreme Court Bar Association, a news item was published in the Sunday, Times of India daily wherein certain excerpts of the message were reported, which suggested that respondent No. 1 made frontal attack on the judiciary.

Petitioner Nos. 1 to 5, the practicing lawyers of Punjab and Haryana High Court filed criminal contempt of court under Article 215 of the Constitution of India against the three respondents alleging that respondent No. 1 entered into a conspiracy with respondent Nos. 2 and 3 to bring administration of justice into disrespect which amounted to deliberate interference in the administration of justice.

Single Judge of the High Court, after preliminary hearing held that allegations against the three respondents was criminal contempt. Respondent Nos. 4 and 5, the editors of the Souvenir of the Literary Association were also impleaded as parties at the behest of the petitioners.

The Secretaries of the Literary Association filed Transfer Petition in the Supreme Court. The petition was allowed and the Contempt Petition was transferred from the High Court to the Supreme Court.

In the instant petition, the question for consideration was whether sufficient cause was made out by the petitioners to initiate contempt proceedings against the respondents.

Dismissing the Contempt Petition and dropping the contempt proceedings, the Court

HELD: 1. A fair reading of the message sent by

respondent No. 1 makes it explicit that the sending and/ or publication of the message in the Souvenir of the Mehfil (Litrary Association) did not scandalize or tend to scandalize, or lower or tend to lower the authority of any court nor prejudiced, or interfered or tended to interfere with the due course of any judicial proceedings; or interfered or tended to interfere with or obstructed or tended to obstruct, the administration of justice in any other manner, within the meaning of 'criminal contempt' as defined in Section 2(c) of the Contempt of Courts Act, 1971. The message contributed by respondent No. 1 read in its proper prospective, did not bring the administration of justice into disrepute or impair. Therefore, it must be held that no criminal contempt was committed or attempted to be committed by respondent No.1. [Paras 7 and 11] [892-B-D; 898-C]

P.N. Duda vs. P. Shiv Shanker and Ors. **(1988) 3 SCC 167, relied on.**

E.M. Shankaran Namboodiripad vs. T. Narayanan Nambiar **(1970) 2SCC 325, referred to.**

Ambard vs. Attorney General for Trinidad and Tobago **1936 AC 322, referred to.**

2. There is no manner of doubt that Judges are accountable to the society and their accountability must be judged by their conscience and oath of their office. Any criticism about the judicial system or the judges which hampers the administration of justice or brings administration of justice into ridicule must be prevented. The contempt of court proceedings arise out of that attempt. National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. There is no manner of doubt that freedom of expression as contemplated by Article 19(1)(a)

of the Constitution is available to the Press and to criticize a judgment fairly albeit fiercely is no crime but a necessary right. A fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. [Para 8] [895-C-G]

3. In the instant case, the message examined the evils prevailing in the judicial system and was written with an object to achieve maintenance of purity in the administration of justice. The message was exposition of ideology of respondent No. 1 and he had shown the corrective measures to be adopted to get the institution rid of the shortcomings mentioned by him. In the facts of the case, the message sent by respondent No. 1 to be published in the Souvenir of the Mehfil (Litrary Association) will have to be regarded as fair criticism of his senior colleagues for their failure to bring up the Junior Bar and of those members of the Bar who were shouting at each other and threatening the Judges. The message is nothing but concerns of a senior advocate who has practiced for long in Supreme Court and who noticed that the public image of the legal community was at its nadir. The article nowhere targets a particular judge. This is not a case of an attack on a Judge which is scurrilous, offensive, intimidatory or malicious beyond condonable limits, in respect of a judgment or his conduct. The article is an expression of opinion about an institutional pattern. The article by itself does not affect the administration of justice. [Para 8] [895-G-H; 896-A-C]

Re: *Sham Lal* **AIR 1978 SC 489, relied on.**

Vishwanath vs. E.S. Venkataramaih **1990 Cri.L.J. 2179 (Bom), approved.**

4. Scandalising in substance is an attack on individual Judges or the court as a whole with or without referring to particular cases casting unwarranted and defamatory aspersions upon the character or the ability of the Judges. 'Scandalising the Court' is a convenient way of describing a publication which, although it does not relate to any specific case either post or pending or any specific Judge, is a scurrilous attack on the judiciary as a whole which is calculated to undermine the authority of the courts and public confidence in the administration of justice. [Para 8] [896-D-F]

Bramhaprakash Sharma vs. State of UP **AIR 1954 SC 10, relied on.**

5. The article which appeared in the Times of India was torn out of text. If the full text of the message sent by respondent No. 1 had been published in the newspaper, in all probabilities the petitioners were not likely to initiate proceedings for criminal contempt of the court against the respondents. However, in view of the unconditional apology tendered by the newspaper, it is not necessary for this Court to delve into details about the conduct of respondent No.3 any further. There is nothing on the record to show that the Souvenir of the Mehfil (Literary Association) in which the message was printed was sold to the public. This was a kind of internal pamphlet/brochure which was distributed to its members. Therefore, no case is made out against respondent Nos. 4 and 5 who were subsequently impleaded in the petition. [Para 12] [898-E-H]

Case Law Reference:

(1988) 3 SCC 167	**Relied on.**	**Para 7**
1936 AC 322	**Referred to.**	**Para 7**
(1970) 2 SCC 325	**Referred to.**	**Para 7**

AIR 1978 SC 489	**Relied on.**	**Para 9**
1990 Cri.L.J. 2179 (Bom)	**Approved.**	**Para 9**
AIR 1954 SC 10	**Relied on.**	**Para 10**

CRIMINAL ORIGINAL JURISDICTION : T.C. (Crl.) No. 2 of 1997.

Harish N. Salve, Ranjit Kumar, Shambhu Prasad Singh, Ankur Saigal, Bina Gupta, Binu Tamta, Sunil Kumar Jain, K.V. Mohan for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. The relevant facts, from which the present contempt petition arises, are as under :

2. Mehfil-e-Wukala ('Mehfil' for short) is a cultural and literally group / association of lawyers practicing in the Supreme Court. The main object as claimed by the said organization has been to promote art, culture and literature amongst the members of the Bar. The said group of lawyers also claims that Mehfil provides the members of legal fraternity a chance to break away from the busy schedule to pursue their talents in the fields of art, culture and literature. The Mehfil was started in the year 1986 as a small group of poets-advocates who used to sit periodically at each other's place and recite poems etc. In the year 1992-93, the members of the Mehfil decided to hold an annual function and to invite more members of the Bar and also the Hon'ble Judges of the Supreme Court and the High Court of Delhi to participate in the activities of the Mehfil. It was also decided to release a souvenir on the said occasion, which was to contain brief account of the activities of the Mehfil, messages, articles etc. to be contributed by the Hon'ble Judges and senior members of the Bar. Accordingly, Annual Function was held on February 6, 1993 at India International Centre, New Delhi and a souvenir was published. Again on February 5,

1994, Annual Function was held which was attended by the members of the Bar and the Hon'ble Judges. On this occasion also a souvenir was published which contained various messages, articles, poems etc. contributed by the members of the Bar and the Hon'ble Judges. For the year 1994-95, it was decided to hold the Annual Function on March 25, 1995. As was done in the previous years, it was decided to release a souvenir on the said occasion. The function was held on the scheduled date and the souvenir was published. It is claimed by Mr. Suresh C. Gupta, learned counsel practicing in this Court in his affidavit in reply that articles and messages were sent by the then Hon'ble Chief Justice of India, Hon'ble Mr. Justice K. Jayachandra Reddy, hon'ble Justice Dr. A.S. Anand, Hon'ble Mr. Justice S.P. Bharucha, Mr. K.K. Venugopal, Senior Advocate and the then President of Supreme Court Bar Association, Hon'ble Mr. Justice M.M. Punchhi, Hon'ble Mr. Justice B.L. Hansaria etc. Mr. Kapil Sibal who is Senior Advocate also sent a message to be published in the souvenir. In his message Mr. Sibal expressed concern about the plight of junior members of the Bar and also about falling standards of the legal fraternity. The message was not released to the press nor the souvenir was made available for sale but was circulated to its members and other members of the Bar. Initially, the message sent by Mr. Sibal did not invite any controversy whatsoever for about a month. However, Mr. Sibal, the learned Senior Advocate, decided to contest for the post of President of Supreme Court Bar Association and filed his nomination. Thereafter, a news item was published in the Sunday Times of India daily dated April 16, 1995 wherein certain excerpts from the message which was published in the souvenir of the Mehfil, were reported which suggested that Mr. Sibal had made a frontal attack on the judiciary.

3. The petitioner Nos.1 to 5 are practicing advocates at the Punjab and Haryana High Court, Chandigarh. Their claim was that Mr. Sibal who is a Senior Advocate of the Supreme Court and was contender for the Presidentship of Supreme

Court Bar Association, had by sending a message which was published in the souvenir of the Mehfil committed a criminal contempt of the court. The petitioner Nos.1 to 5 were of the view that a real prejudice, which can be regarded as substantial interference in the administration of justice was caused because of the calculated and keenly studied attempt by Mr. Sibal to denigrate the institution of judiciary. The petitioner Nos.1 to 5 claimed that the remarks made by Mr. Sibal against Hon'ble Judges amounted to an unignorable and unpardonable mischief which had tendency to shake the faith of the people of the country in the judiciary. What was claimed by the petitioners was that Mr. Sibal had entered into a conspiracy with the respondent Nos.2 and 3 to bring the administration of justice into disrespect which amounted to deliberate interference in the administration of justice and as he had imputed unsubstantiated charges of corruption against the Judges, he was liable to be hauled up for contempt of Court. Therefore, the petitioners instituted Criminal Contempt Petition No.12 of 1995 in the High Court of Punjab and Haryana at Chandigarh. The said petition was filed under Article 215 of the Constitution and prayer made was to punish the respondents for committing contempt of the High Court of Punjab and Haryana at Chandigarh. Initially, the said petition was placed for preliminary hearing before a learned Single Judge of the High Court. The learned Single Judge was of the view that what was alleged by the petitioners against the three respondents impleaded therein was criminal contempt and, therefore, in view of the mandatory provisions contained in Section 15 of the Contempt of Courts Act, 1971 the petition should be heard and decided by a Bench of not less than two Judges. Therefore, the learned Single Judge, by an order dated May 16, 1991 directed the Registry to place the papers before Hon'ble the Chief Justice for listing the matter before a Bench consisting of not less than two judges. Accordingly, the matter was placed for preliminary hearing before a Division Bench and the Bench issued show cause notice to the original respondent Nos.1 to 3 stating that they were directed by the Division Bench to

implead the Editors, Printers and Publishers of 'Mehfil-e-Wukala'. The petitioners filed an application to implead the respondent Nos.4 and 5 as respondents in the contempt petition as they were editors of the Mehfil. The said application was granted and the respondent Nos.4 and 5 were impleaded in the Contempt Petition. The respondent Nos.5 and 6 Secretaries of Mehfil-e-Wukala filed Transfer Petition No.251 of 1996 in this Court and prayed to transfer the Contempt Petition pending before the Punjab and Haryana High Court at Chandigarh to this Court. After hearing the learned counsel for the parties the said petition was allowed and that is why the Registry has registered the case as Transfer Case (Criminal) No.2 of 1997. On notice being served, Mr. Sibal and other respondents have filed affidavit in reply controverting the claims advanced by the petitioners.

4. The question posed for consideration of the Court is whether sufficient case is made out by the petitioners to initiate contempt proceedings against the respondents. It may be mentioned that after transfer of the case from Punjab and Haryana High Court at Chandigarh to this Court, several notices have been issued to the petitioners who are practicing lawyers at the High Court of Punjab and Haryana, Chandigarh. However, they have not responded to the notices nor entered appearance through their learned advocate nor thought it fit to assist the Court in the proceedings initiated by them. However, it is well settled that contempt of Court is a matter between the Court and the alleged contemnor. The matter is pending in this Court since the year 1997. Therefore, this Court has decided to proceed with the hearing of the matter, notwithstanding, the absence of the petitioners. This Court has heard Mr. Harish Salve, learned senior counsel for the respondent No.1 and learned senior counsel Mr. Ranjit Kumar appearing for the learned advocates at whose instance, the contempt petition was transferred to this Court.

5. In order to decide the question posed for consideration

of this Court, it would be relevant to set out the Message/Article contributed by the respondent No.1 in the souvenir of the Mehfil:

> "The public image of the legal community is at its nadir. Influx of large numbers into the profession, deterioration of moral standards of the legal community questionable integrity of some of those who are in judiciary and the sheer economic cost of starting as a professional and sustaining one self have contributed to these falling standards.
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> The judiciary, despite the above, provides a glimmer of hope for the common man. Those who adorn this institution, though tainted, have not yet lost all credibility. We have to all unite together to refurbish the image of the legal fraternity. Before we point fingers at others, let us do some soul-searching.
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> For a start, let us concentrate on the junior members of the Bar. Our senior colleagues owe it to the profession to bring up the Junior Bar. This can never be done until junior members of the Bar have access to the chambers of senior lawyers. We must devise what I may call Voluntary Access Scheme : in terms of which the Supreme Court Bar Association should rotate junior members of the bar amongst the chambers of Senior Lawyers who voluntarily want to participate in this scheme. Access should be provided to at least one, if not two, junior members of the bar to each senior on the basis of rotation for 6 months at a time. This will give to the junior members the advantage of having worked with a variety of seniors. Of course, a minimum payment schedule must be part of this scheme.
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> We must draw up a Code of Conduct applicable to the members of the Bar which will lay down norms not only in relation to their conduct with each other but also with reference to their conduct qua the Bench. Lawyers must refrain from shouting at each other, speaking in anger,

threatening judges, threatening colleagues and the like. It is also necessary that procedures must be devised to ensure adherence to these norms.

Entry into the profession should be limited to only those who pass an examination which may be conducted by the Bar Council of India. This, of course, requires legislation. Lawyers must get together, apply their mind to this issue and ensure the passing of this legislation.

It seems that judges have started disciplining lawyers. Judges themselves need disciplining. The judiciary has failed in its efforts to eradicate the phenomenon of corruption. This phenomenon includes receiving monetary benefits for judicial pronouncements rendering blatantly dishonest judgments, kow-towing with political personalities and obviously favouring the Government and thereby losing all sense of objectivity. The legal community instead of publically denigrading judicial system should come forward with proposed legislation to deal with this issue. A committee must be set up by the Supreme Court Bar Association to look into the modalities of bringing about such legislation in the context of the present constitutional frame-work which provides complete protection to the judiciary.

The issue of legal education must be addressed by the legal fraternity in cooperation with institutions providing legal education in India. Funding should be provided for studies to be conducted in such aspects of the law as required urgent attention.

There must be greater interaction between the various Bar Associations in the country. Constant interaction will lead to exchange of information which, in turn, will enable all of us to attend urgently to the needs of the members of the legal profession.

These are thoughts which require both immediate attention and a well thought of strategy. If we pause for a moment and think about what I have said, at least we will have made a start."

6. It may be stated that the Times of India, Delhi dated April 16, 1995 in the issue of Sunday Times published excerpts from the above quoted message sent by Mr. Sibal and title it as Sibal's Remark Stir Row in Legal Circles.

7. A fair analysis of the message sent by Mr. Sibal makes it clear that he was concerned with the public image of the legal community which according to him was at its nadir. He was of the view that influx of large numbers into the profession, deterioration of moral standards of the legal community, questionable integrity of some of those who were in judiciary and the sheer economic cost of starting as a professional and sustaining one self had contributed to these falling standards. He expressed his firm opinion that judiciary despite the above, provided a glimmer of hope for the common man and though there were tainted Judges, the institution had not yet lost all credibility. He called upon all concerned to unite together to refurbish the image of the legal fraternity. In order to make out his point Mr. Sibal first of all concentrated on the plight of junior members of the Bar. After emphasizing that senior colleagues owe it to the profession to bring up the Junior Bar and that the junior members of the bar must have access to the chambers of the Senior Lawyers, he appealed to the members of the Bar to devise a Voluntary Access Scheme in terms of which the Supreme Court Bar Association would rotate junior members of the Bar amongst the chambers of Senior Lawyers who voluntarily want to participate in the Scheme. Mr. Sibal was of the view that access should be provided to at least one if not two junior members of the bar to each senior on the basis of rotation for at least six months which according to him was likely to give the junior members the advantage of having worked with a variety of seniors. He also emphasized that a minimum

payment schedule to the junior members of the Bar must be part of this Scheme. He called upon those concerned to draw up a Code of Conduct applicable to the members of the bar which would lay down norms not only in relation to their conduct with each other but also with reference to their conduct qua the Bench. He was of the opinion that lawyers must refrain from shouting at each other, speaking in anger, threatening Judges, threatening colleagues and the like and expressed his strong feeling by stating that procedures must be devised to ensure adherence to these norms. He was of the further opinion that entry into the profession should be limited to those who passed an examination which should be conducted by the Bar Council of India. Having addressed to the drawbacks then prevailing in the legal profession, he proceeded to discuss the malaise affecting the judiciary. Having practiced in the Supreme Court for a pretty long time, he perceived that Judges had started disciplining lawyers. He, therefore, mentioned that Judges themselves needed to be disciplined. In his Message, he noted with pain that judiciary had failed in its efforts to eradicate the phenomenon of corruption which included receiving monetary benefits for judicial pronouncements, rendering blantantly dishonest, judgments, kow-towing with political personalities and favouring the Government and thereby losing sense of objectivity. Mr. Sibal had noticed that legal community was assailing and belittling the judicial system publically, which was harmful. He, therefore, urged the legal community to desist from criticizing the judicial system publically and asked them to come forward with proposed legislation to deal with this issue and advised a Committee to be set up by the Supreme Court Bar Association to look into the modalities of bringing about such legislation in the context of then prevalent constitutional framework which according to him provided complete protection to the judiciary. He also emphasized in his message the necessity of legal education by the legal fraternity in cooperation with institutions providing legal education in India and expressed a point of view that funding should be provided for studies to be conducted in such aspects of the law as

required urgent attention. Mr. Sibal further stressed necessity of having greater interaction between the various Bar Associations in the country to exchange information which in turn would enable all concerned to attend urgently to the needs of the members of the legal profession.

As mentioned earlier, only a part of message was published in the newspaper wherein sentences were torn out of context and an impression was given that Mr. Sibal had made a frontal attack on the judiciary. A fair reading of the message quoted above makes it explicit that the sending and/or publication of the message in the Mehfil did not scandalize or tend to scandalize, or lower or tend to lower the authority of any court nor prejudiced, or interfered or tended to interfere with the due course of any judicial proceedings; or interfered or tended to interfere with or obstructed or tended to obstruct, the administration of justice in any other manner, within the meaning of 'criminal contempt' as defined in Section 2(c) of the Contempt of Courts Act, 1971. Having regard to the contours of the issue involved, this Court feels that it would be essential to recall to the memory the weighty observations made by His Lordship Sabyasachi Mukherji in *P.N. Duda vs. P. Shiv Shanker & Ors.* (1988) 3 SCC 167. Therein, Mr. P. Shiv Shankar who at the relevant time was the Hon'ble Minister for Law, Justice and Company Affairs had delivered a speech before a meeting of the Bar Council of Hyderabad. Mr. P.N. Duda, an advocate practicing in Supreme Court had drawn attention of the Court to that speech. According to Mr. Duda, the speech of Mr. P. Shiv Shankar contained statements which were derogatory to the dignity of this Court as it attributed partiality towards economically affluent sections of the people, by this Court. Mr. Duda was of the view that language used in the statements was extremely intemperate, undignified and unbecoming of a person of Mr. Shiv Shankar's stature and position. Mr. Duda, therefore, urged the Court to initiate contempt proceedings against Mr. P. Shiv Shankar. The Court went through the entire speech and also noticed the newspaper

version of the said speech. This Court took into consideration the suggestion made by Lord Atkin in *Ambard vs. Attorney General for Trinidad and Tobago* 1936 AC 322, *E.M. Shankaran Namboodiripad vs. T. Narayanan Nambiar* (1970) 2 SCC 325 and made following apt observations in paragraphs 12 and 13 of the reported decision :

> "12. The question of contempt of court by newspaper article criticising the Judges of the Court came up for consideration in the case of Re: Shri S. Mulgaokar. In order to appreciate the controversy in this case it has to be stated that the issue dated 13th December, 1977, of the Indian Express published a news item that the High Courts had reacted very strongly to the suggestion of introducing a code of judicial ethics and propriety and that "an adverse has been the criticism that the Supreme Court Judges, some of whom had prepared the draft code, have disowned it". In its issue dated December 21, 1977 an article entitled "behaving like a Judge" was published which inter alia stated that the Supreme Court of India was "packed" by Mrs. Indira Gandhi "with pliant and submissive judges except for a few". It was further stated that the suggestion that a code of ethics should be formulated by Judges themselves was "so utterly inimical to the independence of the judiciary, violative of the Constitutional safeguards in that respect and offensive to the self-respect of the Judges as to make one wonder how it was conceived in the first place". A notice had been issued to the Editor-in-Chief of the Newspaper to show-cause why proceedings for contempt under Article 129 of the Constitution should not be initiated against him in respect of the above two news items.
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> 13. It was observed by Chief Justice Beg in that decision that national interest required that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any

partisan spirit or tactics. This should be a part of national ethics. The comments about Judges of the Supreme Court suggesting that they lack moral courage to the extent of having "disowned" what they had done or in other words, to the extent of uttering what was untrue, at least verge on contempt. None could say that such suggestions would not make Judges of this Court look ridiculous or even unworthy, in the estimation of the public, of the very high office they hold if they could so easily "disown" what they had done after having really done it. It was reiterated that the judiciary can not be immune from criticism. But, when that criticism was based on obvious distortion or gross misstatement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it could not be ignored. A decision on the question whether the discretion to take action for Contempt of Court should be exercised must depend on the totality of facts and circumstances of the case. The Chief Justice agreed with the other two learned Judges in that decision that in those facts the proceedings should be dropped. Krishna Iyer, J. in his judgment observed that the Court should act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack was calculated to obstruct or destroy the judicial process. The Court must harmonise the constitutional values of free criticism, and the need for a fearless curial process and its presiding functionary, the judge. To criticise a judge fairly albeit fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it. The Court must avoid confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt but latter is, although overlapping spaces abound. The fourth functional canon is that the Fourth Estate should be given free play within responsible limits

even when the focus of its critical attention is the court, including the highest court. The fifth normative guideline for the Judges to observe is not to be hypersensitive even where distortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, and the sixth consideration is that if the Court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of law by fouling its sources and stream."

8. There is no manner of doubt that Judges are accountable to the society and their accountability must be judged by their conscience and oath of their office. Any criticism about the judicial system or the judges which hampers the administration of justice or brings administration of justice into ridicule must be prevented. The contempt of court proceedings arise out of that attempt. National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. There is no manner of doubt that freedom of expression as contemplated by Article 19(1)(a) of the Constitution is available to the Press and to criticize a judgment fairly albeit fiercely is no crime but a necessary right. A fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. The Message examined the evils prevailing in the judicial system and was written with an object to achieve maintenance of purity in the administration of justice. The message was exposition of Mr. Sibal's ideology and he had shown the corrective measures to be adopted to get the institution rid of the shortcomings mentioned by him. On the facts of the case, the message sent by Mr. Sibal to be published

in the souvenir of the Mehfil will have to be regarded as fair criticism of his senior colleagues for their failure to bring up the Junior Bar and of those members of the Bar who were shouting at each other and threatening the Judges. The message is nothing but concerns of a senior advocate who has practiced long in this Court who noticed that the public image of the legal community was its nadir. The article nowhere targets a particular judge. This is not a case of an attack on a Judge which is scurrilous, offensive, intimidatory or malicious beyond condonable limits, in respect of a judgment or his conduct. The article is an expression of opinion about an institutional pattern. The article by itself does not affect the administration of justice. Here, it would not be out of place to refer to certain reported decisions dealing with the question as to when a publication can be regarded as scandalizing the Court or tending to interfere with the administration of justice or lowering the authority of Court. Scandalising in substance is an attack on individual Judges or the Court as a whole with or without referring to particular cases casting unwarranted and defamatory aspersions upon the character or the ability of the Judges. 'Scandalising the Court' is a convenient way of describing a publication which, although it does not relate to any specific case either post or pending or any specific Judge, is a scurrilous attack on the judiciary as a whole which is calculated to undermine the authority of the Courts and public confidence in the administration of justice.

9. In re: *Sham Lal* AIR 1978 SC 489, a news item referring to a signed document describing one of the views expressed in the Habeas Corpus case, i.e., *ADM Jabalpur vs. Shivkant Shukla* (1976) 2 SCC 521 as 'misdeed' and Judges who gave such decision would be 'ostracized' in other countries appeared in newspaper Times of India. This Court was called upon to initiate contempt proceedings. The Court took the view that this was not a fit case for drawing up formal contempt proceedings and dropped the proceedings. In *Vishwanath vs. E.S. Venkataramaih* 1990 Cri.L.J. 2179 (Bom), Mr. E.s.

Venkataramaiah, former Chief Justice of India, gave an interview to a noted journalist Kuldeep Nair at the eve of his retirement on 17.12.1989 which was published in several newspapers. In course of interview, the former Chief Justice is stated to have made the following statements : "The judiciary in India has deteriorated in its standards because such judges are appointed as are willing to be *influenced by lavish parties & Whisky Bottles."* In every High Court, Justice Venkataramaiha said, there are at least 4 to 5 judges who are practically out every evening, wining and dining either at a lawyer's house or foreign embassy. He estimates the number of such judges around 90 and favours transferring them to other High Courts.

Chief Justice Venkataramaiha reiterated that close relations of Judges be debarred from practicing in the same High Courts. He expressed himself strongly against sons-in-law and brothers of Judges appearing in the Courts where the latter are on the Bench. Most relations of Judges are practicing in High Courts of Allahabad, Chandigarh, Delhi and Patna.

According to C.J. Venkataramaiha practically in all the 22 High Courts in the country close relations of Judges are thriving. There are allegations that certain judgments have been influenced through them even though they have not been directly engaged as lawyers in such case. It is hard to believe the reports that every brother, son or son-in-law of a judge whatever his merit or lack of it as lawyer can be sure of earning an income of more than Rs.10,000/- a month.

The Division Bench of Bombay High Court held that the words complained of did not amount to Contempt of Court on the grounds that (1) the entire interview appears to have been given with the idea to improve the judiciary; (2) the Supreme Court had dismissed the Writ Petition (C) No.126 of 1990 filed on behalf of State Legal Aid Committee, J & K for an appropriate writ commanding the Union of India or any other appropriate authority to disclose the names of 90 judges as mentioned by the former Chief Justice of India.

10. In *Bramhaprakash Sharma vs. State of UP* AIR 1954 SC 10, Resolution of the Executive Committee of the District Bar Association of the Muzzafarnagar to the effect that two judicial officers were thoroughly incompetent and to not inspire confidence and are given to stating wrong facts, was considered overbearing and discourteous but no action was taken against the members of the Bar.

11. Bearing in mind the trends in the law of contempt as noticed by this Court in *N. Duda vs. P. Shiv Shankar* (supra), the message contributed by Mr. Sibal, read in its proper prospective, did not bring the administration of justice into disrepute or impair. Therefore, it must be held that no criminal contempt was committed or attempted to be committed by the respondent No.1.

12. On behalf of the Times of India, written statement has been filed by Mr. Rakesh Bhatnagar. In the reply, the contempt petition is sought to be defended on merits but it is mentioned that there was no deliberate or intentional attempt on the part of the answering respondent to lower the prestige of the Hon'ble Court. By filing the reply the newspaper has tendered unconditional and unqualified apology, if the Court comes to the conclusion that contempt of court was committed by the respondent No.3. However, it will not be out of place to mention that the article which appeared in the Times of India was torn out of text. If the full text of the message sent by Mr. Sibal had been published in the newspaper, in all probabilities the petitioners were not likely to initiate proceedings for criminal contempt of the Court against the respondents. However, in view of the unconditional apology tendered, it is not necessary for this Court to delve into details about the conduct of the respondent No.3 any further. There is nothing on the record to show that the souvenir of the Mehfil in which the message was printed was sold to the public. This was a kind of internal pamphlet/brochure which was distributed to its members.

Therefore, no case is made out against respondent Nos.4 and 5 who were subsequently impleaded in the petition.

13. On the facts and in the circumstances of the case, this Court is of the opinion that this is not a fit case where a formal proceedings for contempt should be drawn up and, therefore, notices issued to them will have to be discharged and the petition will have to be dismissed.

For the foregoing reasons, the contempt proceedings are dropped. The notices issued to the respondents are discharged and the petition is dismissed.

K.K.T. Matters disposed of.

UDHO DASS

v.

STATE OF HARYANA & ORS.

(Civil Appeal No. 3677 of 2010)

APRIL 21, 2010

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

Land Acquisition Act, 1894:

Acquisition of land for setting up a housing project – Compensation – HELD: Once a conclusion is reached that there was the possibility of the acquired land being used for putting up buildings in the immediate or near future, such conclusion would be sufficient to hold that the acquired land had a building potentiality and proceed to determine its market value taking into account the increase in price attributable to such building potentiality – If the compensation proceedings continued over a period of almost 20 years, as in the instant case, the landowner is entitled to say that the potential of the land acquired from him must also be adjudged keeping in view the development in the area spread over the period of 20 years, if the evidence so permits, and cannot be limited to the near future alone – In the instant case, admittedly the land acquired in the year 1990 had great potential, and has been completely urbanized as huge residential and commercial complexes had come up in the area during the last ten or fifteen years – Thus, the landowners are fully entitled to say that the potential of the land acquired was not fully recognized by the High Court and the authorities below – In the circumstances, compensation @ Rs.225/- per sq. yard, which would come to Rs.10,89,000/- per acre, on the basis of the compensation awarded in respect of the neighbouring land pertaining to the year 1992, would be adequate.

Acquisition of lands for urban/commercial purposes – Compensation – HELD: Though the Act provides for payment of solatium, interest and the additional amount, but the 12% per annum increase hardly does justice to such land-owners, and judicial notice can be taken that increase in price in such cases is upto 100% a year – Judicial notice.

Land of the appellants was acquired for a housing project, pursuant to the Notification u/s 4 of the Land Acquisition Act, 1894 issued in May 1990. The Collector awarded the compensation at the rate of Rs.2,00,000/- per acre. The reference court applied the belting method and enhanced the compensation to Rs.6,05,000/- and 7,26,000/- per acre (@ Rs.125/- per sq. yard and Rs.150/- per sq. yard, respectively). The High Court further enhanced the compensation to Rs.6,53,000/- and Rs.7,74,400/- per acre (@ Rs.135/- and Rs.160/- per sq. yard).

In the instant appeals filed by the land-owners, it was contended for the appellants that the compensation awarded in the case of the adjoining land pertaining to the acquisition of the year 1992 at the rate of Rs.250/- per sq. yard should have been made the basis in the instant case also; and that the High Court as also the authorities below did not appreciate the full potential of the land, particularly, in view of the fact that though the compensation proceedings started in the year 1990, the same were still continuing.

Allowing the appeals, the Court

HELD: 1.1. Once a conclusion is reached that there was the possibility of the acquired land being used for putting up buildings in the immediate or near future, such conclusion would be sufficient to hold that the acquired land had a building potentiality and proceed to determine its market value taking into account the increase in price

attributable to such building potentiality. [para 15] [911-C-D]

1.2. Admittedly, in the instant case, the land is situated within the municipal limits of the district headquarters adjoining Delhi and within the National Capital Region. The acquired land is situated on both sides of the road. It must also be noticed that enormous developments have taken place in the area, as huge residential and commercial complexes have came up, resulting in enormous increase in the price of the acquired land in the last 15-20 years. [para 14] [909-F-H; 910-A-D]

P. Rama Reddi and Others vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and others **1995 (1) SCR 584 = (1995) 2 SCC 305, relied on.**

Executive Director Vs. Sarat Chandra Bisoi and Another **(2000) 6 SCC 326, held inapplicable.**

1.3. Although, in the present matter, sale instances around or near about the date of Notification of the present acquisition are available, yet these cannot justify or explain the potential of a particular piece of land on the date of acquisition as the potential can be recognized only some time in the future and it is open to a landowner claimant to contend that the potential can be examined first at the time of the s.18 reference, the first appeal in the High Court or in the Supreme Court in appeal as well. The Collectors, as agents of the State Government, are extraordinarily chary in awarding compensation and, as in the present case, the land owners have had to fight for decades to get their due. The land was notified for acquisition in May 1990. The collector rendered his award in May 1993 awarding a sum of Rs.2,00,000/- per acre. The reference court by its award dated January 2001 increased the compensation to Rs.125/- per square yard for the land of the road behind the ECE factory and

Rs.150/- per square yard for the land abutting the road which would come to Rs.6,05,000/- and Rs.7,26,000/-, respectively, for the two pieces of land. This, itself is a huge increase vis-a-vis the Collector's award. The High Court by its judgment dated 24.9.2007 enhanced the compensation for the two categories to Rs.135 and 160 respectively, making it Rs.6,53,400/- and Rs.7,74,400/-. This is the compensation which ought to have been awarded by the Collector at the time of his award on 12th May 1993. This has, however, come to the land-owners for the first time as a result of the judgment of the High Court after a full 17 years from the date of Notification u/s 4 and 14 years from the date of the award of the Collector on which date the possession of the land must have been taken from the landowner. [para 17] [911-F-H; 912-A-E]

1.4. The landowners were entitled to the compensation fixed by the High Court on the date of the award of the Collector and had this amount been made available to them on that date, it would have been possible for them to rehabilitate their holdings in some other place. This exercise has been defeated for the simple reason that the payment of compensation has been spread over almost two decades. In this view of the matter, a landowner is entitled to say that if the compensation proceedings continued over a period of almost 20 years, as in the instant case, the potential of the land acquired from him must also be adjudged keeping in view the development in the area spread over the period of 20 years, if the evidence so permits, and cannot be limited to the near future alone. Therefore, in the circumstances, the appellants were entitled to say that the potential of the acquired land had not been fully recognized by the High Court or by the reference court. However, caution should be taken that this broad principle would be applicable where the possession of

the land has been taken pursuant to the proceedings under an acquiring Act and not to those cases where land is already in possession of the Government and is subsequently acquired. [para 17] [912-G-H; 913-A-D]

1.5. Insofar the land which is to be used for residential purposes is concerned, a plot away from the main road is often of more value, as the noise and the air pollution alongside the arterial roads is almost unbearable. The belting system in the facts of the present case would thus not be permissible. [para 20] [914-D-E]

2. Though the Act also provides for the payment of the solatium, interest and an additional amount but it is common knowledge that even these payments do not keep pace with the astronomical rise in prices and cannot fully compensate for the acquisition of the land and the payment of the compensation in driblets. The 12% per annum increase which courts have often found to be adequate in compensation matters hardly does justice to those land-owners whose lands have been acquired, as judicial notice can be taken of the fact that the increase is not 10 or 12 or 15% per year but is often upto 100% a year for the land which has the potential of being urbanized and commercialized such, as in the present case. [para 17] [912-D-G]

3. Compensation based exclusively on sale instances is a factor which creates an extremely grim situation. There is wide spread tendency to under value sale prices. The provision of Collector's rates has only marginally corrected the anomaly, as these rates are also abnormally low and do not reflect the true value. The sale instances relied upon by the parties do not accurately reflect the potential of the acquired land. For the purpose of the present case, the award of the High Court in the case of the 1992 acquisition of the lands in the neighbouring village, granting a sum of Rs.250/- per

square yard as compensation is the minimal proper base. Therefore, a sum of Rs.225/- per square yard, which would come Rs.10,89,000/- per acre, is awarded, which would be the adequate compensation in the present case. For arriving at this figure not only the value of the land has been computed on the date of the Notification u/s 4 but its potential has also been recognized on the basis of evidence of development in the area around the acquired lands. It is directed that the landowners will have all statutory benefits that they would be entitled to as a consequence of this order. [para 18,19, 21 and 23] [913-F-H; 914-G-H; 915-C]

Case Law Reference:

1995 (1) SCR 584	**relied on**	**para 10**
(2000) 6 SCC 326	**held inapplicable**	**para 13**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 4571 of 2008.

From the Judgment and order dated 24.9.2007 of the High Court of Punjab & Haryana at Chandigarh in Regular First Appeal No. 1991 of 2001 in LAC No. 228 of 1997.

WITH

S.L.P.(C)...CC No. 10008 & 10015 of 2009, SLP(C) No. 10191 of 2008, IA Nos. 1-2 In S.L.P.(C)...CC No. 10193 of 2009, S.L.P.(C)...CC No. 10239 of 2009, S.L.P.(C)...CC No. 10350 of 2009, S.L.P.(C)...CC No. 10429 of 2009, S.L.P.(C)...CC No. 10431 of 2009, S.L.P.(C)...CC No. 10521 of 2009, SLP(C) No. 11303-11312 of 2008, SLP(C) No. 12240 of 2010, SLP(C) No. 1318 of 2010, SLP(C) No. 14151 of 2008, SLP(C) No. 14363 of 2009, SLP(C) No. 14514 of 2009, SLP(C) No. 14515 of 2009, SLP(C) No. 14523 of 2009, SLP(C) No. 14946 of 2009, SLP(C) No. 15007 of 2009, SLP(C) No. 15041 of 2009, SLP(C) No. 15099 of 2009, SLP(C) No. 15100 of 2009, SLP(C) No. 15356 of 2009, SLP(C) No. 15593 of 2009,

SLP(C) No. 16088 of 2008, SLP(C) No. 16359 of 2008, SLP(C) No. 16676 of 2009, SLP(C) No. 16694 of 2009, SLP(C) No. 16861 of 2008, SLP(C) No. 17005 of 2009, SLP(C) No. 17068 of 2009, SLP(C) No. 17111 of 2008, SLP(C) No. 17175 of 2009, SLP(C) No. 17736 of 2008, SLP(C) No. 18107 of 2009, SLP(C) No. 18168 of 2008, SLP(C) No. 18314 of 2008, SLP(C) No. 19934 of 2008, SLP(C) No. 19938 of 2008, SLP(C) No. 20147 of 2009, SLP(C) No. 22751 of 2009, SLP(C) No. 23350 of 2009, SLP(C) No. 23357 of 2009, SLP(C) No. 23926 of 2008, SLP(C) No. 31649 of 2009, SLP(C) No. 31689-31701 of 2009, SLP(C) No. 31838 of 2009, SLP(C) No. 33116 of 2009, SLP(C) No. 35055-35058 of 2009, SLP(C) No. 4663 of 2010, SLP(C) No. 5537 of 2008, S.L.P.(C)...CC No. 6825-6831 of 2008, S.L.P.(C)...CC No. 9252 of 2009, S.L.P.(C)...CC No. 9310 of 2009, IA Nos. 1-5 In SLP(C) No, 9743 of 2010, SLP(C) No. 9751 of 2008, SLP(C) No. 9977 of 2008.

P.S. Patwalia, Nirmal Chopra, Shakeel Ahmed, Vivek Sharma, Yash Pal Dhingra, Debasis Misra, Chander Shekhar Ashri, Dr. Kailash Chand, Nirmal Chopra, Govind Goel, Ambuj Aggarwal, Nitin Singh, C.D. Singh, Naresh Bakshi, M.L. Sharma, Manjit Singh, Harikesh Singh, Kamal Mohan Gupta, Aman Preet Singh Rahi, Ajay Singh, Saswt K. Acharya, Tushar Bakshi for the appearing parties.

The Order of the Court was delivered

O R D E R

1. Permission to file SLPs is granted.

2. Delay condoned in filing substitution applications.

3. Applications for substitution are allowed.

4. Delay condoned in filing the special leave petitions.

5. Leave granted.

6. Vide Notification dated 17th May, 1990 under Section 4 of the Land Acquisition Act, 1894, (hereinafter called `The Act') 162.5 acres of land situated in village Patti Musalmanan was notified for setting up of a housing project in Sector 12, Sonepat. This Notification was followed by a declaration under Section 6 of the Act on 16th May 1991. The Collector rendered his Award on 12th May 1993 awarding a sum of Rs. 2,00,000/- (Rupees two lakhs) per acre as compensation for the entire land.

7. On a reference under Sec. 18 of the Act to the Additional District Judge, Sonepat, the compensation was enhanced to Rs.125/- per sq. yard for the land behind the E.C.E. factory situated away and on the left side of the Sonepat Bahalgarh road and Rs.150/- per square yard on the right side abutting the aforesaid road. In arriving at these different figures the Reference Court held that the land on the left side did not abut the road and it had therefore less potential value vis-a-vis. the land on the right side which touched the road.

8. The High Court in first appeal further enhanced the compensation from Rs.125/- to Rs.135/- for land on the left side and to Rs.160/- from Rs.150/- on the right side on the principle applied by the Reference Court. The present set of appeals at the instance of the landowners have been filed impugning the judgments of the courts below.

9. We have gone through the record and have heard the learned counsel for the parties at length.

10. It has been submitted by Mr. A.K. Srivastava, the learned senior counsel in most of the appeals, that the appellants were entitled to take the Award for the acquisition in village Jamalpur Kalan which pertained to an acquisition of the year 1992, and which had led to a compensation of Rs.250/- per square yard, as the basis for the determination of the compensation in the present case as well as the land of Jamalpur Kalan had a common boundary with the land acquired

behind the E.C.E. factory with a small deduction in the price as the present acquisition was of the year 1990. In the alternative he has submitted that the compensation ought to have been settled on the basis of the sale instances exhibits P.2 to P.14 which showed a substantial increase yearwise from Rs.300/- per sq. yd in 1984 (Ext. P.2) to Rs. 600/- in 1989 (Ext. P.14). He has also submitted that as the land had been notified for the purpose of a housing project no distinction could be made between the land abutting the main road and that which was slightly away and the belting principle applied by the District Judge as well as the High Court was not called for. For this argument the learned counsel has placed reliance on *P. Rama Reddi and Others vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and others* (1995) 2 SCC 305. It has also been submitted that though the potentiality of the land had admittedly been noted by the District Judge and the High Court but the full potential of land had not been appreciated or recognized and as such it was open to this Court to reappraise the evidence and to arrive at a fair assessment on this aspect, as the compensation proceedings started in the year 1990, were still continuing.

11. Mr. P.S. Patwalia, the learned senior counsel for some of the other claimants has supplemented the arguments made by Mr. Srivastava and has also placed reliance on the award in the case of village Jamalpur Kalan. Some of the other counsel have also raised certain issues but as they are substantially covered by the submissions noted above we need not refer to them.

12. Mr. Shakil Ahmed, the learned counsel appearing in SLP(C) No. 18312/2008 has further pointed out that the proper compensation for the building and trees had not been correctly awarded and the compensation under these heads needed to be substantially enhanced.

13. The arguments raised by the learned counsel for the claimants have been controverted by Mr. Govind Goel, the

learned counsel appearing for the beneficiary-respondents. He has submitted that the Award in the case of Jamalpur Kalan could not be taken into account for the primary reason that it pertained to an acquisition of 1992 whereas the present one was of 1990 and the District Judge as well as the High Court had fully recognized the potential of the land and had accorded compensation on that basis. He has also submitted that the reliance by the claimants on the sale instances Ext. P.2 to P.14 was misplaced as they pertained to very small areas of one Biswa (50 sq. yd) and the other sale instances put on record by the claimants themselves (Ext.p.15 and P.16) pertaining to two sales made on 28th April, 1989 for 4400 square yards at Rs.120/- per square yard and P.16 for 1600 square yards at Rs.122/- per square yard had in fact been accepted by the Courts below with a marginal increase towards the potential of the acquired land. It has also been submitted that in the light of the fact that these were sale instances pertaining to this very village that is Patti Musalmanan there was absolutely no justification in going to the Award pertaining to Jamalpur Kalan for determining the compensation. He has finally submitted that belting in the facts of the case was fully justified and in this connection has placed reliance on *Executive Director Vs. Sarat Chandra Bisoi and Another* (2000) 6 SCC 326)

14. We have heard the learned counsel for the parties and gone through the record. The location of the land in order to appreciate its potential for the purpose of compensation has first to be understood.. Admittedly, the land is situated within the municipal limits of Sonepat which is a district headquarter adjoining Delhi and within the National Capital Region. The distance between Bahalgarh, a small township on the Grand Trunk Road, National Highway No.1, built five centuries ago by Sher Shah Suri (and arguably India's most important and strategic highway and the lifeline between the rest of India and the north and northwest), and Sonepat is 7 km., as per the indication on the National Highway itself. The acquired land is situated on both sides of the road leading from Bahalgarh to

Sonepat with some portions touching the road side and some portion slightly away and situated behind the ECE factory. It is, however, the admitted position and (we have seen the location on the maps that have been produced before us) that the land behind the ECE factory adjoins the area of village Jamalpur Kalan which had been acquired in the year 1992 and which the appellants claim should be made the basis for determining compensation in the present matter as well. It must also be noticed that the enormous development from the Delhi border alongside the Grand Trunk Road and well beyond the Bahalgarh – Sonepat bifurcation is now a matter for all to see and we have seen this on the maps produced in Court as well, as huge residential and commercial areas have been developed with a mind boggling increase in the price of agricultural land in the last 15 or 20 years. While dealing with the question of the potential value of the land acquired this Court in P. Rama Reddy's case (supra) observed that several matters had to keep in mind; they being (and we quote),

> "(i) the situation of the acquired land vis-a-vis the city or the town or village which had been growing in size because of its commercial, industrial, educational, religious or any other kind of importance or because of its explosive population;
>
> (ii) the suitability of the acquired land for putting up the buildings, be they residential, commercial or industrial, as the case may be;
>
> (iii) possibility of obtaining water and electric supply for occupants of buildings to be put up on that land;
>
> (iv) absence of statutory impediments or the like for using th acquired land for building purposes;
>
> (v) existence of highways, public roads, layouts of building plots or developed residential extensions in the vicinity or close proximity of the acquired land;

(vi) benefits or advantages or educational institutions, health care centres, or the like in the surrounding areas of the acquired land which may become available to the occupiers of buildings, if built on the acquired land;

(vii) and lands around the acquired land or the acquired land itself being in demand for building purposes, to specify a few.

15. The material to be so placed on record or made available in respect of the said matters and the like, cannot have the needed evidentary value for concluding that the acquired land being used for building purposes in the immediate or near future unless the same is supported by reliable documentary evidence, as far as the circumstances permit. When once a conclusion is reached that there was the possibility of the acquired land being used for putting up buildings in the immediate or near future, such conclusion would be sufficient to hold that the acquired land had a building potentiality and proceed to determine its market value taking into account the increase in price attributable to such building potentiality."

16. As already indicated above, these are the broad factors that we too have kept in mind.

17. Although, in the present matter, sale instances around or near abouts the date of Notification of the present acquisition are available yet these cannot justify or explain the potential of a particular piece of land on the date of acquisition as the potential can be recognized only some time in the future and it is open to a landowner claimant to contend that the potential can be examined first at the time of the Section 18 Reference, the first Appeal in the High Court or in the Supreme Court in appeal as well. We must also highlight that Collectors, as agents of the State Government, are extraordinarily chary in awarding compensation and the land owners have to fight for decades before they are able to get their due. We take the present case

as an example. The land was notified for acquisition in May 1990. The collector rendered his award in May 1993 awarding a sum of Rs.2,00,000/- per acre. The Reference Court by its award dated January 2001 increased the compensation to Rs.125 per square yard for the land of the road behind the ECE factory and Rs.150 per square yard for the land abutting the road which would come to Rs.6,05,000/- and Rs.7,26,000/- respectively for the two pieces of land. This itself is a huge increase vis-a-vis the Collector's award. The High Court in First Appeal by its judgment of 24th September 2007 enhanced the compensation for the two categories to Rs.135 and 160 respectively making it Rs.6,53,400/- and Rs.7,74,400/-. In other words, this is the compensation which ought to have been awarded by the Collector at the time of his award on 12th May 1993. This has, however, come to the land owner for the first time as a result of the judgment of the High Court which is under challenge in this appeal; in other words, a full 17 years from the date of Notification under Section 4 and 14 years from the date of the award of the Collector on which date the possession of the land must have been taken from the landowner. Concededly, the Act also provides for the payment of the solatium, interest and an additional amount but we are of the opinion, and it is common knowledge, that even these payments do not keep pace with the astronomical rise in prices in many parts of India, and most certainly in North India, in the land price and cannot fully compensate for the acquisition of the land and the payment of the compensation in driblets. The 12% per annum increase which Courts have often found to be adequate in compensation matters hardly does justice to those land owners whose land have been acquired as judicial notice can be taken of the fact that the increase is not 10 or 12 or 15% per year but is often upto 100% a year for land which has the potential of being urbanized and commercialized such as in the present case. Be that as it may, we must assume that the landowners were entitled to the compensation fixed by the High Court on the date of the award of the Collector and had this amount been made available to the landowners on that

date, it would have been possible for them to rehabilitate their holdings in some other place. This exercise has been defeated for the simple reason that the payment of compensation has been spread over almost two decades. In this view of the matter, we are of the opinion that a landowner is entitled to say that if the compensation proceedings continued over a period of almost 20 years as in the present case, the potential of the land acquired from him must also be adjudged keeping in view the development in the area spread over the period of 20 years if the evidence so permits and cannot be limited to the near future alone. We, therefore, feel that in the circumstances, the appellants herein were fully entitled to say that the potential of the acquired land had not been fully recognized by the High Court or by the Reference Court. We must add a word of caution here and emphasize that this broad principle would be applicable where the possession of the land has been taken pursuant to proceedings under an acquiring Act and not to those cases where land is already in possession of the Government and is subsequently acquired.

18. There is another unfortunate aspect which is for all to see and to which the Courts turn a Nelson's eye and pretend as if the problem does not exist. This is a factor which creates an extremely grim situation in a case of compensation based exclusively on sale instances. This is the wide spread tendency to under value sale prices. The provision of Collector's rates has only marginally corrected the anomaly, as these rates are also abnormally low and do not reflect the true value. Where does all this leave a landowner whose land is being compulsorily acquired as he has no control over the price on which some other landowner sells his property which is often the basis for compensation?

19. We are, therefore, of the opinion that the above sale instances relied upon by the parties do not accurately reflect the potential of the acquired land and the award of the High Court in the case of Jamalpur Kalan granting a sum of Rs.250/

- per square yard as compensation is the minimal proper base.

20. Mr. Goyal has, however, submitted that the belting system ordered by the reference and the High Court was the proper one in the circumstances, more particularly as it was well known that land alongside the road had more value vis.a.vis. the land away therefrom. He has, accordingly, submitted that the land behind the ECE factory which was not abutting the road needed to be given lower compensation. Mr. Goyal's reliance on Sarat Chandra's case for this argument is however to no avail. In this matter, agricultural land which had no potential for urbanization and commercialization had been acquired and it was on that basis, this Court held that the belting system was permissible. In the case before us, admittedly the land was acquired in the year 1990, had great potential value, and has been completely urbanized as huge residential complexes, industrial areas and estates and a huge education city have come up in the last ten or fifteen years. Moreover, insofar land which is to be used for residential purposes is concerned, a plot away from the main road is often of more value, as the noise and the air pollution alongside the arterial roads is almost unbearable. It is also significant that the land of Jamalpur Kalan was touching the rear side of the ECE factory and the High Court had granted compensation of Rs.250/- per square yard for the acquisition of the year 1992. We have also seen the site plan to satisfy ourselves and find that the land acquired from Jamalpur Kalan and the present land share a common boundary behind the ECE factory. The belting system in the facts of the present case would thus not be permissible.

21. We are, therefore, of the opinion as the said award pertained to the year 1992, a sum of Rs.225/- per square yard which would come Rs. 10,89000/- per acre would be the adequate compensation in the present case and for arriving at this figure not only have we computed the value of the land on the date of the Notification under Section 4 but have also recognized its potential on the basis of evidence of

development in the area around the Bahalgarh-Sonepat road.

22. Mr. Shakil Ahmed, the learned counsel appearing in one of the cases has also prayed that compensation for the building and trees awarded in his case was inadequate and needed to be enhanced. We are unable to accept this submission as there is no evidence with regard to the value of these buildings and trees.

23. For the reasons mentioned above, we allow these appeals and award a sum of Rs.225/- per square yard as compensation for the entire acquired land and further direct that the appellants will have all statutory benefits that they would be entitled to as a consequences of this order. We also direct the respondent State of Haryana or the beneficiaries, as the case may be, to pay the compensation as enhanced by us by the end of this year.

R.P. Appeals allowed.

MOHD. AYUB DAR

v.

STATE OF J & K

(Criminal Appeal No. 535 of 2009)

JULY 21, 2010

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

Ranbir Penal Code, Samvat 1989 (AD 1932) – ss. 302 and 120B r/w s. 3(3) of TADA Act – Conviction under – By designated court – On appeal, held: Conviction is justified – Prosecution was able to prove the homicidal death – The confession made by the accused was voluntary and truthful and hence reliable –The confessional statement was also corroborated by oral and documentary evidence – Once confession made u/s. 15 of TADA Act is accepted, no other evidence is required – Terrorist and Disruptive Activities (Prevention) Act, 1987 – ss. 3(3) and 15.

Terrorist and Disruptive Activities (Prevention) Act, 1987:

s.15 – Confessional statement under – Held: Can be used for proving non-TADA offences – Ranbir Penal Code, Samvat 1989 – ss. 302 and 120B.

s. 15 – Confessional Statement under – Evidentiary value – Need for corroboration – Held: If the confession is voluntary and truthful and relates to accused himself, no corroboration necessary – Conviction can be solely based on it.

J & K Code of Criminal Procedure, Samvat 1989 (AD 1933) – s. 374 – Applicability of – Conviction of accused for the offences under TADA Act and RPC, by designated court – Life imprisonment – Appeal to Supreme Court without confirmation of the order of imprisonment by High Court –

Power of Supreme Court to look into legality of life imprisonment in view of s. 374 – Held: In view of ss. 2(b), 14, 19 and 25 of TADA Act, for the trial before designated court, Cr.P.C., 1973 is applicable and not Cr.P.C., Samvat 1989 – Thus, s. 374 is not applicable – Therefore, Supreme Court can look into the legality of life imprisonment – Terrorists and Disruptive Activities (Prevention) Act, 1987 – ss. 2(b), 14(3), 19 and 25 – Ranbir Penal Code, Samvat 1989 – ss. 302 and 120 B.

Appellant-accused, alongwith four other accused persons, was prosecuted u/s. 3 (3) of Terrorist and Disruptive Activities (Prevention) Act, 1987 and u/s. 302 and 120B of Ranbir Penal Code, *Samvat* 1989. As per the prosecution case, two terrorist groups were apprehensive that the deceased would assume political leadership of Kashmir and that he was an agent of Indian Government. The accused persons, who were members of one of the militant groups, entered into a criminal conspiracy to eliminate the deceased. On the fateful day, the appellant-accused alongwith two of the accused went to the office of the deceased. One of the other two accused fired at the deceased, while the other accused fired in the air. Thereafter the three accused as per the direction of their head went underground. The appellant-accused was arrested in Delhi in some other case. Thereafter, he was arrested in the instant case. In his statement u/s. 15 of the TADA Act, made before PW-2, he confessed his crime and the involvement of other accused persons. The post-mortem of the dead body could not be carried out as a very serious law and order situation arose due to death of the deceased and on the demand of the followers of the deceased, the dead-body was handed over to them without the post-mortem being carried out.

Two of the assailants died during pendency of the

trial, while the other two were untraceable. Appellant-accused alone came to be charged. The designated court, relying on the evidence of the witnesses and the confessional statement of the appellant-accused, convicted him u/s. 3(3) of TADA Act and u/s. 302 of RPC and sentenced him to life imprisonment and fine with default stipulation. The instant appeal was filed against the order of the designated court by the accused.

Dismissing the appeal, the Court

HELD: 1. It is not correct to say that the life imprisonment ordered by the trial court was liable to be confirmed by the High Court and the same having not been done, this Court could not look into the question of legality of the life imprisonment because u/s. 374 of Cr.P.C., *Samvat* 1989, as applicable to Jammu and Kashmir, even if a life imprisonment ordered by the court is that State is required to be confirmed, it is specifically provided in Section 14(3) of the Terrorist and Disruptive Activities (Prevention) Act that the designated court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offences as if it were the Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before the Court of Session. The word "Code" as defined u/s. 2(b) of the TADA Act, means the Code of Criminal Procedure, 1973. Therefore, it is clear that the trial has to be conducted in accordance with the Cr.P.C., 1973 and not in accordance with the Cr.P.C., *Samvat* 1989 as applicable to the State of Jammu and Kashmir. Under Section 19(1) of the TADA Act, an appeal is provided against the judgment, sentence or order, not being an interlocutory order by a designated court to the Supreme Court of India. Sub-section (2) thereof provides that, except the cases mentioned under sub-section (1), no appeal or revision shall lie to any court from any

judgment, sentence or order including an interlocutory order of a designated court. Section 25 of the TADA Act provides that the provisions of the TADA Act or any Rule thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the TADA Act or in any instrument having effect by virtue of any enactment other than this Act. In view of these provisions there will be no question of applicability of Section 374 of Cr.P.C., *Samvat* **1989. [Para 10] [930-A-H]**

2.1. It is not correct to say that *de hors* the confession of the accused, the prosecution has not been able to prove that the accused/appellant was one of the accused persons present alongwith the other accused persons who had fired at the deceased. The prosecution has certainly been able to prove homicidal death of the deceased by being shot at. True it is that no post mortem was conducted, however, prosecution has given proper explanation that the post mortem could not have been conducted due to angry public reaction. However, in-spite of that, there is good evidence to suggest that the deceased died of the bullet injuries almost immediately after he was fired. All this could not have been possible unless the assailants had entered into conspiracy to murder the deceased. It was in pursuance of that conspiracy alone that the assailants entered the chamber of the deceased and fired at him. Seeing the prosecution evidence as it is, if all the three accused came together and approached the chamber of the deceased and one of them fired at him, there will be no question of only the individual liability. Therefore, the trial court was right in convicting the accused u/s. 3 (3) of the TADA Act. [Paras 17 and 18] [936-B, F-H; 937-A-D]

2.2. Whether the appellant/accused was one of the assailants, could have been proved by direct evidence

firstly or alternatively or in addition to it, by the confessional statement recorded u/s. 15 of the TADA Act. If the confessional statement stands the acid test on credibility, voluntariness and truthfulness, then that would be sufficient to pin the guilt of the accused. [Para 18] [937-D-F]

2.3. If the confession made by the accused is voluntary and truthful and relates to the accused himself, then no further corroboration is necessary and a conviction of the accused can be solely based on it. Such confessional statement is admissible as a substantive piece of evidence. The said confession need not be tested for the contradictions to be found in the confession of the co-accused. It is for that reason that even if the other oral evidence goes counter to the statements made in the confession, the confession can be found to be voluntary and reliable and it can become the basis of the conviction. In the instant case, there is ample corroboration to the confession in the oral evidence as well as the documentary evidence in shape of a chit, which is referred to in the said confession. [Para 27] [945-B-D]

S.N. Dube vs. N.B. Bhoir and Ors. **2000 (2) SCC 254;** *Ravinder Singh alias Bittu vs. State of Maharashtra* **2002 (9) SCC 55, relied on.**

Lokeman Shah and Anr. vs. State of W.B. etc. etc. **2001 (5) SCC 235;** *Abdulvahab Abdul Majid Shaikh and Ors. vs. State of Gujarat etc. etc.* **2007 (9) SCC 293, referred to.**

2.4. The only test which the court has to apply is whether the confession was voluntary and free of coercion, threat or inducement and whether sufficient caution is taken by the police officer who recorded the confession. Once the confession passes that test, it can become the basis of the conviction. The confession in the

instant case was free from all the aforementioned defects and was voluntary. It was properly recorded and it was also recorded in the free atmosphere, as PW-2 the Police Officer who recorded the confession had given sufficient time to the accused for the reflection. The accused had also at no point of time complained regarding any coercion to any authority. The defence, as is apparent from examination of the appellant-accused u/s. 313 Cr.P.C., 1973 is that he had not given any statement at all. [Paras 24 and 28] [946-E-F; 942-E-G]

Kartar Singh vs. State of Punjab **1994 (3) SCC 569, followed.**

State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru etc. etc. **2005 (11) SCC 600, relied on.**

Mohd. Ayubdhar and Anr. vs. State of NCT of Delhi **2000 (10) SCC 296;** *Prakash Kumar @ Prakash Bhutto vs. State of Gujarat* **2007 (4) SCC 266;** *Abdulvahab Abdul Majid Shaikh and Ors. vs. State of Gujarat etc. etc.* **2007 (9) SCC 293, distinguished.**

State through Superintendent of Police, CBI/SIT vs. Nalini and Ors. **1999 (5) SCC 253;** *Lokeman Shah and Anr. vs. State of W.B. etc. etc.* **2001 (5) SCC 235;** *Abdulvahab Abdul Majid Shaikh and Ors. vs. State of Gujarat etc. etc.* **2007 (9) SCC 293, referred to.**

2.5. The appellant on one hand has chosen to rely upon a part of the confession and on the other hand, he asserts that he had, at no point of time, made any confessional statement. This shows the hollowness of defence on the part of the appellant. The confession was indeed made by the appellant and the details given in the confession and the meticulous planning that went behind committing murder of the deceased which has been

reflected in the confession, not only render it voluntary, but truthful also. This confession is not only a good, voluntary and truthful confession but a reliable one also and the trial court has committed no mistake whatsoever in relying upon the said confession. Once the confession made u/s. 15 of the TADA Act is accepted, there is no necessity of any other evidence being required. The way the appellant himself has worked for the success of the conspiracy, the way he has handled the guns and accompanied two other assailants to the house of the deceased and the manner in which the plan was executed convinces that the order is absolutely correct. [Paras 32 and 33] [950-D-H; 951-A-C]

2.6. The whole cross-examination does not dent the case of the prosecution and it can be inferred that the criticism against the confession that it was not recorded in the language of the accused is not justified. There is absolutely no effort made by the defence to establish that the statement was not made in the language of the accused persons. The confession also cannot be foiled on the ground that the original confessional statement was not on record as the original confession was very much available on the record. [Para 21] [940-D-F]

2.7. The failure to examine two-persons ('GS' and 'GQ) as witnesses, would be of no consequence looking at the overall evidence of the witnesses, more particularly, all those who were present at the spot. It cannot be gathered that 'GS' was present at the time of incident. Insofar as the evidence of 'GQ' is concerned, it was pointed out by PW-17 that said person was already dead at the time of trial. [Para 22] [940-G-H; 941-A-B]

3. It is not correct to say that the confession u/s. 15 of TADA Act could have been used only against the TADA Act offences and it cannot be used for a Non-TADA

offence like Section 302 of the RPC and it could not even be read in order to prove the said offence. The facts relating to Section 3(3) of the TADA Act and the facts relating to Section 302 of RPC are completely inter-mixed in this matter. They are the part of the same transaction. A plain reading of the confession clearly goes to show that the accused was guilty of conspiring or attempting to commit or advocating, abetting, advising or inciting or knowingly facilitating the commission of a terrorist act or any act preparatory to a terrorist act. The act of killing the deceased comes within the definition of 'terrorist act' as given in Section 2 (h) r/w. Section 3(1) of the TADA Act. [Para 30] [947-A-E]

Kartar Singh vs. State of Punjab **1994 (3) SCC 569, followed.**

Case Law Reference:

2000 (10) SCC 296	**distinguished.**	**Para 23**
2007 (4) SCC 266	**distinguished.**	**Para 23**
2007 (9) SCC 293	**distinguished.**	**Para 23**
	referred to.	**Para 27**
1994 (3) SCC 569	**followed.**	**Para 24**
2005 (11) SCC 600	**relied on.**	**Para 25**
1999 (5) SCC 253	**referred to.**	**Para 26**
2000 (2) SCC 254	**relied on.**	**Para 27**
2002 (9) SCC 55	**relied on.**	**Para 27**
2001 (5) SCC 235	**referred to.**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 535 of 2009.

From the Judgment & Order dated 7.3.2009 of the 3rd Additional Sessions Judge, Jammu (Designated Court under TADA) in File No. 101/Ch.

Sushil Kumar, Aditya Kumar, Amit Kumar Sharma, E.C. Agrawala for the Appellant.

H.P. Rawal, ASG, A. Mariarputham, Ranjana Narayan, P.K. Dey, A.K. Sharma, Shail Kumar Bhat, B. Krishna Prasad, Anis Suhrawardy, S. Mehndi Imam, Tabrez Ahmad, Mohd, Parvez Dabas for the Respondent.

The Judgment of the Court was delivered by

V. S. SIRPURKAR, J. 1. Appellant Mohd. Ayub Dar S/o Abdul Ahad – Original accused no.1 challenges his conviction for the offence punishable under Section 3 (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (In short "TADA ACT"), as also for the offence punishable under Section 302 of the RPC. Originally, the five accused persons were tried in respect of murder of Mirwaiz Moulvi Farooq, which took place on 21.5.1990, at about 11 O' clock in the morning. Accused no. 2 Abdul Rehman Shigan and accused no.3 Abdulla Bangroo expired during pendency of the trial, while the other two accused persons namely Javed Ahmed Bhat @ Ajmal Khan @ Ditta s/o. Habibulla Bhat and Zahoor Ahmed @ Bilal @ Zana were untraceable. Thus, out of the five accused persons, we are concerned only with accused no.1 (appellant herein) Mohd. Ayub Dar S/o Abdul Ahad.

2. It so happened that on 21.5.1990, at about 11 O' clock in the morning, three unknown terrorists entered into the house of Mirwaiz Moulvi Farooq with the intention of killing him and Moulvi Farooq was severely injured by gun-shot. He, ultimately, succumbed to the injuries in Soura Hospital, Srinagar, and, therefore, the offence registered u/s. 307 of the RPC originally was converted into the offence u/s. 302 of the RPC on the same day. The initial investigation was done by Police Station,

Nageen, which was thereafter transferred to CBI under the orders of the Government of India vide Notification No.228/3/90-AVD.II, dated 11.06.90. The house of Moulvi Farooq was in New Colony, Nageen, Shrinagar, known as '*Mirwaiz Manzil*', wherein one small doubled storeyed building was constructed for the purpose of residential Office of Mirwaiz. This small Office had two rooms on the ground floor and one big hall on the first floor. In one of the two rooms; on the ground floor, the Personal Assistant of Mirwaiz Moulvi Farooq used to sit and the second room was adjacent to the said room, which had office of Mirwaiz Moulvi Farooq. The entrance to the Office of Mirwaiz Moulvi Farooq was from the room of his Personal Assistant.

3. It was the prosecution case that, due to popularity of Mirwaiz Moulvi Farooq, two terrorists outfits namely Jamt-e-Islami in general and Hizbul-Mujahideen in particular were apprehensive that Moulvi Farooq would eventually assume political leadership of Kashmir. They also viewed him as an agent of Government of India working against the interests of militant groups. Therefore, in the year 1990 itself, in the month of April, accused Abdulla Bangroo, Javed Ahmed Bhat @ Ajmal Khan @ Bitta and Mohd. Ayub Dar @ Ishfaq – present appellant, who belong to Hizbul Mujahideen, entered into a criminal conspiracy to eliminate Mirwaiz Moulvi Farooq. Accused Abdulla Bangroo, who was then heading Hizbul Mujahideen, instructed Javed Ahmed Bhat @ Ajmal Khan and Mohd. Ayub Dar @ Ishfaq – present appellant to plan elimination of Mirwaiz Moulvi Farooq. Javed Ahmed Bhat @ Ajmal Khan was then working as an Area Commander of Hizbul-Mujahideen in the downtown area of Srinagar; whereas the appellant/accused was working as a Group Commander in that very area. Later on, Abdul Rehman Shigan @ Inayat and Zahoor Ahmed @ Bilal @ Zana also joined the conspiracy. It came out in the investigation that, in the second week of May, 1990, under the instructions of Javed Ahmed Bhat @ Ajmal Khan, Mohd. Ayub Dar @ Ishfaq – present appellant and Abdul Rehman Shigan @ Inayat had visited the residence of Moulvi Farooq

at Nageen, Srinagar and had requested him for financial help to their militant organization i.e. Hizbul Mujahideen. Moulvi Farooq had agreed to help them and had asked them to meet after 2/3 days during the morning hours. Thereafter, two accused surveyed the area as per their plan and informed the details to Javed Ahmed Bhat @ Ajmal Khan. It was on 21.05.1990 that the three accused namely Mohd Ayub Dar @ Ishfaq (present appellant), Abdul Rehman Shingan @ Inayat and Zahoor Ahmed @ Bilal @ Zana armed with loaded pistol visited the 'Mirwaiz Manzil' at Nageen. Accused Javed Ahmed Bhat @ Bilal had instructed the appellant that, out of the three accused persons, Zahoor Ahmed @ Bilal would fire on Moulvi Farooq and the remaining two accused persons namely Ayub Dar i.e. present appellant and Abdul Rehman Shingan were to provide cover to Zahoor Ahmed @ Bilal. As per the plan, they all reached the gate of Mirwaiz Manzil and met Maqbool Shah, the gate-keeper (PW-16) and informed him that they wanted to meet Moulvi Farooq. Maqbool Shah (PW-16) then asked Gulam Qadir Sofi, the gardener, to take them to the Personal Assistant as he himself was going to the market. Accordingly, the gardener – Gulam Qadir Sofi took the three to the Personal Assistant namely Saidur Rehman (PW-17), who asked them about their names and one of them disclosed his fake name as Gulzar Farooq r/o. Batmaloo. That name was written by the Personal Assistant on a slip of paper and the said slip was sent inside the room of Moulvi Farooq through the gardener Gulam Qadir Sofi. After sometime, Moulvi Farooq called the three accused inside the Office, on which Zahoor Ahmed @ Bilal entered the room of Moulvi Farooq and the remaining two accused persons including the present appellant took up position in the PA's room. On entering the room of Moulvi Farooq, Zahoor Ahmed @ Bilal fired several rounds on Moulvi Farooq from his pistol and immediately, accused Inayat also fired from his pistol in the air while coming out of PA's room, which hit the outside wall of the Office. On hearing the sound of firing, the gardener came inside the Office and tried to catch

hold of Ishfaq, who was trying to escape. However, all the accused persons escaped giving a push to the Gardener Gulam Qadir Sofi. Accused Bilal also tried to run away, but he was caught by Gulam Qadir Sofi. There was a scuffle between the two, in which Bilal sustained an injury below his right eye. Later, after firing one round from his pistol, Bilal also managed to escape. The accused persons ran towards Kashmir University, who were followed by Gulam Qadir Sofi upto the main road and near the University Gate, the assailants ran towards Soura through the University compound and reached Chhatargaon in the afternoon of 21.05.1990. They then reported killing of Moulvi Farooq to Abdulla Bangroo and Ajmal Khan. All the three accused persons were directed by Abdulla Bangroo and Ajmal Khan to go underground for sometime.

4. The prosecution urged that appellant Mohd Ayub Dar @ Ishfaq had visited Pakistan, where he was trained in the handling of firearms and explosives. He was involved in a number of other terrorists' cases and was arrested in Delhi by the Delhi Police on 6.5.1991. He was further arrested in the present case on 15.6.1991 by CBI. When his statement was recorded u/s. 15 of the TADA Act, he confessed the aforesaid crime and disclosed the names of other two assailants namely Abdul Rehman Sigan @ Inayat and Zahoor Ahmed @ Bilal. He also confessed regarding involvement of accused Abdulla Bangroo and Ajmal Khan in the crime.

5. Accused Abdul Rehman Singan @ Inayat, who was in the judicial custody in a case of CID, Srinagar, was also arrested in this case on 20.9.1990. He also confessed the guilt and corroborated the statement made by the present appellant.

6. After he was fired, injured Mirwaiz Moulvi Farooq was removed to Sher-e-Kashmir Institute of Medical Sciences, Soura by Manzoor Ahmed and Saffad Ahmed, who were his brothers-in-law and Nazir Ahmed Dar, a servant. He was examined by Dr. Abdul Mazid and was immediately operated thereupon. Dr. Afzak Wani, Head of the Department of

Neurosurgery, Institute of Medical Sciences, Soura was also consulted. But, at about 12.30 P.M., Mirwaiz Moulvi Farooq succumbed to the injuries in the hospital. Injury Report was prepared by Dr. Abdul Mazid. However, post mortem on the dead body could not be carried out as a very serious law and order situation ensued owing to death of Moulvi Farooq. A huge mob got collected at the spot and they demanded that the dead body of deceased be handed over to them without the post-mortem being carried out. The dead body was, ultimately handed over to the followers of Moulvi Farooq and the last rites were performed on the next day. His wearing apparels were seized and were referred to the Central Forensic Science Laboratory (C.F.S.L.) along with the bullets and empty cartridges seized from the place of occurrence. The C.F.S.L. opined that the wearing apparels were having holes corresponding to the injuries of the deceased. It was further opined that the empty fired cartridges which were seized, as also the bullets seized from the place of occurrence were fired from two types of small arms. The facts suggested that the present accused/appellant and Abdul Rehman Shigan @ Inayat had committed an offence u/s. 302 r/w. section 34 of the RPC, while the other accused persons namely Abdulla Bangroo @ Khalid, Javed Ahmed Bhat @ Ajmal Khan along with Mohd. Ayub Dar @ Ishfaq (present appellant) and Zahoor Ahmed @ Bilal @ Zana and Abdul Rehman Shigan @ Inayat had committed an offence under Section 3 (3) of the TADA Act, 1987.

7. Under the above circumstances, the appellant/accused alone came to be charged. About 24 witnesses came to be examined and the confessional statement recorded by A. K. Suri (PW-2), who was then working as S.P., CBI, came to be relied upon by the prosecution. The statement came to be recorded on 27.6.1991 after the accused/appellant was brought from Delhi to Srinagar.

8. The trial Court considered the evidence of all the

witnesses individually. The Court also took notice of the argument that copy of the First Information Report was not sent to the Court and came to the conclusion that the contention raised by the defence was not correct. The Court further came to the conclusion that there was nothing suspicious regarding non-sending of the First Information Report. The trial Court also rejected the argument of the defence that there were inconsistencies and contradictions in the evidence of prosecution witnesses inter-se. It pointed out that the minor discrepancies could not and did not matter in this case. It was, in fact, observed that the defence was not able to point out any material contradiction in the evidence of witnesses during the course of arguments. The trial Court came to the conclusion that non-performance of post-mortem did not matter as it was clear that Moulvi Farooq died due to gun-shot injuries. In fact, the trial Court accepted the evidence of Dr. Mohd. Afzal Wani (PW-6). Ultimately, the trial Court also accepted the confession given by the appellant. Relying upon the evidence, the trial Court convicted the accused/appellant for the offence u/s. 3 (3) of the TADA Act and u/s. 302 of the RPC. After hearing the accused person on the question of sentence, the trial Court awarded imprisonment for life with a fine of Rs.6,000/- and in default of payment of fine, the appellant was directed to suffer further imprisonment for six months for the offence u/s. 302 of the RPC. The appellant is also sentenced to undergo imprisonment for a period of five years and to pay a fine of Rs.5,000/- u/s. 3(3) of the TADA Act. In default of making the payment of fine, the accused was directed to undergo imprisonment for six months.

9. Lastly, the trial Court, following Section 374 of the J & K Code of Criminal Procedure, 1989, ordered that the imprisonment for life would be subject to confirmation by this Court since this Court is the appellate Court. It is this judgment which is being challenged before us.

10. Shri Sushil Kumar, learned Senior Counsel, initially

raised a preliminary argument to the effect that the life imprisonment ordered by the trial Court was liable to be confirmed by the High Court and the same not having been done, this Court could not look into the question of legality of the life imprisonment. The argument is based on Section 374 of the Criminal Procedure Code as applicable in the State of Jammu and Kashmir, under which even a life imprisonment ordered by the Court in that State is required to be confirmed. The argument is, however, not correct inasmuch as it is specifically provided in Section 14 (3) of the TADA Act that the Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offences as if it were the Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before the Court of Session. The word "Code" is defined u/s. 2 (b) of the TADA Act, wherein is it provided that the word "Code" means the Code of Criminal Procedure, 1973 (2 of 1974). Therefore, it is clear that the trial has to be conducted in accordance with the Criminal Procedure Code, 1973 and not in accordance with the Criminal Procedure Code as applicable to the State of Jammu and Kashmir. U/s. 19 (1) of the TADA Act, an appeal is provided against the judgment, sentence or order, not being an interlocutory order by a Designated Court to the Supreme Court of India. Sub-section (2) thereof provides that, except the cases mentioned under sub-section (1), no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Designated Court. Section 25 of the TADA Act provides that the provisions of the TADA Act or any Rule thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the TADA Act or in any instrument having effect by virtue of any enactment other than this Act. In view of these provisions on which Mr. Rawal, the learned Additional Solicitor General of CBI, relies upon, there will be no question of applicability of Section 374 of the Criminal Procedure Code as applicable to the State of Jammu and Kashmir. Realizing

this, Shri Sushil Kumar, learned Senior Counsel did not seriously press this objection, though considerable arguments were tendered before the Court earlier. In that view of the matter, the first question raised by learned Senior Counsel Shri Sushil Kumar is decided against the defence.

11. The main thrust of the argument of the learned Senior Counsel appearing on behalf of the appellant was that the prosecution has failed to prove the offence u/s. 302 of the RPC independently of the confession. It was urged that, if the confession is ignored, then there would remain no material to involve the accused. It is pointed out that the accused also stood convicted for the offence u/s. 3 (3) of the TADA Act, wherein he was awarded a punishment of five years and to pay a fine of Rs.5,000/- in default to suffer further imprisonment for six months. It is pointed out that the accused had already served out the sentence of five years. The learned Senior Counsel, therefore, did not seriously challenge his conviction u/s. 3 (3) of the TADA Act and instead, concentrated on the conviction for the offence u/s. 302 of the RPC. It was pointed out to us that there was no material to hold that the accused ever conspired or was a part of conspiracy to commit murder of Moulvi Farooq. The learned Senior Counsel urged that there was practically no evidence and the oral evidence tendered on behalf of the prosecution to prove the guilt of the appellant for both the offences was hopelessly vague and could not have been relied upon by the trial Court to convict the appellant of both the offences. The learned Senior Counsel took us through the evidence of prosecution witnesses and urged that the evidence of the witnesses is wholly unreliable and took the prosecution nowhere. By way of additional submission, the learned Senior Counsel urged that the trial Court erred in relying upon the confession recorded by A. K. Suri (PW-2) as the said confession could not have been accepted to be a genuine confession. It was urged that the said confession was neither in the language of the accused nor the accused had ever made any such confession, much less before the witness. It was then

pointed out that the original of the Confession made was also not available nor was placed before the Court. It was further suggested that the oral evidence runs counter to the statement made in the confession and therefore, the confession was untrustworthy.

12. Before considering the confession allegedly made by the appellant, we would take the stock of criticism made against the oral evidence. But even before that, to put the record straight, we would choose to place the clear-cut language of Section 3 (3) of the TADA Act, for which the appellant stands convicted. Section 3, sub section (3) of the TADA Act provides as under :

> "whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

13. We have carefully examined the appeal memo filed u/s. 19 of the TADA Act. Very strangely, we do not find any challenge to the conviction u/s. 3 (3) of the TADA Act. All through, the challenge is to the conviction for the offence u/s. 302, as also to Section 120-B r/w. Section 3 of the RPC. Conviction u/s. 3(3) of the TADA Act was not seriously challenged by Shri Sushil Kumar, learned Senior Counsel; perhaps, because the accused has already suffered more than five years of imprisonment, which was the sentence awarded to him for that offence.

14. It is in the backdrop of this factual situation that the oral evidence would have to be considered.

15. It was not seriously contested that Moulvi Farooq died of bullet injuries and that this was a case of homicidal death.

The first relevant witness amongst those who were present at the time of incident is Nazir Ahmed Dar S/o Mohd. Abdulla Dar (PW-11). He was a family servant in the house of Moulvi Shafat, who was the brother-in-law of Moulvi Farooq. He heard the sound of fire and went to see as to whether the sound of fire had come. He saw two persons jumping from the southern wall of Moulvi Farooq and going towards the southern side. He helped in arranging a vehicle and admitting Moulvi Farooq in the hospital. He was declared hostile as far as he failed to identify the accused. However, he admitted that he did not remember whether even the third person had also jumped from the wall. He also did not remember whether he has given description of the first man whom he saw jumping over the wall. He categorically suggested that the accused person in the Court was not there. His evidence is, therefore, of no consequence for the prosecution. The evidence of Zahid Ali Lone (PW-13), S/o Habib-ullah Lone, an Advocate by profession, is also of no consequence as he refused to even identify the accused and asserted that he did not see the accused. Mohd. Yasin s/o. Misri Khan (PW-14) was on the guard duty at the bungalow of Moulvi Farooq. In his presence, empty cartridge cover was seized from the courtyard of Moulvi Farooq by one Gunwant Singh. The witnesses so far considered by us only go to show that Moulvi Farooq had died homicidal death due to fire and some three persons had entered his house on that day, who escaped.

16. The evidence of Salam-id-Din S/o Mohd. Maqbool Shah (PW-15) is also of no consequence as he had neither seen the deceased nor the assailants. He only came to know about death of Moulvi Farooq. This witness was the Public Relations Officer of Moulvi Farooq. Mohd. Maqbul Shah S/o Khazir Muhammad Shah (PW-16) was the peon of Moulvi Farooq, but he was not on the spot when the incident took place. Much was made of the evidence of this witness that he had not identified the two persons who had come to Moulvi Farooq in the morning. However, it is clear that the two persons

that he was speaking about could not have been the accused persons as they had come at 9 O'clock to Moulvi's place and it is nobody's case that the accused persons had come at 9 O' clock in the morning. He had acted as a panch witness also. Saidur Rehman s/o. Amir Din (PW-17) was specifically referred by Shri Sushil Kumar, learned Senior Counsel. This witness was his Public Relations Officer (PRO)-cum-Personal Assistant (PA). According to him, after the death of Moulvi Farooq, he continued to work as a P.R.O. of his son Moulvi Umar Farooq. He claimed that, on the fateful day, his peon informed that three persons wanted to meet Moulvi Saheb. They were brought in and were made to sit in the Office. Their names were asked and one of them stated his name to be Gulzar Farooq. He did not remember the other two names. He claims that he made the name slip of Gulzar Farooq with his own pen and sent the same to Moulvi Saheb. The said slip (Exhibit D-16) was shown to him. He identified the same. He also identified his own signature. According to him, all the three persons went inside. He was engaged in conversation on telephone. Then he heard the sound of fire and suddenly the door of Moulvi Saheb's room opened and those persons fled away. He saw that Moulvi Farooq was lying in a pool of blood. He then spoke about Moulvi Farooq being transfered to the hospital and his death. He has confirmed that, while fleeing away, he saw a revolver in the hand of one of the boys. He also confirmed that the peon Gulam caught hold of one of the men, but he got away while fleeing himself. Even this witness has not identified the accused/appellant in the Court. He specifically contended that, since the incident was 13 years old, it would be difficult for him to identify any of the three persons. He specifically stated that there was nobody amongst them present in the Court. In fact, much could have been done by cross-examining this witness by the prosecution for the reasons unknown. Even that was not done.

17. Amjad Parvez Munir was examined as PW-18 who spoke about the seizures and the panchas. PW-19 is Javaid

Firdous S/o Alam Din, who is resident of Lucknow and was a Professor working in the Kashmir University. There is nothing that he has spoken about the accused. In fact, we do not know why he was cross-examined. Same is the story about Shafat Ahmad (PW-20) S/o Late Moulvi Gulam Rasool, who is brother-in-law of deceased Late Moulvi Mohd. Farooq. He also did not see any man, though he heard the noise of fire-shots. His evidence also would be of no consequence except to prove that Moulvi Farooq was shot at and that he died in the hospital. Mohd. Tariq s/o. Gulam Hussain (PW-21) is another witness who is a witness on seizure of cover of bullet from the spot. Nothing has come out in his cross-examination. Methlas Kumar Jha is another witness who is posted as a Dy.S.P. CBI SFC II. He had acted as an Investigating Officer. He claimed to have received the FIR copy on 12.6.1990. He spoke about the murder having been admitted by Hizbul Mujahideen organisation. He further spoke that Late Abdullah Bangroo, Ajmal Khan, Bilal, Ishfaq i.e. present appellant and Abdul Rehman Shigan were the accused of murder and that they entered into conspiracy to kill Moulvi Farooq. He then referred to the arrest made of the appellant by Delhi Police. He went to arrest Ayub Dar/present appellant in Delhi and brought him to Srinagar on police remand. He then asserted that, during the investigation, Ayub Dar confessed and stated that he wanted to make statement. He was then produced before the S.P. for recording his statement. He then confirmed that the statement was then recorded by the S.P. He identified the accused as the same person who was arrested and who gave his statement u/s. 15 of the TADA Act, which was recorded by the S.P. He pointed out that he also got recorded statement of accused Abdul Rehman Shigan u/s. 15 of the TADA Act as he was already arrested in some other case, in pursuance of the request made by accused Abdul Rehman Shigan. He was extensively cross-examined by the defence. He claimed to have received the whole file (Exhibit D-2) from Parvaiz Mirza SHO, P.S. Nageen. He identified the photo copy of FIR which was written in 19 lines. He also confirmed that the copy of FIR was

sent to the Magistrate. He identified the FIR. Several inadmissible questions seem to have been asked to this witness about the statements recorded u/s. 161, which are of no consequence. However, all that can be said about this witness is that he went to arrest the accused and produced him before the S.P. for recording his statement. There is no question asked on that aspect. It has again and again come in the cross-examination that he had produced the accused/appellant for recording his statement under the TADA Act; that the accused/appellant was under his custody and that his statement was recorded by the S.P. He asserted that the accused had requested him verbally for recording his statement and he also verbally brought the request of the accused to the attention of the S.P. According to him, the statement of accused was recorded on 27.6.1991 when the accused was produced at 11 O'clock in the morning before the S.P. for recording his statement. He claimed that he did not remain present there. After his statement was recorded, the accused was taken away by this witness. He also had collected second copy of the statement. In short, it cannot be said that the witnesses have identified the accused as one of the three persons who had killed Moulvi Farooq. Shri Sushil Kumar, learned Senior Counsel, therefore, is undoubtedly right when he says that if the other evidence is taken into account de-hors of the confession made, the prosecution cannot claim to have proved the offence that the accused/appellant was one of the accused persons present along with the two other accused persons who had fired at Moulvi Farooq.

18. However, one thing is certain that the prosecution has been able to prove homicidal death of Moulvi Farooq by being shot at. Prosecution has proved that, on that day, at about 10.30, three persons had come. They had gone to the room of Moulvi Farooq and had fired. It is also proved that, it is due to those injuries that Moulvi Farooq died a homicidal death. True it is that no post mortem was conducted; however, prosecution has given proper explanation that the post mortem could not

have been conducted due to angry public reaction. However, in-spite of that, there is good evidence to suggest that Moulvi Farooq died of the bullet injuries almost immediately after he was fired. All this could not have been possible unless the assailants had entered into conspiracy to murder Moulvi Farooq. It was in pursuance of that conspiracy alone that the assailants entered the chamber of Moulvi Farooq and fired at him. The evidence of P.R.O. is very clear in that context. The only question to be considered is whether this appellant was one of assailants. Seeing the prosecution evidence as it is, if all the three accused came together and approached the chamber of Moulvi Farooq and one of them fired at him, there will be no question of only the individual liability. Everything was clear as sun-shine that three had come not with an idea to chat with Moulvi Farooq or to seek any favour from him, but they had come specifically with a specific design to eliminate Moulvi Farooq. We, therefore, do not find anything wrong in the verdict of guilt given by the trial Court so far as Section 3 (3) of the TADA Act is concerned. However, the question would still remain as to whether the appellant/accused was one of the assailants. That could have been proved by direct evidence firstly or alternatively or in addition to it, by the confession statement recorded u/s. 15 of the TADA Act. If the confession statement stands to the Acid test on credibility, voluntariness and truthfulness, then that would be sufficient to pin the guilt of the accused. Therefore, it is now to be examined as to whether the trial Court was justified in relying upon the statement u/s. 15 of the TADA Act.

19. Shri Sushil Kumar, learned Senior Counsel, firstly urged that the confession was shrouded in mystery inasmuch as it was not clear as to whether it was recorded and under what circumstances. He clearly criticized the same saying that it could have been recorded on the video tapes, but was not done. He also pointed out that the confession was not recorded in the language of accused/appellant nor was it a true representation of what was stated. He pointed out that it was

contradictory with the oral evidence and there were innate contradictions which went on to disprove its very credibility. Relying on Rule 15 (2) of the TADA Act, he pointed out that it was explained or interpreted to the maker. He further urged that the original of the confession is not on record. It was further urged that the whole confession is destroyed by the other evidence. Shri Sushil Kumar pointed out that, the confession, as it stands proved, is in English language and there was a clear-cut admission on the part of A. K. Suri (PW-2) that he had not explained the same to the accused. Basically, the argument of Shri Sushil Kumar was that the confession could not have been relied upon, insofar as the offences under the R.P.C. were concerned. According to the learned Counsel, the confession could be relied upon only for the offences under the TADA Act. The learned Counsel heavily relied on the language of Section 15.

20. As against this, Shri Rawal, learned ASG urged that there was clear-cut evidence on record that the accused spoke in English, in which language he confessed also. He further pointed out that necessary caution was administered to the accused inasmuch as he was told that the said confession could be used in evidence against the accused/appellant. Learned ASG further contended that necessary circumstances were explained and signature was appended to the confession and, therefore, there was no question of rejecting the confession. As regards the last point urged by Shri Sushil Kumar, the learned ASG has pointed out that the question of admissibility of confession against the offences under the RPC was no more res-integra and was finally answered by this Court in a decision of Five Judges Bench reported in *Kartar Singh Vs. State of Punjab* [1994 (3) SCC 569]. Besides this, Shri Rawal also pointed out that the oral evidence regarding the confession by A. K. Suri (PW-2) remained unchallenged in the cross-examination on behalf of the defence. He also pointed out that the confession was corroborated as the chit (Exhibit

D-16) was brought on record. He answered the criticism of the learned Senior Counsel by pointing out that some witnesses were not examined as they were either dead or it was obvious that they were not present at the time of incident. It is this basis that the confession is now to be tested.

21. It will be better first to examine in detail the oral evidence of A.K. Suri (PW-2). The said witness deposed regarding presence of the accused in the Court on 27.6.1991 and about his making confessional statement. The witness reiterated that the accused was asked number of questions regarding free will on the part of accused to make a confession. He also specifically asserted that he had informed the accused that he was not bound to make a confessional statement and that if he makes the one, the same would be read against him. The witness also reiterated that the accused was given time to ponder over and even after pondering over the issue of making the confessional statement, the accused, of his own free will, was prepared to give confessional statement which was recorded in his own words by the witness. The witness also identified signature of the accused. He had also produced a questionnaire and asserted that, even after the questionnaire was given to the accused, one and half hours' time was given to the accused to ponder over, which opportunity was utilized by the accused. The witness first proved his writing about being satisfied that the accused was prepared to offer confessional statement of his own free will and then proved the statement. He also reiterated that the accused put his signature on each and every page and after the statement was recorded, it was read over and was understood by the accused, who, only after accepting the same to be correct, put the signatures. The witness was subjected to cross-examination by the defence. However, we are constrained to observe that his cross-examination was a lackluster. Some confusion was tried to be created regarding Exh. PWAK, a carbon copy and Exh.PWAK1 also not being done over the original and being made over a carbon copy. However, after seeing the documents

and hearing Shri Rawal, we are convinced that there was no confusion and the original confession as well as the preliminary documents were made over to the Court. Some unnecessary questions were put to the effect that whether the witness was in uniform while recording the statement. Some insignificant circumstances were also brought that the word 'voluntary' was not written while recording preparedness of the appellant to record the confession. He asserted that he had dispatched the confessional statement report. The last suggestion given to the witness in the cross-examination was almost fatal to the defence which was to the effect that he did not interpret statement of the accused because the same was written in the language in which the accused gave it. He was again specifically asked about his satisfaction statement being on page No.10, to which he specifically answered that the accused had finished his statement at page 9 and therefore, he wrote his satisfaction at page No.10. Again, almost at the end of the cross-examination, it has come that the witness had taken the statement in English and when the accused was talking to the witness, he was taking in English. In short, the whole cross-examination does not dent the case of the prosecution and it can be inferred that the criticism against the confession that it was not recorded in the language of the accused is not justified. There is absolutely no effort made by the defence to establish that the statement was not made in the language of the accused persons. Much was said by Shri Sushil Kumar, learned Senior Counsel that the Original statement is not on record. However, Shri Rawal, learned ASG painstakingly pointed out from the record that the confession cannot be foiled on that count and the original confession was very much available on the record.

22. Shri Sushil Kumar, learned Senior Counsel, had specifically raised a question regarding witnesses Gunwant Singh and Ghulam Qadir Sofi not being examined to corroborate any role ascribed to them. According to the learned Senior Counsel, non-examination of Gunwant Singh and Ghulam Qadir Sofi was extremely material and created a dent

in the prosecution story. Shri Rawal, learned ASG pointed out that, looking at the overall evidence of the witnesses, more particularly, all those who were present at the spot, it cannot be gathered that Gunwant Singh was present at the time of incident. Insofar as the evidence of Ghulam Qadir Sofi is concerned, it was pointed out by Saidur Rehman (PW-17) that said Ghulam Qadir Sofi was already dead at the time of trial. Therefore, the criticism levelled by the learned defence Counsel would be of no consequence.

23. Shri Sushil Kumar then urged that the so-called confession given by this appellant in other matter was disbelieved right upto the Supreme Court. He relied upon the decision in *Mohd. Ayubdhar & Anr. Vs. State of NCT of Delhi* [2000 (10) SCC 296]. This was also a case where the charges were under Section 3, 4 and 5 of TADA Act alongwith Section 302 read with Section 120 IPC. This was a case where the cassette wherein the confession was recorded was destroyed. From the second cassette, it was seen that the concerned officer had not given any warning to the accused that he was not bound to make the statement. The officer also had categorically admitted that no specific warning had been given to the accused. It was on that basis that this Court did not choose to rely upon the confession. Shri Sushil Kumar heavily relied on this ruling and urged to take the same course. We have already given our reasons for accepting the confession. In that view, we cannot rely on this judgment. We are unable to accept this contention for the simple reason that the facts of the said case in the reported decision are neither relevant nor admissible for the present purposes. Shri Sushil Kumar also relied on a reported decision in *Prakash Kumar @ Prakash Bhutto Vs. State of Gujarat* [2007 (4) SCC 266] wherein the confession was disbelieved. We do not find any similarity between the facts in the afore-mentioned reported decision and the facts which have come in the present matter. The confession in this case was disbelieved on merits and it was made by the co-accused. The facts are clearly distinguishable. The learned

Senior Counsel further relied on *Abdulvahab Abdul Majid Shaikh & Ors. Vs. State of Gujarat etc. etc.* [2007 (9) SCC 293], more particularly on observations in Paragraphs 9 and 13 thereof. However, the observations in Para 9 relate to the confession of the co-accused and its admissibility and reliability. The Court, in fact, relied upon the confession taking the view that there was no coercion, threat or any undue influence to the accused. The other facts are not apposite to the controversy. We, therefore, reject the contention of the learned Senior Counsel.

24. Our attention was also drawn to the Constitution Bench decision reported in *Kartar Singh Vs. State of Punjab* [1994 (3) SCC 569] and more particularly, to the paragraphs 263 and 265 thereof. There can be no question about these principles which have been suggested by way of guidelines by this Court. In fact, at the end of the Paragraph 263 of the judgment, the Court has recommended that the Central Government should take note of the guidelines and incorporate them by appropriate amendments in the Act and the Rules. We have not been pointed out any such amendments either in the Act or in the Rules. However, when we see the guidelines laid down and compare them with the care taken in this case about the confession, we feel completely satisfied that the confession was properly recorded and it was also recorded in the free atmosphere, as A.K. Suri (PW-2) had given sufficient time to the accused for the reflection. The accused had also at no point of time complained regarding any coercion to any authority. The defence, as is apparent from examination of the appellant-accused under Section 313 of the Cr.P.C., is that he had not given any statement at all. In view of this, we do not think that the observations of this Court in Paragraphs 263 and 265 of the aforementioned decision would be of any consequence for the decision of this matter. In fact, in Paragraph 406 of the judgment, this Court has spoken about the importance of confession and the various aspects attached to it such as appearance of objectivity and necessity of removing the

suspicion and has gone to the extent of saying that the provision itself is unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution of India. This was in a minority judgment by Hon'ble K. Ramaswamy, J. Hon'ble Sahai, J., however, in Paragraph 456, went on to observe:-

> "The word 'offence' used in the article should be given its ordinary meaning. It applies as much to an offence committed under TADA as under any other Act. The word 'compelled' ordinarily means 'by force'. This may take place positively and negatively. When one forces one to act in a manner desired by him it is compelling him to do that thing."

His Lordship further observed that a confession made by an accused or obtained by him under coercion, suffers from infirmity unless it is made freely and voluntarily. His Lordship then found that Section 15 was violative of Articles 20(3) and 21 of the Constitution. Again the observations, though very strongly worded, do not become binding since constitutionality of Section 15 has been upheld by the majority judgment authored by Hon'ble Pandian, J. We are quite mindful of the strength of the language used in the opinions expressed by two learned Judges. However, even with that, we cannot say that this confession suffers from any defects.

25. Similarly, our attention was also invited to a decision in *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru etc. etc.* [2005 (11) SCC 600] (more particularly to para 185). This was again a judgment concerning the terrorist attack on the Parliament of India by five fidayeen militants. It may immediately be observed that this was not a case under TADA Act, but under the Prevention of Terrorism Act (POTA), 2002. Very heavy reliance was placed on Paragraph 185 therein, which deals with the lapses and violations of procedural safeguards guaranteed in the statute, on account of which the confessional statement of Afzal was not relied upon by this Court. The learned Senior Counsel was at pains to point out that in this

case also, there were lapses and violations of procedural safeguards guaranteed in the statute. We, however, did not find any such lapses or violations which would affect the credibility of the confession. On the other hand, we found that the confession was fully acceptable and reliable.

26. A reference was made to the decision in *State through Superintendent of Police, CBI/SIT Vs. Nalini & Ors.* [1999 (5) SCC 253]. However, we must observe that the learned Senior Counsel has not, in any manner, shown as to how any of the observations made therein apply to the present matter. We would leave the matter at that.

27. As against this, Shri Rawal, learned ASG highlighted two decisions before us, they being *S.N. Dube Vs. N.B. Bhoir & Ors.* [2000 (2) SCC 254] and *Ravinder Singh alias Bittu Vs. State of Maharashtra* [2002 (9) SCC 55]. The other two decisions relied upon by learned ASG are *Lokeman Shah & Anr. Vs. State of W.B. etc. etc.* [2001 (5) SCC 235] and *Abdulvahab Abdul Majid Shaikh & Ors. Vs. State of Gujarat etc. etc.* (cited supra). Shri Rawal pointed out that in the decision in *S.N. Dube Vs. N.B. Bhoir & Ors.* (cited supra), in fact, the confession was recorded in the police station and as such, the guidelines provided in *Kartar Singh Vs. State of Punjab* (cited supra) were not strictly adhered to. Further, our attention was invited to the observations made by this Court in the following terms:-

> "Therefore, merely because some of those guidelines were not followed while recording the confessions it cannot for that reason be held that the said confessions have lost their evidentiary value. If while recording the confessions the police officer had followed all those guidelines also then that would have been a circumstance helpful in inferring that the confessions were made after full understanding and voluntarily."

It would, therefore, be clear, as rightly contended by Shri Rawal that merely because guidelines in *Kartar Singh Vs.*

State of Punjab (cited supra) were not fully followed, that by itself does not wipe out the confession recorded. We have already given our reasons for holding that the confession was recorded by A.K. Suri (PW-2) taking full care and cautions which were required to observe while recording the confession. In *Ravinder Singh alias Bittu Vs. State of Maharashtra* (cited supra), it has been observed in Paragraph 19 that if the confession made by the accused is voluntary and truthful and relates to the accused himself, then no further corroboration is necessary and a conviction of the accused can be solely based on it. It has also been observed that such confessional statement is admissible as a substantive piece of evidence. It was further observed that the said confession need not be tested for the contradictions to be found in the confession of the co-accused. It is for that reason that even if the other oral evidence goes counter to the statements made in the confession, one's confession can be found to be voluntary and reliable and it can become the basis of the conviction. In this case, there is ample corroboration to the confession in the oral evidence as well as the documentary evidence in shape of a chit, which is referred to in the said confession. There is a clear reference that the Personal Assistant, who was a non-Kashmiri and kept a beard, had sent a slip inside. Ultimately, that slip was found by the police, which corroborate the contents in the confession. In our opinion, that is a sufficient corroboration to the confession. In *Lokeman Shah & Anr. Vs. State of W.B. etc. etc.* (cited supra), this Court considered the confession which was under Section 164 Cr.P.C. Therefore, this case is not of much importance to us. In the last referred case of *Abdulvahab Abdul Majid Shaikh & Ors. Vs. State of Gujarat etc. etc.* (cited supra), a plea was raised that though the Chief Judicial Magistrate was readily available to record the confession, the police officer recorded the confession himself. This Court, in Paragraph 9 of the said judgment, observed as follows:-

> "The crucial question is whether at the time when the accused was giving the statement he was subjected to

> coercion, threat or any undue influence or was offered any inducement to give any confession."

The Court ultimately came to the conclusion that the confession did not suffer from these defects. In Paragraph 13 of the said judgment, the question of availability of the Chief Judicial Magistrate was discussed. Further the Court observed:-

> "Under Section 15 of the TADA, a police officer is permitted to record the confessional statement of the accused and certain strict procedure is prescribed.
> The appellants have no case that this procedure has in any way been violated. Merely because the confession was retracted, it may not be presumed that the same was not voluntary."

The confession was accepted by this Court and the appeal was dismissed.

28. All these cases suggest that the only test which the Court has to apply is whether the confession was voluntary and free of coercion, threat or inducement and whether sufficient caution is taken by the police officer who recorded the confession. Once the confession passes that test, it can become the basis of the conviction. We are completely convinced that the confession in this case was free from all the aforementioned defects and was voluntary.

29. We have gone through the complete confession as was given and we are of the clear opinion that the said confession was totally voluntary and all the necessary precautions were taken while recording the same. We are, therefore, of the opinion that the appellant had, in fact, given the confession voluntarily and he was not, in any way, compelled to give the same. Once that position is clear, it only remains to be seen as to whether the said confession could be relied on exclusively for proving the offence u/s. 302 of the RPC.

30. A very substantial argument was raised before us that, considering the language of Section 15 of the TADA Act, the said confession could have been used only against the TADA Act offences namely Section 3 of the TADA Act which was charged against the accused/appellant and it cannot be used for a Non-TADA offence like Section 302 of the RPC and it could not even be read in order to prove the said offence. This question is already settled against the defence as we have earlier pointed out. Shri Sushil Kumar urged that we should at least make a reference to the larger Bench as the case was not correctly decided nor the Judgment was properly given. We are unable to accept the argument of Shri Sushil Kumar. The aforementioned judgment is by a three Judge Bench and is binding on us. This is apart from the fact that the facts relating to Section 3 (3) of the TADA Act and the facts relating to Section 302 of RPC are completely inter-mixed in this matter. They are the part of the same transaction. A plain reading of the confession clearly goes to show that the accused was guilty of conspiring or attempting to commit or advocating, abetting, advising or inciting or knowingly facilitating the commission of a terrorist act or any act preparatory to a terrorist act. The act of killing Moulvi Farooq comes within the definition of 'terrorist act' as given in Section 2 (h) r/w. Section 3 (1) of the TADA Act inasmuch as, in order to achieve the objectives as described in Section 3 (1), Moulvi Farooq was put to death by firing at him. The confession in clearest possible terms and in detailed manner shows formation of a group of terrorists, who were in all seven in number. The confession of accused refers to the training in the use of fire arms and his visit to Pakistan in the year 1989 by crossing the border from Chowkibal side which is on Kupwara side. The appellant has given the whole outfit including the names of leader and other companions and the confession also refers to the fire arms brought by the group of terrorists from Pakistan and the training which was for bringing into effect the terrorist activities in the Kashmir valley. The appellant then gives a graphic account of the five terrorists' action in the years 1989 and 1990. The appellant also gives a

detailed account about the members in the group who had taken active part in those activities. The last activity was about killing of Mirwaiz Moulvi Farooq on 21.5.1991. While elaborating the 5th terrorist activity, it was confessed by the appellant that Moulvi Farooq was considered to be an agent of the CBI and the Government of India and two days prior to his death, one Abdulla Bangroo had ordered killing of Mohd. Farooq. At the time when these orders were given, Ajmal Khan and the appellant herein were with Abdullah Bangroo. It is clear from the confession that the whole modus operandi was discussed and after discussions, the task was given to himself, Bilal and Inayat. They had also visited the house of Moulvi Farooq and met the Chowkidar five days prior to the incident. They again visited the house of deceased where the appellant had a talk with deceased Moulvi Farooq and the financial help which he had promised for, was sought. The date and time for further meeting was decided at that time itself. He then gave reasons for not killing Moulvi Farooq on that day itself.

31. The appellant, thereafter, gave a complete story as to how they went to Moulvi's house and further that he was carrying a German pistol, Inayat was carrying a French pistol and Bilal was carrying a Chinese pistol. According to him, it was decided that it was Bilal who was to fire on Moulvi while appellant and Inayat were to give him protection from others. Detailed description is thereafter given as to how they went from Naidyar by Shikara by giving Rs.20/- to him and how they came to Durgah Hazratbal. It has then come in the confession that from Hazratbal they walked down to the house of Moulvi Farooq and met the Chowkidar whom they had met earlier. A very significant fact is then stated that, after they met the Personal Assistant of Moulvi Saheb, the said Personal Assistant gave a slip and the Mali who had taken the chit inside came out and informed that Moulvi Saheb was calling them inside. Therefore, they all got up from the chair and Bilal went inside the room of Moulvi, while the appellant and Inayat took positions and took out guns and Inayat had also fired one round after Bilal had

started firing inside Moulvi's room. The accused had also taken active part in ordering others to put their hands up. Thereafter, they ran away. He also confirmed that his shirt was held by Gulam Qadir Sofi, but he got himself released and ran away. The details of the act, of their movements after the act and about the chit totally convince that this confession of the accused was not only a voluntary confession but was truthful one. Anxiety on the part of the appellant to given press note after the act has also figured in the confession. It has also come in the confession of the appellant herein that the appellant got Rs.35,000/- and he, therefore, went to Delhi to terrorise the Central Government. He then also referred to his activity in Delhi and his total stay in Delhi. It has come in the confession that their group carried out five bomb blasts in Delhi. A graphic description thereof has also come in the confession. It has also come in the confession that he had visited Pakistan, Lahore and Muzzaffarabad to meet other members of the group namely Hyder, Hanif Hyder, Nasir Khan and Yusuf Bangroo on a fake passport. The said confession also gives details that the said passport was issued in Sikar, Rajastan with Visa of Pakistan. He also gave details of the dress which he was wearing on the day when Moulvi was put to death. All these details cannot be said to simply have been imagined by A. K. Suri (PW 2) so as to include the same in the confession of the accused. In his examination under Section 313 of the Code of Criminal Procedure, the appellant has flatly denied of having made any statement, much less confessional statement to Shri A.K.Suri. His answer to a question is as follows :

> "I was arrested by the Delhi. I didn't make any statement before Mr.Suri. Mr. Suri has indulged in making a wrong statement. In none of the cases, I made my statement. Mr. Suri, Company Officer of a case was a Supervising Officer. Whatever used to come in his heart, he used to do that. He was conducting all proceedings at Delhi. "

The afore-cited answer suggests that the appellant, at no

point of time, had ever made any statement to Shri A. K. Suri either in Delhi or in Srinagar. Very strangely, however, in Ground A of the appeal, a portion of confessional statement is quoted as under:

> "Inayat came out of P. A.'s room and had also fired one round as Bilal started firing inside Moulvi's room. I had also taken up the position told the occupant of the P.A.'s room to hands up. "

Relying on this, the ground further says as under:

> "Such a conviction and sentence is prima facie wrong as the appellant at the best could be held guilty of abetting the crime of murder and not committing murder. Therefore, the life sentence imposed upon him under Section 302 RPC is wrong in law..... "

32. In view of the above, it is clear that the appellant herein on one hand has chosen to rely upon a part of the confession and on the other hand, he asserts that he had, at no point of time, made any confessional statement. We do not wish to rely on this circumstance. However, we have made mention of it only to show hollowness of defence on the part of the appellant.

33. Even otherwise, we are fully satisfied that the confession was indeed made by the appellant and the details given in the confession and the meticulous planning that went behind committing murder of Moulvi Farooq, which has been reflected in the confession, not only render it voluntary, but truthful also. We are thoroughly convinced that this confession is not only a good, voluntary and truthful confession but a reliable one also and the trial Court has committed no mistake whatsoever in relying upon the said confession. Once we accept the confession made u/s. 15 of the TADA Act, there is no necessity of any other evidence being required. A very halting argument was made before us that the charge was only for the conspiracy and it was clear that the accused was

convicted for the offence u/s. 302 of RPC simplicitor. We do not think that such an argument can be made when the appellant has taken part in the conspiracy. The way the appellant himself has worked in the success of the conspiracy, the way he has handled the guns and accompanied two other assailants to the house of Mirwaiz Moulvi Faooq and the manner in which the plan was executed convince us that the order is absolutely correct. We have not been able to see nor the learned Senior Counsel appearing on behalf of the appellant is able to point out any prejudice being caused on account of defect of charge, which question was not even argued before the trial Court. We do not find any merit in the instant appeal and proceed to dismiss the same. Consequently, the appeal is dismissed.

K.K.T. Appeal dismissed.

D.A.V. BOYS SR. SEC. SCHOOL ETC. ETC.
v.
DAV COLLEGE MANAGING COMMITTEE
(Transfer Petition (Civil) Nos. 1233-1237 of 2008 etc)

JULY 23, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Code of Civil Procedure, 1908 – s.25 – Transfer petition – Allegations of infringement of registered trade mark against schools run by Chennai based Society – Suits filed by respondent-Committee in District Court in Delhi under s.134 of the Trade Marks Act – Defendant-schools filed petition for transfer of the suits to civil court in Chennai – Held: The mere convenience of the parties may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice – On facts, there is no valid ground for transfer of the suits since balance of convenience and other attendant circumstances are not in favour of the defendant-schools transferring the suits to their place – Trade Marks Act, 1999 – s.134.

The respondent-Committee obtained a trademark registration in respect of the letters "DAV" and "Dayanand Anglo Vedic", and issued a notice of "cease and desist" to various schools run by the Tamil Nadu Arya Samaj Education Society asking them not to use the words "DAV" for their schools. It also filed four suits against the said schools under Section 134 of the Trade Marks Act, 1999 before the District Court, Tis Hazari, Delhi.

The defendant-schools filed transfer petitions before the Supreme Court praying for transfer of the said suits to City Civil Court, Chennai, Tamil Nadu *inter alia* on the grounds of inconvenience due to distance, language and

the old age of the Secretary of the said Tamil Nadu Society.

Dismissing the transfer petitions, the Court

HELD: 1.1 Mere convenience of the parties may not be enough for the exercise of power u/s. 25, CPC but it must also be shown that trial in the chosen forum will result in denial of justice. In the interest of justice and to adherence of fair trial, this Court exercises its discretion and orders transfer in a suit or appeal or other proceedings. [Para 11] [961-E-F]

1.2. Section 25, CPC itself makes it clear that if any application is made for transfer, after notice to the parties, and if the Court is satisfied that an order of transfer is expedient for the ends of justice necessary direction may be issued for transfer of any suit, appeal or other proceedings from a High Court or other civil court in one State to another High Court or other civil court in any other State. In order to maintain fair trial, this Court can exercise this power and transfer the proceedings to an appropriate court. [Para 11] [961-C-E]

1.3. In the present case, the respondent-Committee has instituted various suits at Delhi under Section 134 of the Trade Marks Act, 1999 impleading the petitioners herein as defendants. The respondent has also pointed out that more than 50 suits have been pending all over India. Though the petitioners have raised the problem of distance, language and age of the President/Secretary of their respective Trust, the same hurdles are applicable to the respondent also, if their suits are transferred outside Delhi. [Para 12] [961-G-H; 962-A-B]

1.4. It is true that the petitioners, who are defendants, in order to defend their case necessarily have to spend sometime at Delhi. However, in view of the amendment

made in the Code of Civil Procedure in respect of recording of evidence and of the fact that Delhi being a Capital of the country and the petitioners who are running educational institutions have to visit this place for their official work, balance of convenience and all other attendant circumstances are not in favour of the petitioners getting transfer of the suits to their place. If the request of the petitioners is acceded to, taking note of the fact that the institutions of the respondent numbering more than 700 are spread over India and 50 other suits are pending in various places, it would be more difficult for the respondent/plaintiff to continue with their suits and in that event their sufferings would be more than the inconvenience to be caused to the petitioners/ defendants. It would be far more practical and in the best interest of the parties that the proceedings are conducted in Delhi. There is no valid ground for transfer of the suits as claimed by the petitioners. [Paras 12-14] [962-B-E; 962-G; 963-A]

1.5. If the petitioners' claim is accepted, it would open floodgates for similarly placed persons infringing registered trade marks to approach this Court to transfer their suits to the locations convenient to themselves all over India and defeat the purpose of Section 134 of the Trade Marks Act which confers a jurisdiction with respect to a registered trade mark. [Para 13] [962-F-G]

Maneka Sanjay Gandhi v. Rani Jethmalani **(1979) 4 SCC 167;** *Subramaniam Swamy (Dr.) v. Ramakrishna Hegde* **(1990) 1 SCC 4;** *Kulwinder Kaur alias Kulwinder Gurcharan Singh v. Kandi Friends Education Trust and Ors.* **(2008) 3 SCC 659, relied on.**

Case Law Reference:

(1979) 4 SCC 167	**relied on**	**Para 8**
(1990) 1 SCC 4	**relied on**	**Para 9**

(2008) 3 SCC 659 relied on Para 10

CIVIL ORIGINAL JURISDICTION : Transfer (Civil) Nos. 1233-1237 of 2008.

Petition Under Section 25 Code of Civil Procedure.

WITH

T.P.(C) Nos. 243-244 of 2009

T.P.(C) No. 667 of 2009.

Mukul Rohatgi, Ranjit Kumar, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Gladys Daniel, S. Santnam Swaminadhan, Naveen R. Nath, S.S. Ray and Rakhi Ray for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. The petitioners in Transfer Petition (Civil) Nos. 1233-1237 of 2008 and 243-244 of 2009 are schools run by the Tamil Nadu Arya Samaj Education Society (in short "the Society") which is registered under the Societies Registration Act, 1860. According to the petitioners, the Society was registered on 02.01.1975 and has been running and managing schools for the last more than 30 years. The schools are being run under a specific system of education propounded by "Swami Dayanand Saraswati" known as "Dayanand Anglo Vedic" system (in short "DAV"). The petitioners have been using the expression "DAV" with its schools for the last more than 30 years. The respondent-Committee is running about 700 educational institutions. On 16.01.2005, the respondent-Committee has obtained a trademark registration in respect of the letters "DAV" and "Dayanand Anglo Vedic" under Class 41 which is a service mark. On 04.08.2008, the respondent-Committee issued a notice to the petitioners of "cease and desist", namely, the petitioners should not use the words "DAV" for its schools. On 25.08.2008, the petitioners through their

advocate replied to the said notice informing that the schools are being run by the Society for the last 38 years with the words "DAV". The respondent-Committee filed four suits under Section 134 of the Trade Marks Act, 1999 before the District Court, Tis Hazari, Delhi against various schools run by the Society at Chennai individually without making the Society as a party.

2. Transfer Petition (Civil) No. 667 of 2009 is filed by another petitioner from Chennai alleging that it is running and managing a school using the expression "DAV" for more than 24 years. It also raised similar plea seeking transfer of suit No.417 of 2008 titled *DAV College Managing Committee vs. Dayanand Anglo Vedic School* pending in Tis Hazari Court, Delhi to the original side jurisdiction of the High Court of Madras.

3. Opposing the transfer petitions, the respondent-Committee which has filed suits at Delhi has highlighted that it is a duly registered society with the Registrar of Societies under the Societies Registration Act, XXI of 1860. Dayanand Anglo Vedic College Trust and Management Society is a charitable Educational Society founded by a few good people and followers of His Holiness Swami Dayanand Saraswati to spread his teachings and Principals of Arya Samaj including Mahatma Hasraj and Master Sewaram. At present, they are managing about 700 educational institutions throughout India. The defendant which is a school situated in Chennai in the State of Tamil Nadu without the consent and approval of the plaintiff dishonestly and with mala fide intention to earn goodwill and reputation of the plaintiff-society, started running an educational institution under the name and style DAV by infringing the registered trade mark and passing off the copy right of the plaintiff-society by using its acronym DAV in the similar/ deceptively similar manner as of the plaintiff.

4. Heard Mr. Mukul Rohatgi, learned senior counsel for the

petitioners in T.P. (C) Nos. 1233-1237 of 2008 and 243-244 of 2009, Ms. Gladys Daniel, learned counsel for petitioner in T.P. (C) No. 667 of 2009 and Mr. Ranjit Kumar, learned senior counsel for the respondent-Committee.

5. The petitioners have filed these petitions praying to transfer the suits filed by the respondent-Committee pending before Tis Hazari Courts, Delhi to the City Civil Court, Chennai, Tamil Nadu on the following grounds:

(i) That no cause of action has arisen at Delhi;

(ii) That the petitioners do not have any school at Delhi;

(iii) That there are large number of students studying in these schools who have been made defendants by the Committee in the suits filed at Delhi and all of them are in Chennai;

(iv) The Secretary of the Society since the very inception, Mr. S. Jaidev, who is of the age of 84 years and being very old, it is difficult for him to come to Delhi.

(v) Most of the witnesses to be examined on the side of the petitioners/defendants are in Tamil Nadu and they are conversant with the language of Tamil only. Likewise most of the documents are in Tamil and it is difficult to mark the same in the proceedings at Delhi.

(vi) The petitioner in Transfer Petition No. 667 of 2009 also contended that the person who is managing the affairs of their society is aged about 71 years and it is difficult for him to attend the hearing at Delhi.

6. The respondent-Committee, while denying all the claims of the petitioners, highlighted that in view of the fact that about

700 institutions have been spread all over India if the suits filed at Delhi are transferred to Chennai as claimed, there is likelihood of similar petitions by others particularly from other States and as on date 50 other suits are pending in different States. It is also stated that the President who is running the Trust at Delhi is aged about 95 years. It is also contended that considering the relief prayed for and the suits having been filed under Section 134 of the Trade Marks Act, 1999 on the jurisdiction point the Court at Delhi alone is competent to try the same. The allegation relating to inconvenience due to language is applicable to the respondent also and prayed for dismissal of all the transfer petitions.

7. In order to appreciate the rival contentions, it is useful to refer Section 25 of the Civil Procedure Code which gives power to this Court to transfer suits etc. which reads thus:

> *"25. Power of Supreme Court to transfer suits, etc.* – (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State."

8. Transfer of suits under Sections 24 and 25 have been considered by this Court in various decisions. In *Maneka Sanjay Gandhi v. Rani Jethmalani,* (1979) 4 SCC 167, this Court stated: (SCC p. 169, para 2)

> "2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its

attendant environment, is necessitous if the Court is to exercise its power of transfer. *This is the cardinal principle although the circumstances may be myriad and vary from case to case."* **(Emphasis supplied**)

9.Similarly in *Subramaniam Swamy (Dr.) V. Ramakrishna Hegde,* (1990) 1 SCC 4 dealing with power of this Court to transfer a case under Section 25 of the Code, A.M. Ahmadi, J. (as His Lordship then was) stated: (SCC p. 9, para 8)

"8. Under the old section the State Government was empowered to transfer a suit, appeal or other proceeding pending in the High Court of that State to any other High Court on receipt of a report from the Judge trying or hearing the suit that there existed reasonable grounds for such transfer provided that the State Government of the State in which the other High Court had its principal seat consented to the transfer. The present Section 25 confers the power of transfer on the Supreme Court and is of wider amplitude. Under the present provision the Supreme Court is empowered at any stage to transfer any suit, appeal or other proceeding from a High Court or other civil court in one State to a High Court or other civil court of another State if it is satisfied that such an order is expedient for the ends of justice. The cardinal principle for the exercise of power under this section is that the ends of justice demand the transfer of the suit, appeal or other proceeding. The question of expediency would depend on the facts and circumstances of each case but the paramount consideration for the exercise of power must be to meet the ends of justice. It is true that if more than one court has jurisdiction under the Code to try the suit, the plaintiff as dominus litis has a right to choose the court and the defendant cannot demand that the suit be tried in any particular court convenient to him. The mere convenience of the parties or any one of them may not be

enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Cases are not unknown where a party seeking justice chooses a forum most inconvenient to the adversary with a view to depriving that party of a fair trial. Parliament has, therefore, invested this Court with the discretion to transfer the case from one court to another if that is considered expedient to meet the ends of justice. Words of wide amplitude—for the ends of justice—have been advisedly used to leave the matter to the discretion of the Apex Court as it is not possible to conceive of all situations requiring or justifying the exercise of power. *But the paramount consideration must be to see that justice according to law is done; if for achieving that objective the transfer of the case is imperative, there should be no hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff. The petitioner's plea for the transfer of the case must be tested on this touchstone."* ***(Emphasis supplied)***

10. In Kulwinder Kaur alias Kulwinder Gurcharan Singh vs. Kandi Friends Education Trust and Others, (2008) 3 SCC 659, this Court considered various tests to be applied in respect of transfer of suits under Sections 24 and 25 of the Code and in para 23 observed thus:

23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation;

"interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the court from which he seeks to transfer a case, it is not only the power, but the duty of the court to make such order.

11. Section 25 of the Code itself makes it clear that if any application is made for transfer, after notice to the parties, if the Court is satisfied that an order of transfer is expedient for the ends of justice necessary direction may be issued for transfer of any suit, appeal or other proceedings from a High Court or other Civil Court in one State to another High Court or other Civil Court in any other State. In order to maintain fair trial, this Court can exercise this power and transfer the proceedings to an appropriate Court. The mere convenience of the parties may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Further illustrations are, balance of convenience or inconvenience to the plaintiff or the defendant or witnesses and reasonable apprehension in the mind of the litigant that he might not get justice in the Court in which suit is pending. The above-mentioned instances are only illustrative in nature. In the interest of justice and to adherence of fair trial, this Court exercises its discretion and order transfer in a suit or appeal or other proceedings.

12. In the light of the above principles, let us consider the claim of the parties. We have already referred to the fact that the respondent-Committee has instituted various suits at Delhi under Section 134 of the Trade Marks Act impleading the petitioners herein as defendants. The respondent has also pointed out that more than 50 suits have been pending all over

India. Though the petitioners have raised the problem of distance, language and age of the President/Secretary of their respective Trust, we are of the view that same hurdles are applicable to the respondent also if their suits are being transferred outside Delhi. It is true that the petitioners who are defendants in order to defend their case necessarily have to spend sometime at Delhi. However, in view of the amendment made in the Code of Civil Procedure in respect of recording evidence and of the fact that Delhi being a Capital of this country and the petitioners who are running educational institutions have to visit this place for their official work, we are satisfied that balance of convenience and all other attended circumstances are not in favour of the petitioners transferring the suit to their place. As rightly pointed out by learned senior counsel for the respondent, if the request of the petitioners are acceded to, taking note of the fact that their institutions numbering more than 700 have been spread over India and 50 other suits are pending in various places, it would be more difficult for the respondent/plaintiff to continue with their suits and in that event their sufferings would be more than the inconvenience to be caused by the petitioners/defendants.

13. We are also satisfied that it would be far more practical and in the best interest of the parties that the proceedings are conducted in Delhi. Further, if the petitioners' claim is accepted, it would open floodgates for similarly placed persons infringing registered trade marks to approach this Court to transfer their suits to the locations convenient to themselves all over India and defeat the purpose of Section 134 of the Trade Marks Act which confers a jurisdiction with respect to a registered trade mark. Since the issue relating to jurisdiction particularly whether Court at Delhi has jurisdiction or not is to be decided by the Trial Court, we are not expressing anything on the merits of their claims.

14. In the light of what has been stated above, we do not find any valid ground for transfer of the suits as claimed by the

petitioners. Consequently, all the transfer petitions are dismissed. However, we make it clear that we have not expressed anything on the merits of either parties and it is for them to plead and establish their respective case. No order as to costs.

B.B.B. Transfer Petitions dismissed.

PODYAMI SUKADA

v.

STATE OF M.P. (NOW CHHATISGARH)

(Criminal Appeal No. 1243 of 2006)

JULY 23, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KUMAR PRASAD, JJ.]

Penal Code, 1860 – s. 302 – Homicidal death of mother by son – Extra-judicial confession made by son in presence of witnesses and recovery of weapon at his instance – Conviction and sentence u/s. 302 by courts below – On appeal, held: Witnesses to the extra judicial confession declared hostile by prosecution, thus does not inspire confidence – It cannot be held with certainty that any extra judicial confession in fact was made by son-accused – Conviction cannot be sustained merely on the ground of recovery of weapon of crime at the instance of accused – Thus, accused granted the benefit of doubt – Order of conviction and sentence set aside.

According to the prosecution case, the appellant caused death of his mother with a burnt stick. Thereafter, he made extra-judicial confession in the Panchayat in the presence of witnesses-PWs. 1 to 4 and the weapon of crime was recovered at his instance. However, the prosecution declared the said witnesses hostile. The courts below convicted the appellant u/s. 302 IPC and imposed punishment of life imprisonment. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1 The evidentiary value of extra judicial confession depends upon trustworthiness of the witness

before whom confession is made. Law does not contemplate that the evidence of an extra judicial confession should in all cases be corroborated. It is not an inflexible rule that in no case conviction can be based solely on extrajudicial confession. It is basically in the realm of appreciation of evidence and a question of fact to be decided in the facts and circumstances of each case. [Para 10] [969-G-H; 970-A]

1.2 In the instant case, all the witnesses to the extra judicial confession have been declared hostile by the prosecution. It is true that the evidence of the hostile witness is not altogether wiped out and remains admissible in evidence and there is no legal bar to base conviction on the basis of the testimony of hostile witness but as a rule of prudence, the court requires corroboration by other reliable evidence. The PW 1, PW 2, PW 3 and PW 4 in their evidence had stated that the meeting was called in the village after the death of the deceased, but PW 2 and PW 4 have nowhere stated that extrajudicial confession was made by the appellant admitting that he had killed the deceased. PW 1 and PW 3 too have not stated anything about extrajudicial confession in their examination in chief but after being declared hostile and cross-examined by the prosecution they disclosed that the appellant had confessed that he killed the deceased with the burnt stick as she told him that he was wandering after consuming liquor. However, when cross-examined by the defence, again they admitted that no such confession was made by the appellant. Thus, there is complete sommersault in their evidence. The evidence of both the prosecution witnesses is slippery and from their evidence, it is difficult to hold with certainty that any extra judicial confession in fact was made by the appellant. This state of evidence leaves this Court in doubt and the witnesses of the extrajudicial confession do not inspire confidence

and merely on the ground of recovery of weapon of crime at the instance of the appellant, it would be unsafe to sustain the conviction of the appellant. The appellant is granted the benefit of doubt. The impugned judgment of conviction and sentence of the appellant is set aside. [Paras 9, 11 and 12] [969-C-F; 970-D-E; 970-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1243 of 2006.

From the Judgment and Order dated 22.06.2005 of High Court of Chhatisgarh at Bilaspur in Criminal Appeal No. 936 of 2000.

D.N. Goburdhan and P. Bagchi for the Appellant.

Atul Jha and Dharmendra Kumar Sinha for the Respondent.

The Judgment of the Court was delivered by

C.K. PRASAD, J. 1. This appeal, by grant of leave arises from the judgment and order dated 22nd June, 2005 passed by the Chhatisgarh High Court in Criminal Appeal No.936 of 2000, whereby it had upheld the conviction of the appellant under Section 302 of the Indian Penal Code and punishment of life imprisonment inflicted by Order dated 18th February 2000, passed by the First Additional Sessions Judge, Bastar in Sessions Trial No.45 of 2000.

2. According to the prosecution, on 9th December, 1999 Madvi Pali, went to the house of Madvi Mase to borrow money and when she reached there, she found her dead. She informed PW.1, Madvi Rama about the incident. Madvi Rama went to the house of Madvi Mase and found her dead with wounds at different places on the body. PW.1, Madvi Rama, according to the prosecution, convened a meeting and on enquiry, the appellant confessed in the meeting that in the night of 8th December, 1999 his mother (deceased)-Madvi Mase scolded him alleging that he wanders after consuming liquor

which enraged him and he picked up a burning wooden plank and assaulted her which caused her death. On the basis of what has been disclosed in the meeting PW.1 Madvi Rama gave report to the Police Station, Tongpal.

3. On the basis of the aforesaid information, a case under Section 302 of the Indian Penal Code was registered against the appellant. During the course of investigation inquest report of the dead body was prepared in the presence of the witnesses and the dead body sent to Primary Health Centre, Tongpal for postmortem examination. Dr. S.L. Dhangar(PW.5), a Civil Assistant Surgeon, posted at the Primary Health Centre, Tongpal conducted the postmortem examination and found a large number of burn injuries on the person of the deceased and in his opinion the death had occurred due to shock on account of burn injuries. PW.6, P.L. Nayak, the Investigating Officer of the case arrested the appellant during the course of investigation and on his statement, the wooden plank, alleged to have been used in the commission of the crime, was recovered.

4. After usual investigation, the charge-sheet was submitted under Section 302 of the Indian Penal Code and the appellant was committed to the Court of Sessions to face the trial for commission of the above said crime. Appellant abjured his guilt and claimed to be tried.

5. To bring home the charge, the prosecution has altogether examined six witnesses out of whom PW.1 Madvi Rama, PW.2 Mangdu, PW.3 Aaita and PW.4 Lekhan have been declared hostile and cross-examined by the prosecution. Besides aforesaid witnesses, prosecution has also examined P.W.5 Dr. S.L. Dhangar, the autopsy surgeon and P.W.6 P.L. Nayak, the investigating officer. The plea of the appellant is denial simplicitor and false implication but no defence witness has been examined.

6. On the basis of evidence on record the trial court came

to the conclusion that Madvi Mase met with a homicidal death, which finding has been affirmed by the High Court in appeal. Further relying on the extrajudicial confession and recovery of the weapon of crime at the instance of the appellant the Trial Court convicted and sentenced the appellant as above and it has been maintained by the High Court in appeal. Relevant portion of the judgment of the High Court in this regard reads as follows:

> "In view of the above, we are of the considered opinion that extrajudicial confession regarding causing death of his mother attacking her with the teak wood plank was made by the accused before the Panchayat, this evidence of extrajudicial confession by accused before these witnesses inspire confidence of the Court as the same stands corroborated by F.I.R. Ex.P.1 Recovery of weapon of offence as well as medical evidence also corroborates the confession. Therefore, the finding of the Trial Court convicting the accused for the offence under Section 302 is based on the legal evidence and we do not find any circumstance to differ from the view taken by the Trial Court."

7. We have heard Mr. D.N. Goburdhan for the appellant and Mr. Atul Jha for the State. Mr. Goburdhan submits that in view of the evidence on record, the finding recorded by the courts below that deceased met with the homicidal death, cannot legitimately be assailed. However, he submits that the witnesses to the extra judicial confession are not reliable and hence the conviction and sentence of the appellant deserve to be set aside. He points out that alleged recovery of the weapon of crime at the instance of the appellant is tainted and hence, not enough to accept the case of the prosecution.

8. Mr. Jha, however, submits that extra judicial confession of the appellant together with the recovery of the weapon of crime at his instance conclusively establishes the guilt of the appellant.

9. There is no eye-witness of the crime and in order to bring home the charge the prosecution has relied on the extrajudicial confession said to have been made by the appellant in the Panchayat in the presence of PWs.1 to 4 and further recovery of weapon by the Investigating Officer at his instance. Hence what needs to be considered is as to whether the extrajudicial confession said to have been made by the appellant in the presence of the witnesses deserves to be relied. As stated earlier all the witnesses to the extra judicial confession have been declared hostile by the prosecution. True, it is that the evidence of the hostile witness is not altogether wiped out and remains admissible in evidence and there is no legal bar to base conviction on the basis of the testimony of hostile witness but as a rule of prudence, the court requires corroboration by other reliable evidence. In the present case PW.1 Madvi Rama, PW.2 Mangdu, PW.3 Aaita and PW.4 Lekhan in their evidence had stated that the meeting was called in the village after the death of the deceased, but PW.2 Mangdu and PW.4 Lekhan have nowhere stated that extrajudicial confession was made by the appellant admitting that he had killed the deceased. PW.1, Madvi Rama and PW.3, Aaita too have not stated anything about extrajudicial confession in their examination in chief but after being declared hostile and cross-examined by the prosecution they disclosed that the appellant had confessed that he killed the deceased with the burnt stick as she told him that he was wandering after consuming liquor. However, when cross-examined by the defence, again they admitted that no such confession was made by the appellant. Thus there is complete sommersault in their evidence.

10. Evidentiary value of extra judicial confession depends upon trustworthiness of the witness before whom confession is made. Law does not contemplate that the evidence of an extra judicial confession should in all cases be corroborated. It is not an inflexible rule that in no case conviction can be based solely on extrajudicial confession. It is basically in the realm of appreciation of evidence and a question of fact to be decided

in the facts and circumstances of each case.

11. In the face of the evidence aforesaid, the question falls for consideration is as to whether the conviction of the appellant is fit to be sustained only on the basis of the extrajudicial confession coupled with the recovery of weapon of crime at the instance of appellant. As stated earlier PW.2, Mangdu and PW.4, Lekhan neither in the examination-in-chief nor in the cross-examination had stated anything about the extrajudicial confession said to have been made by the appellant. PW.1, Madvi Rama and PW.3, Aaita in the examination-in-chief did not support the case of the prosecution and after being declared hostile and cross-examined by the prosecution did say about the extrajudicial confession by the appellant but again on cross-examination by the defence they admitted that no such confession was made by the appellant. Thus the evidence of both the prosecution witnesses are slippery and from their evidence, it is difficult to hold with certainty that any extra judicial confession in fact was made by the appellant. This state of evidence leaves us in doubt and we are of the opinion that the witnesses of the extrajudicial confession do not inspire confidence and merely on the ground of recovery of weapon of crime at the instance of the appellant, it shall be unsafe to sustain the conviction of the appellant. Accordingly, we grant appellant the benefit of doubt.

12. In the result, we allow the appeal, set aside the impugned judgment of conviction and sentence of the appellant. Appellant is in jail, he be released forthwith, unless required in any other case.

N.J. Appeal allowed.

NATIONAL LEATHER CLOTH MANUFACTURING CO.
v.
UNION OF INDIA & ANR.
(Civil Appeal No. 3403 of 2003)

JULY 23, 2010

[D.K. JAIN AND ANIL R. DAVE, JJ.]

Central Excise Act, 1944:

Section 4(4)(d)(i) – Valuation of excisable goods for assessment of excise duty – Cost of secondary packing – Exclusion of – HELD: By including cost of packing in value of goods, legislature has sought to extend the levy beyond the manufactured article itself and, therefore, the provision has to be strictly construed – Cost of additional packing in the nature of secondary packing cannot be added in the value of goods in terms of s.4(4)(d)(i) for assessment of excise duty – Interpretation of Statutes.

The assessee, a manufacturer of coated fabrics, sold its product to wholesalers at the factory gate in polythene bags. It further packed three rolls in hessian cloth, in order to send the same to up-country customers. The assessee made a claim for refund of the amount representing differential excess duty on account of cost of hessian cloth used in further packing. The claim was rejected by the Revenue on merits and also as barred by time. The High Court dismissed the assessee's writ petition.

In the instant appeal filed by the assessee, the only question for consideration before the Court was: "whether the cost of packing of fabric in hessian cloth, which according to the assessee, is not required for sale of their goods at the factory gate and is necessitated to protect the fabric from damage during the course of

transportation to up-country customers is includible in the assessable value of the coated fabrics manufactured by the assessee for the purpose of levy of excise duty?

Partly allowing the appeal, the Court

HELD: 1.1 As per s.4(4)(d)(i) of the Central Excise Act, 1944, the cost of packing is to be included in working out the value of the goods, unless the packing is of a durable nature and is returnable by the buyer to the assessee. By including the cost of packing in the value of goods, the legislature has sought to extend the levy beyond the manufactured article itself and, therefore, the provision has to be strictly construed. Although the provision is clear and unambiguous, yet the concept of "primary packing" and "secondary packing" was evolved by this Court in *Bombay Tyre International Ltd.** **The test laid down was that it is only the cost of packing ordinarily required for selling the goods in the course of wholesale trade to a wholesale buyer at the factory gate which would be includible in the value of the goods and not the cost of any additional or special packing. [para 11-12] [978-E-H; 979-A-C]**

Union of India & Ors. Vs. Bombay Tyre International Ltd. & Ors.* **(1984) 1 SCC 467, relied on.

1.2 The cost of secondary packing in hessian cloth cannot be included in the value of the goods in terms of s. 4(4)(d)(i) of the Act, for the purpose of assessment of excise duty. Since, admittedly, the fabric manufactured by the assessee was sold by the assessee to the wholesalers at the factory gate only in polythene bags, the further packing of three rolls in hessian cloth for the convenience of the up-country customers in transportation of the goods was not in the course of normal delivery to the customers in the wholesale trade at the factory gate and was, therefore, not required to

make the product marketable. [para 16] [980-F-H; 981-A]

Commissioner of Central Excise, Allahabad & Ors. Vs. Hindustan Safety Glass Works Ltd. & Ors. **2005 (2) SCR 229 = (2005) 3 SCC 468;** and *Union of India & Ors. Vs. Godfrey Philips India Ltd.* **1985 (3) Suppl. SCR 123 = (1985) 4 SCC 369;** *Geep Industrial Syndicate Ltd. Vs. Union of India* **1992 (61) E.L.T. 328 (S.C.) – relied on.**

Commissioner of Central Excise, Calcutta Vs. Hindustan National Glass & Industries Ltd. **2005 (2) SCR 744 = (2005) 3 SCC 489 – cited.**

Case Law Reference:

1984 (1) SCC 467	**referred to**	**para 7**
2005 (2) SCR 229	**relied on**	**para 7**
2005 (2) SCR 744	**cited**	**para 7**
1985 (3) Suppl. SCR 123	**relied on**	**para 13**
1992 (61) E.L.T. 328 (S.C.)	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3403 of 2003.

From the Judgment & Order dated 10.07.2002 of the High Court of Judicature at Bombay in writ Petition No. 1001 of 1981.

Jay Savla. Meenakshi Ogra for the Appellant.

R.P. Bhat, Rajiv Nanda, B.K. Prasad, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This appeal, by special leave, is directed against the judgment and order dated 10th July 2002, passed by the High Court of Judicature at Bombay, whereby the High

Court has dismissed the writ petition filed by the appellant (for short "the assessee") and affirmed the order passed by the Assistant Commissioner of Central Excise, Bombay-II ("the Adjudicating Authority" for short), rejecting the claim preferred by the assessee for refund of the excess amount of excise duty paid by them as time barred as also on merits on account of disallowance of post manufacturing expenses for the purpose of valuation of the goods in terms of Section 4 of the Central Excise Act, 1944 (for short "the Act") as it existed at the relevant time.

2. The background facts, giving rise to this appeal, are as follows:

The assessee was engaged in the manufacture of coated fabrics. The price of goods declared by the assessee in the price list, as required under Rule 173C of the Central Excise Rules, 1944 (for short "the Rules"), was approved by the Revenue from time to time. However, for the first time, in the two revised price lists, both dated 12th November 1980, the assessee indicated that prices declared by them earlier contained certain post manufacturing expenses, which had to be excluded while computing the value of the fabric for the purpose of assessment to excise duty. The claim was rejected by the Adjudicating Authority vide order dated 7th January 1981. Thereafter, the assessee, vide their letter dated 7th July 1981, made a claim of consolidated refund, amounting to Rs.40,18,805.60, for the period from 13th November 1977 to 12th November 1980, representing differential excess duty paid by them on various elements of post manufacturing expenses. One of the deductions so claimed, with which we are concerned in this appeal, was on account of cost of material used for packing the final product. Having failed to get any response, the assessee filed a Writ Petition (No.1001 of 1981) in the Bombay High Court seeking appropriate directions for refund along with interest thereon. On 8th February 1982, the assessee revised their refund claim to Rs.40,59,856.40/-. During the pendency of the petition, certain interim orders

regarding deposit of the said amount by the revenue and submission of documentary evidence by the assessee before the Adjudicating Authority were passed by the High Court. Eventually, upon consideration of the evidence adduced by the assessee, vide order dated 12th April 1984, the Adjudicating Authority rejected their claim for excluding the cost of polythene bags, printed as well as plain, and hessian cloth used for packing the fabrics. The Adjudicating Authority was of the view that the packing of coated fabrics in polythene bags for delivery to the customers located in Bombay as also packing of three such rolls in hessian cloth and stitching them into one bundle for dispatch to up-country customers was in the normal course of trade and, therefore, there was nothing special about such packing so as to exclude its cost from the value of the fabric. The Adjudicating Authority also held that the refund claim was barred by time.

3. On rejection of the claim, the assessee amended the writ petition in order to challenge the validity of order dated 12th April 1984. As stated above, the order of the Adjudicating Authority has been affirmed by the High Court. Rejecting the plea of the assessee that additional packing of three rolls of fabric in hessian cloth was done at the specific request of the up-country customers in order to protect the packed fabric from damage during the course of transportation and, therefore, at least the cost of such secondary packing should be excluded from the assessable value, the High Court held as follows:

> "…in view of the clear finding given by the adjudicating authority to the effect that the Assessee has been uniformly using hessian cloth for all the delivery to the up-country customers, irrespective of any specific request, the use of hessian cloth as secondary packing has to be held to be normal packing which are offered to the wholesalers at the factory gate. In view of the clear finding given by the Adjudicating Authority and in the light of decision of the Apex Court in the case of *Union of India Vs. MRF* reported in 1995 (77) ELT 433, the cost of the secondary packaging in which the goods are ordinarily sold to the wholesalers is liable to be included in the assessable value. In this view of the matter denial of deduction on account of secondary packaging from the assessable value as post manufacturing expenses is justified. Apart from that, it is not the case of the assessee that the secondary packing is of a durable nature and is returned by the buyer to the assessee. Therefore, the cost of such packing has to be included in the assessable value."

4. The High Court also held that the refund claim was beyond the period prescribed under the Act. Aggrieved, the assessee is before us in this appeal.

5. Vide order dated 31st March 2003, leave was granted limited to the question "whether the cost of secondary packing is to be included in the assessable value of the appellant's goods?"

6. We have heard learned counsel for the parties.

7. In support of the appeal, Mr. Jay Savla, learned counsel appearing for the appellant, submitted that the High Court as well as the Adjudicating Authority failed to appreciate the distinction between the primary and the secondary packing, as enunciated by this Court in *Union of India & Ors. Vs. Bombay Tyre International Ltd. & Ors.*[1]. Learned counsel contended that admittedly the rolls of coated fabric were packed in polythene bags for sale at the factory gate in the course of wholesale trade and the bundling of three such rolls in hessian cloth was an additional packing done at the request of up-country customers in order to protect the goods from damage and, therefore, the cost of such packing could not be included in the value of the cloth. In support of the plea that additional packing according to the requirement of the buyer constitutes secondary packing and, therefore, its cost cannot be included in the value of the

1. (1984) 1 SCC 467.

fabric, reliance was placed on the decisions of this Court in *Commissioner of Central Excise, Allahabad & Ors. Vs. Hindustan Safety Glass Works Ltd. & Ors*[2]. and *Commissioner of Central Excise, Calcutta Vs. Hindustan National Glass & Industries Ltd*[3].

8. Per contra, Mr. R.P. Bhat, learned senior counsel appearing for the revenue, while supporting the decision of the High Court, submitted that in view of the finding by the Adjudicating Authority, affirmed by the High Court to the effect that hessian cloth was the standard packing for the fabric for sale in the wholesale market, its cost was includible in the value of the goods in terms of Section 4 of the Act.

9. The short question arising for consideration is whether the cost of packing of fabric in hessian cloth, which, according to the assessee, is not required for sale of their goods at the factory gate and is necessitated to protect the fabric from damage during the course of transportation to up-country customers is includible in the assessable value of the coated fabric manufactured by the assessee for the purpose of levy of excise duty?

10. Section 4 of the Act, in so far as it is relevant for our purpose, reads as follows :

> *"4. Valuation of excisable goods for purposes of charging of duty of excise.*—(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be—
>
> (a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:
>
> ....
> ....
>
> (4) For the purposes of this section,—
>
> ....
> ....
>
> (d) 'value', in relation to any excisable goods,—
>
> (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee;
>
> Explanation.— In this sub-clause 'packing' means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;"

11. The Section provides as to how the value of excisable goods is to be determined. The expression "value" has been extended to include the cost of packing. As per Section 4(4)(d)(i) of the Act, the cost of packing is to be included in working out the value of the goods, unless the packing is of a durable nature and is returnable by the buyer to the assessee. Explanation thereto enumerates various types of packing, of which cost has to be included in the value of the goods. It is evident that by including the cost of packing in the value of goods, the legislature has sought to extend the levy beyond the manufactured article itself and, therefore, the provision has to be strictly construed.

12. Although the provision is clear and unambiguous, yet the concept of "primary packing" and "secondary packing" was evolved by this Court in *Bombay Tyre International Ltd.* (supra). In that case, while observing that the degree of packing

2. (2005) 3 SCC 468.

3. (2005) 3 SCC 489.

would vary from one class of excisable goods to another and the packing may be of different grades, which may be necessary to make an article marketable, it was held "that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy." Thus, the test laid down was that it is only the cost of packing ordinarily required for selling the goods in the course of wholesale trade to a wholesale buyer at the factory gate which would be includible in the value of the goods and not the cost of any additional or special packing.

13. In *Union of India & Ors. Vs. Godfrey Philips India Ltd.*[6], a question arose as to whether the cigarettes manufactured and packed in cardboard packets, each containing 10 to 20 cigarettes and those packets were packed in corrugated fibreboard cartons/containers, the cost of corrugated fibreboard containers was liable to be included in determination of the value of the cigarettes for the purpose of excise duty. The majority view was that since the corrugated cartons were employed as secondary packing only for the purpose of avoiding damage or injury during transit and were not necessary for selling the cigarettes in the wholesale market at the factory gate, their cost was not to be included in the value of the cigarettes for the purpose of levy of excise duty.

14. In *Geep Industrial Syndicate Ltd. Vs. Union of India*[5], the assessee was manufacturing batteries and torches. The torches and batteries manufactured by them were first packed in polythene bags and then these polythene bags were placed in cardboard cartons. The cardboard cartons were placed in the wooden boxes at the time of delivery at the factory gate. Though there was no dispute about the inclusion of cost of polythene bags and cardboard cartons, the dispute was whether

4. (1985) 4 SCC 369.

5. 1992 (61) E.L.T. 328 (S.C.)

the cost of wooden boxes, in which the cardboard boxes were packed, was to be included in the value of batteries and torches. It was held by a bench of three Judges of this Court that the wooden boxes were in the nature to secondary packing and, therefore, their cost was not includible in the value of batteries and torches.

15. In *Hindustan Safety Glass Works Ltd.* (supra) referring to the ratio of decisions in *Bombay Tyre International Ltd.* (supra) and *Geep Industrial Syndicate Ltd.* (supra), again a bench of three learned Judges summed up the test on the issue, as follows :-

> "14…The test is whether the packing is done in order to put the goods in a marketable condition. Another way of testing would be to see whether the goods are capable of reaching the market without the type of packing concerned. Each case would have to be decided on its own facts. It must also be remembered that Section 4(4)(d)(i) specifies that the cost of packing is includible when the packing is not of a durable nature and returnable to the buyer. Thus, the burden to show that the cost of packing is not includible is always on the assessee. Also under Section 4(a) the value is to be the normal price at which such goods are ordinarily sold in the course of wholesale trade for delivery at the time and place of removal."

16. Having examined the facts of the instant case on the touchstone of the test laid down in the aforementioned cases, we are of the opinion that since admittedly the fabric manufactured by the assessee was sold by the assessee to the wholesalers at the factory gate only in polythene bags, the further packing of three rolls in hessian cloth was not in the course of normal delivery to the customers in the wholesale trade at the factory gate and was, therefore, not required to make the product marketable. The additional packing in the nature of a secondary packing was done for the purpose of convenience of the up-country customers in the transportation

of the goods manufactured by the assessee. We, therefore, hold that the cost of secondary packing in hessian cloth cannot be included in the value of the goods in terms of Section 4(4)(d)(i) of the Act for the purpose of assessment of excise duty.

17. In so far as the question of limitation is concerned, as already stated, leave was granted only on the afore-noted limited issue and, therefore, we express no opinion on that aspect.

18. We, accordingly, allow the appeal partly and set aside the impugned order to the extent indicated above, leaving the parties to bear their own costs.

R.P. Appeal partly allowed.

STATE OF MADHYA PRADESH
v.
NERBUDDA VALLEY REFRIGERATED PRODUCTS COMPANY PVT. LTD & ORS.
(Civil Appeal NO. 5883 OF 2010 etc.)

JULY 23, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Constitution of India, 1950:

Article 226 – Exercise of writ jurisdiction in the matters falling in the domain of executive – High Court in a writ petition setting aside the order of Nazul Officer by which he rejected petitioner's application for NOC filed without payment of lease rent – HELD: The Nazul Officer is better equipped with to decide the application for grant of NOC – Even if the order of Nazul Officer requires interference, the person aggrieved could challenge the same before the Collector u/s 18 of the Revenue Book Circular – It is not such a case which warrants direct interference by High Court in exercise of its extra-ordinary jurisdiction under Article 226 – Revenue Book Circular (Madhya Pradesh) – s.18 – Constitutional Law – Separation of powers.

Contempt of Court:

Contempt petition – In a writ petition High Court directing Nazul Officer to decide the application for NOC filed by writ petitioner and to consider particular documents only – Nazul Officer on consideration of the relevant rules and regulations, rejecting the application – High Court directing the Nazul Officer to explain his "misconduct" – HELD: When a matter is remitted to original authority, it must be allowed to take a decision in accordance with the statutory provisions, rules and regulations and there cannot be any restriction on such a

course – Even if there is an error in the order of the original authority, it is for the appellate authority to set it right and the High Court is not justified in issuing the direction – Constitution of India, 1950 – Article 226 – Practice and Procedure.

The appellant-State executed a lease deed in favour of respondent no.1-company in respect of certain land on 14.3.1939 for a term of 30 years for the purpose of developing trade in refrigerated food stuffs and industries. The lease was being renewed with 30 years term and lastly it was renewed for a period of 30 years from 14.3.1999 to 13.3.2029.

By letter dated 16.1.2004 the State Government permitted the respondent company to change the use of the leased land from industrial purpose to commercial and residential purpose on payment of lease rent as assessed in terms of the rules and regulations. On 6.3.2007, the respondent-company made an application before the Nazul Officer for grant of NOC for raising commercial and residential constructions on the leased land without paying the lease rent. The Nazul Officer rejected the application by order dated 15.4.2008. The order was challenged by the respondent-company in a writ petition. An objection was raised by the State Government as to maintainability of the writ petition in view of the alternative remedy u/s 18 of the Revenue Book Circular. However, the High Court, by its order dated 26.9.2008, directed the Nazul Officer to decide the application of the respondent-company and to consider only the Circular dated 14.2.1966 and the arbitration award while taking the decision. The Nazul Officer considered the relevant rules and regulations, and rejected the application by order dated 2.2.2009. The respondent-company filed a contempt petition before the

High Court which, by its order dated 13.10.2009, directed the Nazul Officer to personally present himself before the Court and explain his "misconduct". Aggrieved, the State Government filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 There is broad separation of powers under the Constitution of India between three organs of the State, i.e., the Legislature, the Executive and the Judiciary. It is also well established principle that one organ of the State should not ordinarily encroach into the domain of another. Even if the order of the first authority, in the case on hand, the Nazul Officer, requires interference, it is for the appellate authority to look into it and take a decision one way or the other and it is not an extraordinary case which warrants direct interference by the High Court in exercise of its extra-ordinary jurisdiction under Art. 226 of the Constitution of India, as an appellate court over the finding arrived at by the Nazul Officer. [para 13] [994-B-F]

1.2 Grant of NOC depends upon various factors and fulfilment of certain conditions and the Nazul Officer is better equipped with to decide the application. Undoubtedly, while deciding the application, Nazul Officer has to consider not only the circulars but also rules and regulations framed by the State Government. It is relevant to note that the Nazul Officer has adverted to a relevant fact that the Government, while renewing the lease of 3.13 acres of land from 14.03.1999 to 13.03.2029 in favour of the respondent-Company, permitted it to change the use of leased land from industrial purpose to commercial or residential purpose on payment of the lease rent, as payable on the land used or changed for commercial or residential purpose. In such circumstances, if the said direction is applicable, it is but proper on the part of the respondent to comply with it. If

the respondents are aggrieved of the order of the Nazul Officer, they could challenge the same before the Collector u/s 18 of the Revenue Book Circular. Interference by the High Court against the order of the original authority, which is based on factual details, is not warranted under writ jurisdiction. [para 13] [994-B-F]

Punjab National Bank vs. O.C. Krishnan & Ors., **2001 (1) Suppl. SCR 466 = (2001) 6 SCC 569;** *State of Himachal Pradesh and Ors. vs. Gujarat Ambuja Cement Ltd. and Anr*. **2005 (1) Suppl. SCR 684 = (2005) 6 SCC 499 – relied on.**

2. This Court, in a series of decisions, has held that when a matter is remitted to the original authority to decide the issue, the said authority must be allowed to take a decision one way or the other in accordance with the statutory provisions, rules and regulations applicable to the same. There cannot be any restriction to pass an order in such a way *de hors* the statutory provisions or regulations/instructions applicable to the case in particular. Even if there is any error, it is for the Collector/ Government to set it right and the High Court is not justified in asking the officer to personally present and explain his "misconduct". The High Court has exceeded its jurisdiction in issuing such a direction. [para 14] [994-G-H; 995-A-B]

Case Law Reference:

2001 (1) Suppl. SCR 466	**relied on**	**para 12**
2005 (1) Suppl. SCR 684	**relied on**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5883 of 2010.

From the Judgment & Order dated 13.10.2009 of the High Court of Madhya Pradesh at Jabalpur in Contempt Petition Civil No. 173 of 2009.

WITH

C.A. No. 5884 of 2010.

Ravindra Shrivastav, C.D. Singh, S. Choudhary, J. Merlyn Abraham for the Appellant.

S. Gopakumaran Nair, T.G. Narayaan Nair, K.N. Madhusoodanan for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Delay condoned in S.L.P.(C) No. 35734 of 2009. Leave granted in both the special leave petitions.

2. Being aggrieved by the final order dated 26.09.2008 passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 5469 of 2008 setting aside the order dated 15.04.2008 passed by the Nazul Officer rejecting the application moved by the Respondent-Nerbudda Valley Refrigerated Products Company Pvt. Ltd. (hereinafter referred to as "the Company") for the grant of No Objection Certificate (NOC) to raise constructions on the leased land after changing the land use from industrial purpose to commercial purpose, the State of Madhya Pradesh has filed appeal arising out of S.L.P.(C) No. 35734 of 2009. Pursuant to the order of the High Court, the respondent-Company alleging that though the Nazul Officer passed an order, has not granted NOC and disposed of the same not in accordance with the Circular of the State Government, filed a Contempt Petition (C) 173 of 2009 before the High Court. By order dated 13.10.2009, the High Court after finding that the Nazul Officer has dealt with the matter beyond the Circular dated 14.02.1966 of the State Government and not followed its earlier order, directed him to personally present before the Court on 27.10.2009 to explain his "misconduct" in passing such order. Questioning the said order, the State of Madhya Pradesh has also filed SLP (C) 35732 of 2009. Since both the orders of the High Court relate to the same issue, these

appeals are being disposed of by this judgment.

3. Heard Mr. Ravindra Shrivastav, learned senior counsel for the appellant and Mr. S. Gopakumaran Nair, learned senior counsel for the respondent.

4. The issues which arise for consideration in these appeals are:-

(i) Whether the High Court has exceeded its jurisdiction under Article 226 of the Constitution of India while setting aside the order dated 15.04.2008 passed by the Nazul Officer in a writ petition when an alternative remedy is available to respondent no. 1 to challenge the said order before the Collector as per Section 18 of the Revenue Book Circular?

(ii) Whether the High Court is justified in directing the Nazul Officer to present personally to explain his "misconduct"?

5. Before considering the above issues, it is useful to refer certain factual details which necessitated the Nazul Officer to pass an order declining to grant NOC. The State of Madhya Pradesh as early as on 14.03.1939 executed the lease of 12 acres of land in favour of the respondent- Company for a term of 30 years from 14.03.1939 to 13.03.1969 for the purpose of developing trade in refrigerated food stuffs and industries at the ground rent of Rs. 1/- per acre per annum for the first 30 years of the lease. The Government of Madhya Pradesh, vide notification dated 14.02.1966, instructed the Nazul Officer to examine the question of ownership of the land as per rules and regulations so that the Government land could not be encroached at the time of construction of the building. This notification empowers the Nazul Officer to examine the question of ownership of the land on which the construction has to be raised. As Respondent No. 1 has violated the terms and conditions of the lease and exceeded the scope and purpose of the lease by raising constructions on the leased land without

prior approval or permission of the State Government, the Additional Collector, Bhopal, on 03.05.1982, issued a show cause notice asking the respondent to explain as to why the lease not to be determined. In view of the dispute between the parties, the issue was referred to Arbitration as per clause 12 of the lease deed dated 14.03.1939 for amicable settlement. The Arbitrator, by his award dated 03.07.1985, held that there is no prohibition in the lease deed that respondent No. 1 would not raise constructions to develop industry, trade and commerce. The said award was challenged by the appellant-State in Misc. Appeal No. 166 of 1988 before the High Court of Madhya Pradesh and the High Court upheld the award passed by the Arbitrator on 03.07.1985. Pursuant to the said order of the High Court, the appellant-State renewed the lease deed for 3.82 acres of land for a period of 30 years commencing from 1969 to 1999 in favour of the respondent. The Government of Madhya Pradesh, vide its letter dated 04.05.1999, permitted the respondent-Company to change the use of leased land from industrial purpose to commercial or residential purpose on payment of lease rent, as payable on the land used or changed for commercial or residential purpose, as per the commercial rate assessed according to the rules and regulations and also directed the Collector, District Bhopal, to recover the said rent as per the rules and regulations.

6. The appellant-State again renewed the lease deed for 3.13 acres of land for 30 years from 14.03.1999 to 13.03.2029 in favour of the respondent-Company. Vide letter dated 16.01.2004, the appellant-State permitted the respondent-Company to change the use of leased land from industrial purpose to commercial and residential purpose on payment of lease rent as assessed as per the rules and regulations. The Joint Director, Town & Country Planning, Bhopal sanctioned the plan for 3 years for residential, commercial development on the leased land presented by the respondent. The Government of Madhya Pradesh, vide its letter dated 19.01.2007, directed the Collector, Bhopal that where the use of leased land is changed,

then the rent on such leased land shall be re-assessed as per the rules and regulations. On 06.03.2007, the respondent-Company made an application for grant of NOC before the Nazul Officer, Bhopal, for raising commercial and residential constructions on the leased land without paying the lease rent of Rs. 30,41,10,240/- assessed as per rules and regulations on the change of use of leased land to commercial and residential purpose.

7. The respondent filed a Writ Petition No. 15400 of 2007 before the High Court of Madhya Pradesh praying for issuance of W*rit of Mandamus* directing the Nazul Officer to decide the application for grant of NOC pending before him. On 25.02.2008, the Tehsildar issued advertisement in the newspapers inviting objections against granting of NOC to the respondent-Company for change of use of leased land. One Aziz Udeen, Partner M/s Chandan Mal Looks & Co. had registered his objection against granting NOC to the respondent-Company on the ground that there is a dispute between the respondent and his company regarding the land for which the respondent is seeking NOC and Civil Suit No. 503 of 2006 is already pending before the Civil Judge.

8. By order dated 20.03.2008, in Writ Petition No. 15400 of 2007, the High Court directed the Nazul Officer/Appropriate Authority to take a decision on the application of the respondent-Company for grant of NOC. In compliance of the said order, the Nazul Officer, Bhopal, asked for certain documents and sought information from the respondent-Company to decide the application. The respondent-Company failed to submit those documents and information sought for despite several reminders. After hearing the parties, the Nazul Officer, by order dated 15.04.2008, rejected the application for grant of NOC. Aggrieved by the said order, the first respondent preferred Writ Petition No. 5467 of 2008 before the High Court of Madhya Pradesh. In the said writ petition, the State had taken the preliminary objection that the writ petition is not maintainable

as alternative remedy was available to the respondent under Section 18 of the Revenue Book Circular. In spite of the said objection, by order dated 26.09.2008, the High Court directed the respondent-Company to submit the documents and information sought for by the Nazul Officer and also directed the Nazul Officer to decide the application of the respondent for grant of NOC by passing a speaking order. In the same order, the High Court directed the Nazul Officer to consider only the circular dated 14.02.1966 and the Arbitration Award while deciding the application for NOC. Again, the Nazul Officer asked certain documents and sought for information from the respondent-Company and after hearing the respondent the Nazul Officer, by order dated 02.02.2009, rejected the application for grant of NOC. Questioning the said order, the respondent preferred Contempt Petition (C) No. 173 of 2009 before the High Court. The High Court, on 13.10.2009, while issuing notice in the Contempt Petition, observed that the Nazul Officer is trying to frustrate and circumvent the directions issued by the High Court directing him to explain his "misconduct".

9. Mr. Ravindra Shrivastav, learned senior counsel appearing for the State objected to the order of the High Court by pointing out that under Section 18 of the Revenue Book Circular, against the order of the Nazul Officer, an effective remedy by way of appeal would lie before the Collector. According to him, when such remedy is available, the High Court is not justified in exercising its extraordinary jurisdiction under Article 226. He also pointed out that even after the direction of the High Court, the Nazul Officer has passed an order only in accordance with law, hence, if the first respondent is aggrieved, it can be challenged in the manner known to law before the Collector. However, it filed a contempt petition and the High Court directed personal appearance of the Nazul Officer to explain his "misconduct" for not passing orders as per the earlier order. According to the learned senior counsel for the State, the Nazul Officer has passed an order as per the

provisions of the statute, circulars and Government instructions. On the other hand Mr. S. Gopakumaran Nair, learned senior counsel for the respondent-Company supported the order of the High Court and pleaded for dismissal of both the appeals.

10. We have carefully considered the rival contentions and perused the relevant materials.

11. Coming to the first objection as to the exercise of jurisdiction by the High Court under Article 226 in respect of the order dated 15.04.2008 passed by the Nazul Officer, it is pointed out that an effective remedy by way of an appeal to the Collector is provided under Section 18 of the Revenue Book Circular which reads as under:-

"Section 18-Sale and Disposal of Land

2.117. All land which is the property of Government should ordinarily be sold through the Director of Land Records. Agricultural or pastoral land acquired for public purposes should, when it is no longer required by Government, be disposed of in accordance with the instructions in paragraph 3 of M.P. Revenue Book Circular 1-5.

2.118. If any Nazul land in charge of the W.D. is to be relinquished, a reference should be made by the C.E. to the Collector who will deal with the land under the Provisions of the M.P. Revenue Book Circular IV-I, paragraph 29.

2.119. When any Government land or other immovable public property is made over to a local body for public, religious, educational or any other specified purposes, the grant should be subject to the following conditions in addition to any other that may be prescribed:-

(1) that the property shall be liable to be resumed by Government;

(a) if it is used for any purpose other than that specified; or

(b) in the case of buildings, if they are allowed to fall into disrepair;

(2) that the property should be at any time resumed by Government, the compensation payable shall in no case exceed-

(a) the amount paid to Government by the local body less depreciation on buildings, if any, calculated in accordance with Paragraph 3.036 of Chapter III-"Buildings" for the period during which the property was in charge of the local body or the present value of the property, whichever is less;

(b) the cost or present value, whichever is less, of any buildings or other works constructed on the property by the local body."

12. A perusal of the order of the Nazul Officer shows that grant of NOC depends upon various factors and fulfillment of certain conditions. It is also not in dispute that the said officer is better equipped with to decide the application for grant of NOC. Undoubtedly, while deciding such an application, Nazul Officer has to consider not only the circulars but also rules and regulations framed by the State Government. Even otherwise, when the ultimate order of Nazul Officer can be canvassed before Collector, the High Court ought not to have exercised its extraordinary jurisdiction under Art. 226 as an appellate court over the finding of fact arrived at by the Nazul Officer. In this context, it is useful to refer the following decisions:

In *Punjab National Bank vs. O.C. Krishnan & Ors.,* (2001) 6 SCC 569, this Court held:-

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks

and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

In *State of Himachal Pradesh and Ors. vs. Gujarat Ambuja Cement Ltd. and Anr.* (2005) 6 SCC 499, this Court observed as under:-

"17. We shall first deal with the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without

availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction."

13. There is broad separation of powers under the Constitution between three organs of the State, i.e., the Legislature, the Executive and the Judiciary. It is also well established principle that one organ of the State should not ordinarily encroach into the domain of another. Even if the order of the first authority, in the case on hand, Nazul Officer, requires interference, it is for the appellate authority to look into it and take a decision one way or the other and it is not an extraordinary case which warrants direct interference by the High Court under Art. 226. It is relevant to note that the Nazul Officer has adverted to a relevant fact that the Government, while renewing the lease of 3.13 acres of land from 14.03.1999 to 13.03.2029 in favour of the respondent-Company, permitted it to change the use of leased land from industrial purpose to commercial or residential purpose on payment of the lease rent, as payable on the land used or changed for commercial or residential purpose. In such circumstances, if the said direction is applicable, it is but proper on the part of the respondent to comply with it. Even if the stand of the respondent-Company is acceptable and if they are aggrieved of the order of the Nazul Officer, they are free to challenge the same before the Collector as pointed above. In our opinion, interference by the High Court against the order of the original authority, which is based on factual details, is not warranted under writ jurisdiction.

14. Coming to the second submission, in view of our conclusion about the order of the High Court dated 26.09.2008, we are satisfied that the second issue is to be answered against the respondent. Here again, this Court, in a series of decisions, has held that when a matter is remitted to the original authority to decide the issue, the said authority must be allowed to take a decision one way or the other in accordance with the

statutory provisions, rules and regulations applicable to the same. There cannot be any restriction to pass an order in such a way *de hors* to the statutory provisions or regulations/ instructions applicable to the case in particular. As pointed out earlier, even if there is any error, it is for the Collector/ Government to set it right and the High Court is not justified in asking the officer to personally present and explain his "misconduct". In our considered view, the High Court has exceeded its jurisdiction in issuing such a direction.

15. In the light of the above discussion, we set aside the impugned order of the High Court dated 26.09.2008 passed in Writ Petition No. 5469 of 2008 and the order dated 13.10.2009 in Contempt Petition No. 173 of 2009. We make it clear that if the matter is still pending with the Nazul Officer, he is at liberty to pass appropriate orders in accordance with the earlier directions of the High Court as well as the rules and regulations, instructions and circulars issued by the Government which are applicable to the matter in issue uninfluenced by any of the observations made by the High Court. It is further made clear that if the Nazul Officer has already concluded and passed an order and the respondent-company is aggrieved of the same, it is free to avail the remedy under Section 18 of the Revenue Book Circular and in that event it is for the Collector to consider and pass orders in accordance with law.

16. With the above directions, both the appeals are allowed. No order as to costs.

R.P. Appeals allowed.

PERNOD RICARD INDIA (P) LTD.
v.
COMMISSIONER OF CUSTOMS, ICD TUGHLAKABAD
(Civil Appeal No. 5840 of 2008)

JULY 26, 2010

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

Customs Act, 1962: s.130E – Statutory appeal filed before Supreme Court u/s.130E against the order of tribunal – Challenging the applicability of rule 6 of 1988 Rules – Dismissal of appeal by Supreme Court by a non-speaking order – Held: Dismissal of appeal by Supreme Court was in exercise of appellate jurisdiction – Doctrine of merger would be attracted and the appellant is estopped from raising the issue of applicability of Rule 6 – Doctrine of merger – Estoppel – Appeal before Supreme Court.

Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 – Rule 5(1)(c) – Transaction value – "adjustment" in terms of Rule 5(1)(c) for determination of value of goods imported – Tribunal's direction with regard to the adjustment on account of volume of the goods imported by the importer @ 20% in the price difference between each variety of its imported goods and the corresponding import of the competitor – Held: Not justified – Adjustment can be granted only on production of evidence which establishes the reasonableness and accuracy of adjustment and higher volumes of goods imported would not be sufficient to justify an adjustment – A commercial practice is not a conclusive evidence for determining real price of a consignment – In the absence of some documentary evidence indicating that any rebate/discount was given to the importer by the supplier, adjustments under Rule 5(1)(c) cannot be justified.

Appeal: Dismissal of statutory appeal vis-à-vis dismissal of special leave petition by non speaking order – Distinction between.

Appellant, a manufacturer of spirits, imported Concentrate of Alcoholic Beverages (CAB). The appellant was a related person to the supplier. Two show cause notices were issued against the appellant proposing demand of differential custom duty in respect of imports for the period January 1995 to June 2000 and July 2000 to May 2001. Against the first show cause notice, the appellant filed a writ petition before High Court. The High Court directed that the notice issued under Section 28 of the Customs Act, 1962 should be treated as notice for finalisation of the provisional assessment. The Commissioner of Customs adjudicated upon both the show cause notices and confirmed the demand of Rs.40.37 crores as against the proposed demand of Rs.50.04 crores. Appellant filed appeal before tribunal.

By order dated 25th March 2003, while accepting the claim of the appellant that CAB should be classified under heading 2808.10, the Tribunal rejected the plea of the appellant that in spite of the fact that the supplier was a "related person", the value declared by them should be accepted in terms of Rule 4(3)(b) of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988. The Tribunal remanded the matter to the adjudicating authority for a fresh consideration on the question of applicability of Rule 6.

The appellant challenged the order before Supreme Court by way of appeal under Section 130E of the Act which was dismissed on 21st November, 2003.

Pursuant to the order of the Tribunal, dated 25th March 2003, the Commissioner passed a fresh order

3. (1988) 4 SCC 409.

dated 29th August 2003 and held that Rule 6 was applicable on the facts of the instant case. He accordingly, confirmed the demand of duty of customs amounting to Rs.39.96 crores. The said order was again challenged by the appellant in the tribunal, mainly on the ground that the value of imported CAB could not be determined under Rule 6. In the alternative, it was pleaded that even the quantification of the value under Rule 6 was seriously flawed. The tribunal observed that the applicability of Rule 6 was left to the adjudicator in the remand order and no appeal was filed thereagainst. The Tribunal again set aside the order of adjudication by the Commissioner and remanded the matter to him with certain directions by order dated 29th June, 2005. Pursuant thereto, the Commissioner passed a fresh adjudication order on 20th June 2006, confirming a total differential duty of Rs.40.37 crores.

The appellant challenged the said order by preferring yet another appeal to the Tribunal. The Tribunal upheld the decision of the Commissioner in determining the value of the imports under Rule 6. However, partly accepting the appeal, the tribunal directed adjustment @ 20% in the price difference between each variety of CAB of the appellant and the corresponding CAB of the competitor on account of higher volume of imports by the appellant for determining the value of import of CAB. Dissatisfied with the direction/order of Tribunal both the parties filed the appeals.

Disposing of the appeals, the Court

HELD: 1. Having carefully perused the orders of remand passed by the Tribunal on 25th March 2003 and 29th June 2005 the issue with regard to the applicability of Rule 6 of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 for valuation of

CAB had attained finality on the summary dismissal of the appellant's appeal by this Court by order dated 21st November 2003. It is clear from a bare reading of the observations of the Tribunal in its order dated 25th March 2003, that remand to the Commissioner for fresh adjudication was confined only to the errors committed while determining the assessable values based on the transaction value of "similar goods". Thus, in principle, the Tribunal proceeded on the premise that the valuation was to be done as per the procedure laid down in Rule 6. This was also evident from appellant's pleadings when they challenged the order of remand contending in their appeal under Section 130E of the Act that Rule 6 had no application on the facts of their case and the value of imported CAB by them had to be determined as per Rule 4(3)(b) of the 1988 Rules. The appeal was, however, dismissed *in limine.* Once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non speaking order, the doctrine of merger does apply, unlike in the case of dismissal of special leave to appeal under Article 136 of the Constitution by a non-speaking order.In the present case, the appellant preferred statutory appeal under Section 130E of the Act against order of the Tribunal dated 25th March 2003 and, therefore, the dismissal of appeal by this Court though by a non-speaking order, was in exercise of appellate jurisdiction, wherein the merits of the order impugned were subjected to judicial scrutiny. In the instant case, the doctrine of merger would be attracted and the appellant is estopped from raising the issue of applicability of Rule 6 in their case. Moreover, the issue with regard to the applicability of Rule 6 had attained finality for yet another reason. It is manifest from the Tribunal's order dated 29th June 2005, that the scope and purpose of remand to the Commissioner was limited. The Tribunal categorically declined to go into the issue of the appropriateness of Rule 6, with the result that the

finding of the Commissioner in his order passed pursuant to Tribunal's earlier order dated 29th August 2003, regarding applicability of Rule 6 remained undisturbed and in fact attained finality, in as much as, the appellant did not question the correctness of the remand order passed by the Tribunal on 29th June 2005. The Tribunal erred in re-opening and examining afresh the question as to whether or not the value of CAB could be determined by applying Rule 6 and, therefore, the objection of the revenue in that regard is accepted. [Paras 22, 24, 26] [1013-F-G; 1014-A-D; 1017-B-D]

2.1. Rule 6 (2) provides that the provisions of clauses (b) and (c) of sub-rules (1) to (3) of Rule 5 of these rules shall *mutatis mutandis* also apply in respect of similar goods. A similar stipulation appears in Interpretative note (2) to Rule 6. Rule 5(1)(c) provides that where no sale referred to in clause (b) of sub-rule (1) of this rule, is found, the transaction value of identical goods sold at different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both shall be used, provided that such adjustments shall be made on the basis of 'demonstrated evidence', which clearly establishes the reasonableness and accuracy of the adjustments. Interpretative Note 4 to Rule 5 reiterates that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of 'demonstrated evidence' that clearly establishes the reasonableness and accuracy of the adjustment. One such evidence could be a valid price list containing prices referring to different levels or different quantities. [Para 31] [1021-F-H; 1022-A-B]

Commissioner of Central Excise, Jaipur v. Rajasthan SPG. & WVG. Mills Ltd. & Anr. **(2007) 13 SCC 129;** *Mirah Exports Pvt. Ltd. v. Collector of Customs* **(1998) 3 SCC 292;**

Basant Industries Nunhai, Agra v. Additional Collector of Customs, Bombay **1995 Supp (3) 320 – referred to.**

2.2. Bearing in mind the object behind the provision for "adjustment" in terms of Rule 5(1)(c), the fine distinction between the words "adjustment" and 'discount' sought to be brought out by the appellant is of no relevance to the controversy at hand. The provision is clear and unambiguous, meant to provide some adjustment in the price of identical goods, imported by two or more persons but in different quantities. It is plain that such "adjustment" may not necessarily lead to a decrease in the value. It may result in an increase as well. Reference to the word 'discount' in the interpretative note is by way of an illustration to indicate that a seller's price list is one of the relevant pieces of evidence to establish the factum of quantity discount by the seller. It is manifest that "adjustment" in terms of Rule 5(1)(c) of 1988 Rules, for the purpose of determination of value of an import, can be granted only on production of evidence which establishes the reasonableness and accuracy of adjustment and higher volumes of imports per se, would not be sufficient to justify an adjustment, though it may be one of the relevant considerations. Therefore, in so far as the question of "adjustment" in terms of Rule 5(1)(c) is concerned, the revenue having accepted the order of remand dated 29th June 2005, cannot turn around and contend that no adjustment whatsoever is warranted. Similarly, there may also be some substance in the observation of the Tribunal that generally when the transactions are in large volumes over a long period, grant of discount is a normal commercial practice but again a commercial practice, per se, cannot be treated as conclusive evidence for determining real price of a consignment. Therefore, in the absence of some documentary evidence indicating that any rebate/ discount was given to the appellant by the supplier,

adjustments under Rule 5(1)(c) cannot be justified. In the present case, it is evident from the impugned order that though the Tribunal had felt that requisite evidence to establish the range of adjustment was lacking and for that purpose, according to it, the matter was required to be remanded to the Commissioner but being influenced by the fact that there had already been three rounds of appeals to the Tribunal, it undertook the exercise itself. This approach of the Tribunal was not in order and therefore, in the absence of any demonstrated evidence, its direction for ad-hoc adjustment @ 20%, cannot be sustained. The order of the Tribunal under appeal, in so far as it pertains to the applicability of Rule 6 of 1988 Rules, is affirmed, however, the direction with regard to the adjustment on account of volume of imports of CAB by the appellant @ 20% in the price difference between each variety of CAB imported by the appellant and the corresponding CAB of the competitor, is set aside. [Paras 33-36] [1023-D-H; 1024-A-G]

Metal Box India Ltd. v. Collector of Central Excise, Madras **(1995) 2 SCC 90;** *Kunhayammed & Ors. v. State of Kerala & Anr.* **(2000) 6 SCC 359.** *V.M. Salgaocar & Bros. Pvt. Ltd. v. Commissioner of Income Tax* **(2000) 5 SCC 373;** *Supreme Court Employees' Welfare Association v. Union of India & Anr.* **(1989) 4 SCC 187;** *Commissioner of Central Excise, Jaipur v. Rajasthan SPG. & WVG. Mills Ltd. & Anr.* **(2007) 13 SCC 129,** *Mirah Exports Pvt. Ltd. v. Collector of Customs* **(1998) 3 SCC 292;** *Basant Industries Nunhai, Agra Vs. Additional Collector of Customs, Bombay* **1995 Supp (3) 320 – referred to.**

Case Law Reference:

(1995) 2 SCC 90	**referred to**	**Para 17**
(2000) 6 SCC 359	**referred to**	**Para 23**
(2000) 5 SCC 373	**referred to**	**Para 25**

(1989) 4 SCC 187	**referred to**	**Para 25**
(2007) 13 SCC 129	**referred to**	**Para 32**
(1998) 3 SCC 292	**referred to**	**Para 32**
1995 Supp (3) 320	**referred to**	**Para 32**
(2007) 13 SCC 129	**referred to**	**Para 32**
(1998) 3 SCC 292	**referred to**	**Para 32**
1995 Supp (3) 320	**referred to**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5840 of 2008.

From the Judgment & Order dated 25.06.2008 of the Customs, Excise & Service Tax Appellant Tribunal (CESTAT), New Delhi in Custom Appeal No. 559/2006.

WITH

C.A. No. 1110 of 2009.

B. Bhattacharya, ASG, V. Lakshmi Kumaran, R. Parthasarthy, L. Badri Narayan, Alok Yadav, M.P. Devanath, Rupesh Kumar, Arijit Prasad, Debashis Mukherjee, Satish Agarwal, Ajay Singh, Nishant Patil, B.K. Prasad, Anil Katiyar, R. Parthasarthy for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. These two appeals under Section 130E of the Customs Act, 1962 (for short "the Act") by the importer (hereinafter referred to as "the appellant") (C.A. No. 5840 of 2008) as well as by the revenue (C.A. No. 1110 of 2009) arise from the final order dated 25th June 2008, passed by the Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi (for short "the Tribunal"), in Custom Appeal No.559 of 2006. By the impugned order, while upholding the

decision of the Commissioner of Customs in determining the value of the "Concentrate of Alcoholic Beverages" ("CAB" for short), imported by the appellant, under Rule 6 of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 (for short "the 1988 Rules"), the Tribunal has directed the jurisdictional Commissioner to redetermine the customs duty liability of the appellant after making certain adjustments in the manner indicated in the order.

2. As both the appeals call in question the same order, these are being disposed of by this common order.

3. The case has had a chequered history and, therefore, in order to appreciate the controversy, it would be necessary to narrate the facts in detail.

The appellant (formerly named and styled as Seagrams India Pvt. Ltd.) is a wholly-owned subsidiary of the Seagram Company Ltd., Canada, established for manufacturing/blending of non-molasses based spirits. The appellant imported CAB from M/s Joseph E Seagram and Sons Ltd., Scotland, a wholly-owned subsidiary of Seagram Company Ltd., Canada. The strength of CAB imported was about 60%. It is not in dispute that the appellant is a "related person" to the supplier and this fact was disclosed to the Customs Authorities. The import of CAB was of four varieties, each one meant for manufacturing four brands of scotch whiskies, namely "100 Pipers", "Passport", "Something Special" and "International Malts" (Royal Stag; Oaken Glow; Blenders Pride and Imperial Blue). The import of CAB was in wooden barrels and their value was declared separately for assessment. The appellant diluted the imported CAB by adding demineralised water and reduced the strength to 42.8% v/v; packed them in bottles under respective brands; paid State excise duty and sold these to the dealers for ultimate sales to the consumers.

4. In the year 1999, the Directorate of Revenue Intelligence commenced investigation into the imports of CAB by the

appellant, which resulted in the issuance of two show cause notices. The first show cause notice dated 19th December 2000 was issued proposing demand of differential duty of customs amounting to Rs.37,96,70,451/- in respect of imports relating to the period from January 1995 to June 2000 and the second show cause notice dated 16th August 2001 was issued demanding differential duty of customs of Rs.12,08,42,462/- relating to imports during the period July 2000 to May 2001. Penal action was also proposed in both the show-cause notices.

5. Against show-cause notice dated 19th December 2000, the appellant filed a writ petition before the High Court of Delhi. Vide its order dated 27th August 2001, the High Court directed that the notice issued under Section 28 of the Act be treated as notice for finalization of the provisional assessment in terms of Section 18(2) of the Act. While disposing of the petition, the High Court observed that the authorities were free to decide as to whether any notice in terms of Section 111/124 of the Act was warranted. At the same time, the High Court granted liberty to the appellant to seek its remedy as per law in the event of issuance of such a show cause notice.

6. The Commissioner of Customs adjudicated upon both the show cause notices by a common order dated 31st May 2002, finalizing the assessments and confirming the demand of Rs.40.37 crores as against proposed demand of Rs.50.04 crores. The Commissioner classified the imported CAB under the Chapter heading 2808.30 as whisky as against the claim of the appellant under the Chapter heading 2808.10.

7. Being aggrieved by the order of adjudication, the appellant filed an appeal before the Tribunal. Vide order dated 25th March 2003, while accepting the claim of the appellant that CAB should be classified under heading 2808.10, the Tribunal rejected the plea of the appellant that in spite of the fact that the supplier was a "related person", the value declared by them should be accepted in terms of Rule 4(3)(b) of the 1988 Rules.

Nevertheless, the Tribunal remanded the matter to the adjudicating authority for a fresh consideration on the question of applicability of Rule 6 as it felt that the appellant had not been granted adequate opportunity to put forth their case against the proposal to apply Rule 6. The Tribunal, however, permitted the Commissioner to proceed under Rule 7 or 8 in the event of his accepting the appellant's plea that Rule 6 could not be applied. Relevant portion of the order is extracted be"…We are also of the view that while working out the provisions of Rule the Commissioner has not taken into consideration all the relevant factors. While fixing the value under Rule 6, the authority has to look into the definition of the term 'similar goods' under Rule 2(e) and that the conditions contained therein are satisfied. Clauses (b) and (c) of sub-rule (1), sub-rule(2) and sub-rule(3) of Rule 5 are made applicable to Rule 6 also. We find that there is no proper consideration of the above provisions by the Commissioner while arriving at the value under Rule 6. The appellant is justified in complaining that comparison was not made with the transaction of similar goods sold for export to India and imported at or about the time as the goods being valued, especially in the case of the goods covered by the second show cause notice dated 16th September, 2001. Comparison is made with imports which had taken place in January 1999, May 1999 and December 1998 for valuing the goods imported during the period July 2000 to May 2001."

8. The appellant challenged the said order before this Court by way of an appeal under Section 130E of the Act, which was dismissed on 21st November 2003. The appellant pleaded that invocation of Rule 6 by the Commissioner in the final adjudication order was beyond the scope of the show cause notice, in as much as, in the show cause notice itself it was observed that Rule 6 could not be applied because of non-availability of requisite data for adjustments required to be made under the said Rule. It was asserted that the value of CAB imported had to be determined as per Rule 4(3)(b) of 1988 Rules.

9. Pursuant to the order of the Tribunal, dated 25th March 2003, the Commissioner passed a fresh order dated 29th August 2003 and held that Rule 6 was applicable on the facts of the instant case. He accordingly, confirmed the demand of duty of customs amounting to Rs.39.96 crores. The said order was again challenged by the appellant in the Tribunal, mainly on the ground that the value of imported CAB could not be determined under Rule 6. In the alternative, it was pleaded that even the quantification of the value under Rule 6 was seriously flawed.

10. Accepting the alternative submission of the appellant relating to the errors committed by the Commissioner while determining the assessable value of CAB on the basis of the transaction value of "similar goods", by its order dated 29th June 2005, the Tribunal again set aside the order of adjudication by the Commissioner and remanded the matter back to him with certain directions. Since the observations of the Tribunal contained in paragraphs 7 and 13 have some bearing on the merits of the rival stands on behalf of the parties, these are extracted hereunder:

> "**7.** We are not going into the above mentioned issue about the appropriateness of Rule 6 for two reasons. Firstly, we had left this Rule open to the adjudicator in our remand order and no appeal had been filed against that order. Secondly, the present appeal can be disposed of after considering the appellant's contentions in terms of Rule 6."
>
> **"13.** As already noted we are not going into the submissions made by the appellant against valuation under (sic) Rule 6. Instead, the appeal is being disposed of after considering the alternate submissions relating to errors committed while determining the assessable values based on the transaction value of similar goods."

The final direction by the Tribunal reads as follows:

> "From the above, it is clear that the valuation of the items in question should be re-done by using lowest transaction value of Findlaters for determining the price of 100 Pipers. Further, due adjustments towards quantity difference and retail price difference should be made wherever warranted. In order to facilitate such revaluation, we set aside the impugned order and remit the case to the Commissioner for fresh adjudication. Both sides would be at liberty to present data relevant to the above issues."

11. This decision of the Tribunal was not put in issue by the appellant before a higher forum. Pursuant to and in furtherance of the directions issued by the Tribunal in the said order, the Commissioner passed a fresh adjudication order on 20th June 2006, confirming a total differential duty of Rs.40.37 crores, which happened to be more than the duty amount of Rs.39.96 crores as confirmed in the second adjudication order.

12. As expected, the appellant challenged the said order by preferring yet another appeal to the Tribunal. Inter-alia, observing that in the first remand order the question of applicability of Rule 6 was left to be decided by the adjudicator and in the second remand order, dated 29th June 2005, the Tribunal did not go into the applicability of the said rule and allowed the appeal on the basis of alternative pleas of the appellant, the Tribunal decided to go into the question of applicability of Rule 6. Upon re-consideration of the issue, the Tribunal upheld the decision of the Commissioner in determining the value of the imports under Rule 6. However, partly accepting the appeal, the Tribunal held that the appellant will be entitled to further adjustments in the value of CAB determined on the basis of the value of similar goods, on account of: (i) imports of substantially higher volumes of CAB; and (ii) where the retail price of bottled whisky was substantially lower than those of the comparable brands. It was, however, clarified that once the assessable value was determined for any brand by following the above method, the assessable value shall not be enhanced

till a higher import price of the similar goods was noticed. The Tribunal also laid down the following methodology for making the adjustments on account of difference in volume of imports and the retail price:-

> "The price difference between each variety of CAB of the importer (say PI – Price of Import) and the corresponding CAB of competitor (say PC – Price of Comparable goods) shall be arrived at first as PC-PI; thereafter value of the import of CAB of each brand shall be determined as PI+80% of (PC-PI). In other words, instead of adding the entire difference it shall be restricted to 80% i.e. by reducing the difference by 20%.
>
> We direct that the adjustments on account of difference in retail prices shall be made in the manner prescribed below. The percentage of difference between the retail price of any brand of the appellant with the corresponding brand being compared shall be arrived at and to that extent the value of CAB of the competitor's import shall be reduced to arrive at the assessable value for CAB imported by the appellant.
>
> The above determination is subject to the following conditions:-
>
> (a) The value of any brand to be adopted shall not be higher than the value adopted by the Commissioner in his second order dated 28.09.2003.
>
> (b) The value of any brand to be adopted shall not be lower than the value declared by the importer."

13. Being dissatisfied with the order/directions of the Tribunal, as stated above, both the parties are before us in this appeal.

14. We have heard Mr. V. Lakshmikumaran, learned counsel appearing for the appellant and Mr. B. Bhattacharya, learned Additional Solicitor General for the revenue.

15. Learned counsel for the appellant strenuously urged that both the authorities below have committed a serious error of law by holding that the value of the imported CAB is to be determined as per the procedure prescribed in Rule 6 of the 1988 Rules. It was argued that having regard to the fact that scotch whisky is a specialty goods and is not commercially interchangeable, the CAB imported by the appellant and by others cannot be said to be 'similar goods' as defined in Rule 2(1)(e) of the 1988 Rules. It was submitted that determination of similarity in terms of Rule 2(1)(e) by the Commissioner and affirmed by the Tribunal is fallacious for the reasons: — (i) in specialty goods, the comparison of goods on the basis that such goods broadly contain the same components is misleading in as much as while all scotch whiskies are made from malt, have an age of at least three years and sold at the same concentration at the retail level yet such comparisons obliterate the inherent differences on the basis of which consumer preferences are decided. Different scotch whiskies have different tastes depending on the casks in which the scotch whisky is aged, the temperature during the ageing process, water used for making the scotch, the ingredients used etc. Additionally, blended scotch whiskies are blends of other scotch whiskies and blending formulae are kept secret, making each blended scotch whisky a unique product in the market; (ii) the CAB imported do not have the same quality, reputation and trademark. The concentrate imported by the appellant has a particular trademark i.e. 100 Pipers, Passport and Something Special 12 Years Old, which have certain quality and very little reputation in the Indian market whereas the concentrate imported by their competitors, having the trademark of Black Dog 12 Years Old, Black & White and VAT 69 have different quality and reputation as they are relatively very well known brands being sold in India for several decades and (iii)

the variation in price is largely due to the branding and individual preferences and, therefore, some goods command a premium price as compared to others, which is the case with regard to scotch whisky market also. The appellant and their competitors spend significantly on branding for differentiating their products and such branding, coupled with individual preferences, render such goods as not similar. Similarity cannot be determined on the basis of similarity in the prices at which the goods manufactured out of the imported goods are sold in the retail market in as much as retail price of the same brand can, in fact, be more or less in different States when compared with competitors' brand.

16. Learned counsel then submitted that even if the goods in question are treated as similar goods, Rule 6 cannot be applied because no suitable adjustments can be made for quantity difference. According to the learned counsel, apart from the fact that any goods, such as scotch whiskies, which are specialty goods, the variations in consumer preferences and the value of trademark and reputation are difficult to ascertain and adjust, there cannot be "demonstrated evidence" for quantifying such differences and, therefore, Rule 6 cannot be applied.

17. Learned counsel for the appellant also urged that the formula devised by the Tribunal, directing loading of the price of imports with 80% of the price differential owing to the differential in quantity imported is arbitrary. It was urged that since the quantity imported by the appellant is 500% to 1500% of the quantity imported by the identified brands, an adjustment of at least 40% from the price of such identified brands should have been allowed by the Tribunal. In support of the proposition that deduction to the extent of 50% in cases of whole sales were allowed, reliance was placed on a decision of this Court in *Metal Box India Ltd. Vs. Collector of Central Excise, Madras*[1]. It was, thus, pleaded that the order of the Tribunal, approving

1. (1995) 2 SCC 90.

the application of Rule 6 deserves to be set aside. In the alternative, it was urged that if this Court comes to the conclusion that Rule 6 is to be applied for determining the value of CAB, comparison should be made for each year with the lowest price of other imports during the year with at least 40% reduction from the list price to take care of quantity differences.

18. *Per contra,* Mr. Bhattacharya, while supporting the decision of the Tribunal, in so far as the question of applicability of Rule 6 was concerned, submitted that the Tribunal committed a serious error of law in re-examining the said question. It was contended that apart from the fact that second remand order dated 29th June 2005, whereby the Tribunal had directed the Commissioner to apply Rule 6 and re-determine the value of CAB after making adjustments wherever warranted, was not questioned by the appellant, in view of the dismissal of their appeal by this Court against Tribunal's order dated 25th March 2003, the said issue had attained finality and the appellant was estopped from raising it before any forum.

19. In support of revenue's appeal, learned counsel submitted that the direction by the Tribunal to the Commissioner to give adjustment of 20% while determining the value of the imported CAB is vitiated because no evidence in this behalf was produced by the appellant before the Commissioner. Referring to para 4 of the interpretative note to Rule 5 of the 1988 Rules, learned counsel asserted that no adjustment on account of difference in quantity can be granted unless there is "demonstrated evidence" on the basis whereof reasonableness and accuracy of the adjustment could be established.

20. In rejoinder, Mr. V. Lakshmikumaran argued that the appellant was fully justified in agitating before the Tribunal the issue with regard to the applicability of Rule 6. It was submitted that since the applicability of Rule 6 had been left to the adjudicator to decide in the first remand order, the question of applicability of Rule 6 arose before the Tribunal only in the

second round. In second round again, appellant's appeal having been disposed of on their alternative submissions regarding Rule 6, the appellant's submission on applicability of Rule 6, in fact, came up for consideration before the Tribunal for the first time in the third round of appellant's appeal before the Tribunal. It was, thus, argued that filing or non filing of an appeal against the two earlier orders of the Tribunal is irrelevant.

21. The questions arising for determination are:-

(i) Whether the Tribunal was justified in re-examining the question of applicability of Rule 6?

(ii) If the answer to question (i) is in the affirmative, then whether the value of the CAB for the purpose of levying duty of customs is to be determined as per the procedure prescribed in Rule 6 or in terms of some other Rule?

(iii) Whether the direction by the Tribunal regarding adjustment to the tune of 20% in the price difference between CAB of the appellant and the corresponding CAB of the competitor, on account of volume of imports, is justified?

22. Having carefully perused the orders of remand passed by the Tribunal on 25th March 2003 and 29th June 2005, we are of the opinion that the issue with regard to the applicability of Rule 6 of the 1988 Rules for valuation of CAB had attained finality on the summary dismissal of the appellant's appeal by this Court vide order dated 21st November 2003. It is clear from a bare reading of the observations of the Tribunal in its

order dated 25th March 2003, extracted in para 11 supra that remand to the Commissioner for fresh adjudication was confined only to the errors committed while determining the assessable values based on the transaction value of "similar goods". Thus, in principle, the Tribunal proceeded on the premise that the valuation had to be done as per the procedure laid down in Rule 6. This is also evident from appellant's pleadings when they challenged the order of remand *inter-alia*, contending in their appeal under Section 130E of the Act that Rule 6 had no application on the facts of their case and the value of imported CAB by them had to be determined as per Rule 4(3)(b)of the 1988 Rules. The appeal was, however, dismissed *in limine.* In our opinion, once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non speaking order, the doctrine of merger does apply, unlike in the case of dismissal of special leave to appeal under Article 136 of the Constitution by a non-speaking order.

23. The nature, concept and logic of doctrine of merger was explained elaborately in *Kunhayammed & Ors. Vs. State of Kerala & Anr.*[2]. Speaking for a bench of three learned Judges, R.C. Lahoti, J. (as His Lordship then was) observed: (SCC p. 370, para 12)

> "**12.** The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or

2. (2000) 6 SCC 359.

order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

The Court further observed:

"**41.** Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court."

24. In the present case, the appellant preferred statutory appeal under Section 130E of the Act against order of the Tribunal dated 25th March 2003 and, therefore, the dismissal of appeal by this Court though by a non-speaking order, was in exercise of appellate jurisdiction, wherein the merits of the

order impugned were subjected to judicial scrutiny. In our opinion, in the instant case, the doctrine of merger would be attracted and the appellant is estopped from raising the issue of applicability of Rule 6 in their case.

25. In the view we have taken, we are fortified by a decision of this Court in *V.M. Salgaocar & Bros. Pvt. Ltd. Vs. Commissioner of Income Tax,*[3] wherein the Court was called upon to consider the effect of dismissal of an appeal under Section 261 of the Income Tax Act, 1961 by a non speaking order. Speaking for the Bench, D.P. Wadhwa, J. while drawing distinction between an order dismissing *in limine* a special leave petition under Article 136 of the Constitution and an appeal under Article 133, and drawing support from the decision of this Court in *Supreme Court Employees' Welfare Association Vs. Union of India & Anr.,*[4] held that former case does not but the latter does attract the doctrine of merger. The Court observed thus:-

"Different considerations apply when a special leave petition under Article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under Article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case it has been laid by this Court that when a special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger

3. (2000) 5 SCC 373.

4. (1989) 4 SCC 187.

does not apply in the case of dismissal of special leave petition under Article 136. When an appeal is dismissed the order of the High Court is merged with that of the Supreme Court."

26. Moreover, in the instant case the issue with regard to the applicability of Rule 6 had attained finality for yet another reason. It is manifest from the Tribunal's order dated 29th June 2005, that the scope and purpose of remand to the Commissioner was limited. As it is evident from the afore-extracted paragraphs of the said order of the Tribunal, that the Tribunal categorically declined to go into the issue about the appropriateness of Rule 6, with the result that the finding of the Commissioner in his order passed pursuant to Tribunal's earlier order dated 29th August 2003, regarding applicability of Rule 6 remained undisturbed and in fact attained finality, in as much as, the appellant did not question the correctness of the remand order passed by the Tribunal on 29th June 2005. Keeping in mind the factual scenario, we are of the opinion that the Tribunal erred in re-opening and examining afresh the question as to whether or not the value of CAB could be determined by applying Rule 6 and, therefore, the objection of the revenue in that regard deserves to be accepted. We order accordingly.

27. In the light of our opinion on the first question, we deem it unnecessary to assess the merits of the submissions made by learned counsel for the parties on the question of applicability of Rule 6 of the 1988 Rules.

28. This takes us to the last question, viz. whether or not the direction of the Tribunal to the Commissioner to grant adjustment @ 20% in the price difference between each variety of CAB of the appellant and the corresponding CAB of the competitor on account of higher volume of imports by the appellant, for determining the value of the CAB is justified?

29. The appellant as well as the revenue are both dissatisfied with the said direction. The former claims that they

should get discount of at least 40%. The stand of the latter, to the contrary, is that no demonstrated evidence, establishing the reasonableness and accuracy of the adjustment, having been adduced, the appellant is not entitled to any adjustment.

Rules 3, 5 and 6 of the 1988 Rules are relevant for our purpose and they read as follows:-

"**3. Determination of the method of valuation.—**For the purpose of these rules,-

(i) the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these Rules."

"**5. Transaction value of identical goods.-** (1)(a) Subject to the provisions of Rule 3 of these rules, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1) of this rule, is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the

adjustments, whether such adjustment leads to an increase or decrease in the value.

(2) Where the costs and charges referred to in sub-rule (2) of Rule 9 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

(3) In applying this rule, if more than one transaction value of identical goods is found; the lowest such value shall be used to determine the value of imported goods."

"6. Transaction value of similar goods.- (1) Subject to the provisions of Rule 3 of these rules, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued.

(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of Rule 5 of these rules shall, *mutatis mutandis*, also apply in respect of similar goods."

30. Rule 12 of the 1988 Rules provides that the interpretative notes specified in the Schedule to these rules shall apply for the interpretation of the rules. Notes to Rule 5 read as under:-

"**Notes to Rule 5**

1. In applying rule 5, the proper officer of customs shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used :

(a) a sale at the same commercial level but in different quantities;

(b) a sale at a different commercial level but in substantially the same quantities; or

(c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for :

(a) quantity factors only;

(b) commercial level factors only; or

(c) both commercial level and quantity factors.

3. For the purposes of rule 5, the transaction value of identical imported goods means a value, adjusted as provided for in rule 5(1) (b) and (c) and rule 5(2), which has already been accepted under rule 4.

4. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only identical imported goods for which a transaction value exists involved a sale of 500 units, and it is recognised that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in

quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a value under the provisions of rule 5 is not appropriate."

Notes to Rule 6 are also relevant for our purpose and read as follows:

"**Note to Rule 6**

1. In applying rule 6, the proper officer of customs shall, wherever possible, use a sale of similar goods at the same commercial level and in substantially the same quantities as the goods being valued. For the purpose of rule 6, the transaction value of similar imported goods means the value of imported goods, adjusted as provided for in rule 6(2) which has already been accepted under rule 4.

2. All other provisions contained in note to rule 5 shall *mutatis mutandis* also apply in respect of similar goods."

31. Rule 6 (2) provides that the provisions of clauses (b) and (c) of sub-rules (1) to (3) of Rule 5 of these rules shall *mutatis mutandis* also apply in respect of similar goods. A similar stipulation appears in note (2) to Rule 6. Rule 5(1)(c) provides that where no sale referred to in clause (b) of sub-rule (1) of this rule, is found, the transaction value of identical goods sold at different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both shall be used, provided that such adjustments shall be made on the basis of 'demonstrated evidence', which clearly establishes the reasonableness and accuracy of the adjustments. Interpretative

Note 4 to Rule 5 reiterates that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of 'demonstrated evidence' that clearly establishes the reasonableness and accuracy of the adjustment. One of such evidence could be a valid price list containing prices referring to different levels or different quantities.

32. The case of the revenue is that the term 'demonstrated evidence' means some evidence to establish that the seller had agreed to give some discount to the importer on the listed price of the product on account of high volume of purchase, which in common parlance is termed as bulk discount and the production of such evidence is a pre-requisite for any adjustment under the Rule. The stand of the appellant, on the contrary, is that Rule 5(1)(c) and the interpretative note (4) to Rule 5 only seek to clarify that where identical goods are sold to two or more buyers at a time but are not at the same commercial level or quantity, an "adjustment" shall be made to take account of the difference attributable to commercial level or to quantity or both. Their plea is that since the rule itself recognizes that prices differ when quantity differs, reference to 'discount' in the interpretative note needs to be viewed in a wider context because according to the appellant, the expression "demonstrated evidence" is broader in scope than the term 'discount', which is used only as an example of such evidence for adjustment. It is also pleaded that tying the concept of "adjustment" to 'discount' would severely restrict the application of Rule 5 or 6 as a clear evidence of 'discount' may not be available in all cases though on the facts of a particular case adjustment may be needed. In support of the proposition that there is a difference between the concept of "adjustment" and 'discount', reliance was placed on the decision of this Court in *Commissioner of Central Excise, Jaipur Vs. Rajasthan SPG. & WVG. Mills Ltd. & Anr.*[5], wherein it was observed that the concept of 'discount' and 'abatement' are different. It was also argued on behalf of the appellant that it is a well accepted norm that higher quantity of

5. (2007) 13 SCC 129.

goods attract lower prices, which fact has received judicial recognition by this Court in *Mirah Exports Pvt. Ltd. Vs. Collector of Customs*[6], *Metal Box India Ltd.* (supra) and *Basant Industries Nunhai, Agra Vs. Additional Collector of Customs, Bombay*[7]. Responding to the stand of the revenue that on the facts of the case, no adjustment was warranted, the appellant asserts that the issue of adjustment has reached finality as the correctness of the second remand order, whereby the Tribunal had remanded the matter to the Commissioner in view of the mistake in the application of Rule 6, had not been questioned by the revenue. In the said order, the Tribunal had held that due adjustments towards quantity differences and retail prices difference should be made wherever warranted. Thus, recognizing that in the present case some "adjustments" were called for.

33. We are of the considered opinion, that bearing in mind the object behind the provision for "adjustment" in terms of Rule 5(1)(c), the fine distinction between the words "adjustment" and 'discount' sought to be brought out by the appellant is of no relevance to the controversy at hand. The provision is clear and unambiguous meant to provide some adjustment in the price of identical goods, imported by two or more persons but in different quantities. It is plain that such "adjustment" may not necessarily lead to a decrease in the value. It may result in an increase as well. Reference to the word 'discount' in the interpretative note is by way of an illustration to indicate that a seller's price list is one of the relevant pieces' of evidence to establish the factum of quantity discount by the seller. It is manifest that "adjustment" in terms of Rule 5(1)(c) of 1988 Rules, for the purpose of determination of value of an import, can be granted only on production of evidence which establishes the reasonableness and accuracy of adjustment and higher volumes of imports per se, would not be sufficient to justify an adjustment, though it may be one of the relevant considerations.

6. (1998) 3 SCC 292.

7. 1995 Supp (3) 320.

34. Therefore, in so far as the question of "adjustment" in terms of Rule 5(1)(c) is concerned, we are in agreement with the Tribunal that the revenue having accepted the order of remand dated 29th June 2005, cannot now turn around and contend that no adjustment whatsoever is warranted. Similarly, there may also be some substance in the observation of the Tribunal that generally when the transactions are in large volumes over a long period, grant of discount is a normal commercial practice but again a commercial practice, per se, cannot be treated as conclusive evidence for determining real price of a consignment. In our opinion, therefore, in the absence of some documentary evidence indicating that any rebate/ discount was given to the appellant by the supplier, adjustments under Rule 5(1)(c) cannot be justified.

35. In the present case, it is evident from the impugned order that though the Tribunal had felt that requisite evidence to establish the range of adjustment was lacking and for that purpose, according to it, the matter was required to be remanded to the Commissioner but being influenced by the fact that there had already been three rounds of appeals to the Tribunal, it undertook the exercise itself. We are convinced that this approach of the Tribunal was not in order and therefore, in the absence of any demonstrated evidence, its direction for ad-hoc adjustment @ 20%, cannot be sustained.

36. In the result, the appeal preferred by the importer-appellant is dismissed and the revenue's appeal is allowed. The order of the Tribunal under appeal, in so far as it pertains to the applicability of Rule 6 of 1988 Rules, is affirmed, however, the direction with regard to the adjustment on account of volume of imports of CAB by the appellant @ 20% in the price difference between each variety of CAB imported by the appellant and the corresponding CAB of the competitor, is set aside.

37. In the circumstances, there will be no order as to costs.

D.G. Appeals disposed of.

STATE OF HIMACHAL PRADESH & ANR.
v.
M/S. HIMACHAL TECHNO ENGINEERS & ANR.
(Civil Appeal No. 5998 of 2010)

JULY 26, 2010

[R.V. RAVEENDRAN AND GYAN SUDHA MISRA, JJ.]

Arbitrations and Conciliation Act, 1996 – s. 34 – Arbitration Award – Challenge to – Petition u/s. 34 along with the application for condonation of delay of 28 days in filing application – Dismissal of, since it was filed on 11.3.08, beyond the period of three months plus thirty days – On appeal held: Petition filed on 11.3.2008 was not barred by limitation – Date of delivery of award on non-working days could not be construed as 'receipt' of award by appellant – Date of receipt should be taken as 12.11.2007 – For calculating three months period, date on which Executive Engineer received the award is to be excluded – Three months would be calculated from 13.11.2007 and would expire on 12.2.2008 – Thirty days from 12.2.2008 under the proviso should be calculated from 13.2.2008 and, having regard to the number of days in February, would expire on 13.3.2008 – Delay of twenty eight days in filing application u/s. 34 being within the limit of condonable delay, is condoned – Matter is remanded to High Court for consideration afresh – Limitation Act, 1963 – s. 12 – General Clauses Act, 1897 – s. 9.

The appellant-State is represented by the Executive Engineer. The appellant entered into a works contract with the respondent. Dispute arose with regard to payment for extra work. The respondent referred the dispute to the arbitrator. The arbitrator passed an award in favour of the respondent. The peon in the Office of Executive Engineer received the award under postal cover on 10.11.2007- a

Government holiday. Next day was a Sunday. The Executive Engineer received the award on 12.11.2007. The appellant filed a petition u/s. 34 of the Arbitration and Conciliation Act, 1996 on 11.3.2008 challenging the arbitration award along with an application for condonation of 28 days in filing the petition. The High Court dismissed the application as also the petition since it was barred by limitation. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1 When the award is delivered or deposited or left in the office of a party on a non-working day, the date of such physical delivery is not the date of 'receipt' of the award by that party. The fact that the beldar or a watchman was present on a holiday or non-working day and had received the copy of the award cannot be considered as 'receipt of the award' by the party concerned, for the purposes of s. 31(5) of the Arbitration and Conciliation Act, 1996. The date of receipt will have to be the next working day. Though the cover containing the award was delivered to the beldar in the office of the Executive Engineer on 10.11.2007 which was a holiday, the Executive Engineer received the award on 12.11.2007 (Monday), which was the next working day. Therefore, the date of delivery of the award on a holiday (10.11.2007) could not be construed as 'receipt' of the award by the appellant. The date of receipt therefore should be taken as 12.11.2007 and not 10.11.2007. [Para 7] [1032-G-H; 1033-A-B]

Union of India v. Tecco Trichy Engineers & Contractors **2005 (4) SCC 239 – referred to.**

1.2. Section 12 of Limitation Act, 1963 provides for exclusion of time in legal proceedings. Sub-section (1) thereof provides that in computing the period of limitation for any application, the day from which such period is to

be reckoned, shall be excluded. The applicability of s. 12 to petitions u/s. 34 of the Act is not excluded by the provisions of the Act. Section 9 of General Clauses Act, 1897 provides that in any Central Act, when the word 'from' is used to refer to commencement of time, the first of the days in the period of time shall be excluded. Therefore, the period of "three months from the date on which the party making that application had received the arbitral award" shall be computed from 13.11.2007. [Para 8] [1033-C-E]

2.1 The High Court held that 'three months' mentioned in s. 34(3) refers to a period of 90 days. This is erroneous. A 'month' does not refer to a period of thirty days, but refers to the actual period of a calendar month. [Para 9] [1033-F-G]

2.2 Sub-section (3) of Section 34 of the Act and the proviso thereto significantly, does not express the periods of time mentioned therein in the same units. Sub-section (3) uses the words 'three months' while prescribing the period of limitation and the proviso uses the words 'thirty days' while referring to the outside limit of condonable delay. The legislature had the choice of describing the periods of time in the same units, that is to describe the periods as 'three months' and 'one month' respectively or by describing the periods as 'ninety days' and 'thirty days' respectively. It did not do so. Therefore, the legislature did not intend that the period of three months used in sub-section (3) to be equated to 90 days, nor intended that the period of thirty days to be taken as one month. [Paras 10 and 11] [1033-H; 1034-A-F]

Salma Khatoon v. State of Bihar ***(2001) 7 SCC 197 – referred to.*** *Dodds v. Walker* **(1981) 2 All ER 609 – referred to.**

3. As the award was received by the Executive

Engineer on 12.11.2007, for the purpose of calculating the three months period, the said date shall have to be excluded having regard to section 12(1) of Limitation Act, 1963 and section 9 of General Clauses Act, 1897. Consequently, the three months should be calculated from 13.11.2007 and would expire on 12.2.2008. Thirty days from 12.2.2008 under the proviso should be calculated from 13.2.2008 and, having regard to the number of days in February, would expire on 13.3.2008. Therefore the petition filed on 11.3.2008 was well in time and was not barred by limitation. [Para 12] [1034-G-H; 1035-A-B]

4. The order of the High Court is set aside. The delay of twenty eight days on the part of the appellant in filing the application u/s. 34 of the Act being within the limit of condonable delay, is condoned, as sufficient cause was shown. The matter is remanded to the High Court for consideration of the petition under section 34 of the Act on merits, in accordance with law. [Para 13] [1035-C]

Case Law Reference:

2005 (4) SCC 239	**Referred to.**	**Para 7**
(1981) 2 All ER 609	**Referred to.**	**Para 11**
(2001) 7 SCC 197	**Referred to.**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5998 of 2010.

From the Judgment & Order dated 06.03.2009 of the High Court of Himanchal Pradesh at Shimla in Arbitration Case No. 7 of 2008.

Naresh K. Sharma for the Appellant.

S.R. Sharma, Dinesh Kumar Garg, Priya Kashyap for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant (State of Himachal Pradesh represented by the Executive Engineer, I&PH Division, Hamirpur) entered into a contract with the respondent on 15.7.2002, for the construction of a water purification plant. The respondent raised a dispute in regard to the payment for extra work, which was referred to arbitration. The arbitrator made an award dated 5.11.2007 in favour of the respondent and sent it to the parties by speed post. The postal cover containing the award was received by a peon/beldar in the office of the Executive Engineer on 10.11.2007 (a Saturday) which was a government holiday. 11th November, 2007 being a Sunday was also a holiday. It was received by the Executive Engineer on 12.11.2007.

3. A petition under section 34 of the Arbitration and Conciliation Act, 1996 ('Act' for short) was filed by the appellant on 11.3.2008, challenging the arbitral award. The petition was accompanied by an application under sub-section (3) of section 34 of the Act, for condonation of delay of 28 days in filing the petition. The respondent resisted the application contending that the petition under section 34 was filed beyond the period of 3 months plus 30 days and therefore, was liable to be rejected. A learned Single Judge of the High Court dismissed the application for condonation of delay and as a consequence dismissed the petition under section 34 of the Act. He held that as the award was received in the office on 10.11.2007, the period of three months, that is "90 days" had to be reckoned from 11.11.2007 by excluding the date of receipt; that the said three months period ended on 9.2.2008; that even if the maximum additional period of 30 days was counted thereafter (by calculating from 10.2.2008), the last date of limitation for filing the petition would have been 10.3.2008 and therefore the petition filed on 11.3.2008 was barred by limitation. He held that court had power to condone the delay

only to a maximum period of ninety days plus thirty days and therefore, the delay in filing the petition on 11.3.2008 could not be condoned. Feeling aggrieved the appellant has filed this appeal by special leave.

4. Section 34 of the Act relates to applications for setting aside arbitral awards. Sub-section (3) of Section 34 prescribes the period of limitation for such applications. It reads thus:

> "(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

Having regard to the proviso to section 34(3) of the Act, the provisions of section 5 of the Limitation Act, 1963 will not apply in regard to petitions under section 34 of the Act. While section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to sub-section (3) of section 34 of the Act places a limit on the period of condonable delay by using the words "may entertain the application within a further period of thirty days but not thereafter." Therefore, if a petition is filed beyond the prescribed period of three months, the court has the discretion to condone the delay only to an extent of thirty days, provided sufficient cause is shown. Where a petition is filed beyond three months plus thirty days, even if sufficient cause is made out, the delay cannot be condoned.

5. This leads us to the question whether the petition was

filed beyond three months plus thirty days. There is no dispute that if the petition had been filed within a period of three months plus thirty days, the delay has to be condoned as sufficient cause was shown by the appellant for condonation of the delay. But the High Court has accepted the contention of the respondent that the period of three months plus thirty days expired on 10.3.2008 and therefore the petition filed on 11.3.2008 was barred. Therefore, the following questions arise for our consideration:

(i) What is the date of commencement of limitation?

(ii) Whether the period of three months can be counted as 90 days?

(iii) Whether only three months plus twenty eight days had expired when the petition was filed as contended by the appellant, or whether petition was filed beyond three months plus thirty days, as contended by the respondent?

Re : Question (i)

6. Sub-section (3) of section 34 of the Act provides that an application for setting aside an award may not be made after three months have elapsed from *the date on which the party making that application has received the arbitral award*. Sub-section (5) of section 31 of the Act provides that after an arbitral award is made, a signed copy shall be delivered to each party. If one of the parties to arbitration is a government or a statutory body or a corporation, which has notified holidays or non-working days, and if the award was delivered to it on a holiday, the question is whether the date of physical delivery to the office of a party, should be considered as the date of receipt of the award by the party, or the next working day should be considered as the date of receipt.

7. In *Union of India v. Tecco Trichy Engineers & Contractors* [2005 (4) SCC 239], this Court considered the

meaning of the word 'received' in Section 31(5) of the Act and held :

> "The delivery of an arbitral award under sub-Section (5) of Section 31 is not a matter of mere formality. It is a matter of substance……. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the arbitral tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.
>
> In the context of a huge organization like Railways, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-Section (1) or (5) of Section 33 or under sub-Section (1) of Section 34.

When the award is delivered or deposited or left in the office of a party on a non working day, the date of such physical delivery is not the date of 'receipt' of the award by that party. The fact that the beldar or a watchman was present on a holiday or non-working day and had received the copy of the award cannot be considered as 'receipt of the award' by the party concerned, for the purposes of section 31(5) of the Act. Necessarily the date of receipt will have to be the next working day. In this case, it is not disputed that though the cover

containing the award was delivered to the beldar in the office of the Executive Engineer on 10.11.2007 which was a holiday, the Executive Engineer received the award on 12.11.2007 (Monday), which was the next working day. Therefore we hold that the date of delivery of the award on a holiday (10.11.2007) could not be construed as 'receipt' of the award by the appellant. The date of receipt therefore should be taken as 12.11.2007 and not 10.11.2007.

8. Section 12 of Limitation Act, 1963 provides for exclusion of time in legal proceedings. Sub-section (1) thereof provides that in computing the period of limitation for any application, the day from which such period is to be reckoned, shall be excluded. The applicability of Section 12 of Limitation Act, 1963 to petitions under Section 34 of the Act is not excluded by the provisions of the Act. Section 9 of General Clauses Act, 1897 provides that in any Central Act, when the word 'from' is used to refer to commencement of time, the first of the days in the period of time shall be excluded. Therefore the period of "three months from the date on which the party making that application had received the arbitral award" shall be computed from 13.11.2007.

Re : Question (ii)

9. The High Court has held that 'three months' mentioned in section 34(3) of the Act refers to a period of 90 days. This is erroneous. A 'month' does not refer to a period of thirty days, but refers to the actual period of a calendar month. If the month is April, June, September or November, the period of the month will be thirty days. If the month is January, March, May, July, August, October or December, the period of the month will be thirty one days. If the month is February, the period will be twenty nine days or twenty eight days depending upon whether it is a leap year or not.

10. Sub-section (3) of Section 34 of the Act and the proviso thereto significantly, do not express the periods of time

mentioned therein in the same units. Sub-section (3) uses the words 'three months' while prescribing the period of limitation and the proviso uses the words 'thirty days' while referring to the outside limit of condonable delay. The legislature had the choice of describing the periods of time in the same units, that is to describe the periods as 'three months' and 'one month' respectively or by describing the periods as 'ninety days' and 'thirty days' respectively. It did not do so. Therefore, the legislature did not intend that the period of three months used in sub-section (3) to be equated to 90 days, nor intended that the period of thirty days to be taken as one month.

11. Section 3(35) of the General Clauses Act, 1897 defines a month as meaning a month reckoned according to the British calendar. In *Dodds v. Walker* - (1981) 2 All ER 609, the House of Lords held that in calculating the period of a month or a specified number of months that had elapsed after the occurrence of a specified event, such as the giving of a notice, the general rule is that the period ends on the corresponding date in the appropriate subsequent month irrespective of whether some months are longer than others. To the same effect is the decision of this Court in B*ibi Salma Khatoon v. State of Bihar* – (2001) 7 SCC 197. Therefore when the period prescribed is three months (as contrasted from 90 days) from a specified date, the said period would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.

Re: Question (iii)

12. As the award was received by the Executive Engineer on 12.11.2007, for the purpose of calculating the three months period, the said date shall have to be excluded having regard to Section 12(1) of Limitation Act, 1963 and Section 9 of General Clauses Act, 1897. Consequently, the three months should be calculated from 13.11.2007 and would expire on

12.2.2008. Thirty days from 12.2.2008 under the proviso should be calculated from 13.2.2008 and, having regard to the number of days in February, would expire on 13.3.2008. Therefore the petition filed on 11.3.2008 was well in time and was not barred by limitation.

Conclusion

13. In view of the above, the appeal is allowed and the order of the High Court is set aside. The delay of twenty eight days on the part of the appellant in filing the application under section 34 of the Act being within the limit of condonable delay, is condoned, as sufficient cause was shown. The matter is remanded to the High Court for consideration of the petition under section 34 of the Act on merits, in accordance with law.

N.J. Appeal allowed.

BIPIN KUMAR MONDAL

v.

STATE OF WEST BENGAL

(Criminal Appeal No.1247 of 2008)

JULY 26, 2010

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860*: ss.302, 323 – Murder – Appellant stabbing his wife and son to death – PW-1, the other son while trying to intervene also sustaining injuries – Conviction u/ss.302 and 323 – Challenged – Held: There was nothing to show that PW-1 had any reason to rope his father into such gruesome murder – Evidence of PW-1 was natural, probable and convincing – The other witnesses who were close relatives and neighbours and reached the spot after hearing the shouts of PW-1, also supported the prosecution case – Ocular evidence was duly supported by post mortem report – Courts below were right in ordering conviction based on the testimony of a single witness since the evidence was cogent and credible – Absence of motive would not dislodge the prosecution case as there was direct evidence of a trustworthy witness regarding the commission of crime – Evidence Act, 1872 – s.134 – Witness – Sole witness.*

Criminal law: *Motive – Held: Becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding commission of the crime – Penal Code, 1860 – ss.302 and 323.*

The prosecution case was that PW-1 lodged an Ejahar stating that his father (appellant) came to their house on the fateful night and attacked his mother and the younger brother with a knife. When PW-1 tried to save his mother, he was also attacked and he received injuries

on his head and hands. The appellant ran away. Both the victims died on the spot. The neighbours reached the place of incident on hearing the shouts of PW-1. The trial court held that prosecution was able to prove its case beyond reasonable doubt and convicted the appellant under Section 302 and Section 323 IPC. The High Court affirmed the order of conviction. The order of conviction was challenged in the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The Ejahar lodged by PW-1 giving full details of the commission of the offence and naming his father as the person who committed the offences was written by PW-10. On scrutiny of the evidence of PW-10, it became evident that he was an independent witness residing in another village and could not have any grudge to support the case of the prosecution by deposing falsely. [Para 11] [1044-G-H; 1045-A]

1.2. The conduct of PW-1 remained very natural, probable and convincing. No reason came forward in his cross-examination as to why he would depose against his father. There was no suggestion by PW-1 that he was not sure as to who had committed the offence, as in his cross-examination, he denied such suggestion stating that it was not a fact that he told the name of the assailant as his father by suspicion. The other witnesses who were close relatives and neighbours of the appellant supported the prosecution case. PW-2 deposed that he reached the place of occurrence at about mid-night when PW-1 shouted and on enquiry from PW-1, he learnt that his mother and brother were murdered by his father with a sharp cutting knife. PW-1 was also injured on his head and hands. PW-3, PW-4, PW-6, PW-7 and PW-8 also deposed to the same effect. All these witnesses were cross-examined but there was nothing to show that any

part of their depositions could be doubted. There was nothing on record to show that there could be any reason for PW-1, a son, to falsely implicate and rope his father into such a gruesome murder or the other witnesses, who had been so close relatives and neighbours of the appellant, would support the prosecution case. The defence did not even make a suggestion to PW-1, that he was not injured by the appellant with a knife. The evidence of PW-1, therefore, cannot be ignored. However, as the prosecution failed to produce any evidence to the effect that PW-1 remained admitted in public health centre, that part of the evidence was ignored by the trial court as well as by the High Court. The witnesses were natural and most probable and their presence at the place of occurrence immediately after the commission of crime was expected, being close relatives and neighbours. No reason could be given as to why such close relations of the appellant would depose against him. [Paras 11, 16, 17] [1045-A-F; 1047-B-G]

1.3. The ocular evidence given by PW-1, was duly supported by the post mortem report and by the doctor PW-5 who had explained that several stab injuries were caused in the chest, neck and heart of the deceased wife of appellant. He proved the post mortem report and opined that the cardio-respiratory failure due to shock and haemorrhage due to injuries, had been the cause of death. He also opined that the injuries were caused by sharp cutting weapon. Same was the situation as regards the injuries on the body of the son of the appellant. [Para 14] [1046-E-G]

1.4. PW-9 was the Investigating Officer at a later stage when the first Investigating Officer was transferred and he deposed to the effect that he submitted the charge sheet against the accused under Sections 302/324 IPC on 13.4.2000 showing the appellant as absconder. The

appellant was given opportunity to cross-examine the said I.O.; but the opportunity was not availed. In fact, he was the best person to explain as to why there could not be any recovery of the weapon used in the crime. [Para 13] [1046-C-D]

2. Undoubtedly, there was nothing on record to show as what could be the motive behind the murder of the wife and son by the appellant. However, the issue of motive becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime. In such a case, particularly when a son and other closely related persons deposed against the appellant, the proof of motive by direct evidence would lose its relevance. In the instant case, the ocular evidence was supported by the medical evidence. In a case relating to circumstantial evidence, motive does assume great importance, but to say that the absence of motive would dislodge the entire prosecution story is giving this one factor an importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. [Paras 17, 20] [1047-C-F; 1048-G]

3. Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, mere absconding by the appellant after commission of the crime and remaining untraceable for such a long time itself cannot establish his guilt. [Para 22] [1050-C-E]

Shivji Genu Mohite v. State of Maharashtra AIR 1973 SC 55; *Hari Shankar v. State of U.P.* **(1996) 9 SCC 40;** *Bikau Pandey & Ors. v. State of Bihar* **(2003) 12 SCC 616;** *Abu Thakir & Ors. v. State of Tamil Nadu* **(2010) 5 SCC 91;** *Ujagar Singh v. State of Punjab* **(2007) 13 SCC 90;** *State of U.P. v. Kishanpal & Ors.* **(2008) 16 SCC 73;** *Matru @ Girish Chandra*

v. The State of U.P. **AIR 1971 SC 1050;** *Rahman v. State of U.P*. AIR 1972 SC 110; *State of M.P. v. Paltan Mallah & Ors.* **AIR 2005 SC 733, relied on.**

4. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. [Para 25] [1051-A-C]

Sunil Kumar v. State Govt. of NCT of Delhi **(2003) 11 SCC 367;** *Namdeo v. State of Maharashtra* **(2007) 14 SCC 150;** *Kunju @ Balachandran v. State of Taml Nadu* **AIR 2008 SC 1381;** *Jagdish Prasad v. State of M.P.* **AIR 1994 SC 1251;** *Vadivelu Thevar v. State of Madras* **AIR 1957 SC 614, relied on.**

Case Law Reference:

AIR 1973 SC 55	**relied on**	**Para 18**
(1996) 9 SCC 40	**relied on**	**Para 19**
(2003) 12 SCC 616	**relied on**	**Para 19**
(2010) 5 SCC 91	**relied on**	**Para 19**
(2007) 13 SCC 90	**relied on**	**Para 20**
(2008) 16 SCC 73	**relied on**	**Para 21**
AIR 1971 SC 1050	**relied on**	**Para 22**
AIR 1972 SC 110	**relied on**	**Para 22**
AIR 2005 SC 733	**relied on**	**Para 22**

(2003) 11 SCC 367	**relied on**	**Para 25**
(2007) 14 SCC 150	**relied on**	**Para 26**
AIR 2008 SC 1381	**relied on**	**Para 27**
AIR 1994 SC 1251	**relied on**	**Para 27**
AIR 1957 SC 614	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1247 of 2008.

From the Judgment & Order dated 13.7.2005 of the High Court at Calcutta in CRA No. 352 of 2001.

Seeraj Bagga (AC) for the Appellant.

Avijit Bhattacharjee, Ananya Kar for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 13th July, 2005, passed in Criminal Appeal No. 352 of 2001 by the High Court of Calcutta, by which the High Court dismissed the application filed by the appellant and upheld the conviction and sentence passed by the Trial Court in Sessions Trial No. 4 of 2001 *(State Vs. Bipin Kumar Mondal)* under Sections 302 and 307 of the Indian Penal Code, 1860 (hereinafter called as the 'IPC').

Factual Matrix :

2. Facts and circumstances giving rise to this appeal are that one Sujit Mondal, PW-1, lodged an Ejahar with Raninagar Police Station on 6.12.1999 stating that his father Bipin Kumar Mondal, appellant herein, came to their house at about midnight on 5.12.1999 and attacked his mother, Usha Rani Mondal, with a knife and inflicted severe injuries on her person. When he went to save his mother, he was also attacked by his father.

He received injuries on his head and hands and he had to escape out of fear. His younger brother, Ajit Mondal, was also severely injured with a knife by his father. On hearing the hue and cry made by Sujit Mondal, PW-1, his neighbours came and in the meantime his father ran away.

3. On the basis of the said Ejahar, the police investigated the case and submitted the charge sheet against the appellant under Section 302/307 IPC. Appellant pleaded not guilty and hence, he was put to trial.

4. In support of its case, the prosecution examined 11 witnesses to bring home the charge against the appellant. An Ejahar was lodged by the son of the appellant and other witnesses had been close neighbours and relatives residing in the same village. The Trial Court considered the evidence of prosecution witnesses and came to the conclusion that petition of complaint had been written by Saidul Islam, PW-10, on the instructions of Sujit Mondal, PW-1, and both of them supported the prosecution case in Court. Saidul Islam, PW-10, was a resident of another village and had gone to Raninagar Public Health Centre in connection with the treatment of his relation and there he was requested by Sujit Mondal, PW-1, to write the said Ejahar (Exh.-1). Sujit Mondal, PW-1, had deposed that he had gone to the same Public Health Centre at Raninagar and was admitted for treatment for one day. The other witnesses who were close neighbours had supported the prosecution case and deposed that all of them reached the place of occurrence after hearing the shouts by Sujit Mondal and when they reached there, they were told by Sujit Mondal, PW-1, that his father had killed his mother and brother and inflicted injuries on his person. After considering the entire evidence on record and taking it into consideration along with the defence taken by the appellant, which had been only to the extent that he was innocent, the trial Court held that the prosecution had succeeded in proving its case beyond reasonable doubt. However, the injuries on the person of Sujit Mondal, PW-1, were found not to be so serious

and he has failed to produce any certificate from Raninagar Public Health Centre or any other proof that he was admitted there. The appellant was convicted under Sections 302 and 323 IPC. Thus, he was awarded the sentence of life imprisonment under Section 302 IPC and 6 months' RI under Section 323 IPC, however, it was held that both the sentences would run concurrently vide judgment and order dated 12.6.2001.

5. The appellant preferred Criminal Appeal No.352 of 2001, which has been dismissed by the High Court vide impugned judgment and order dated 13th July, 2002. Hence, this appeal.

Rival Submissions :

6. Shri Seeraj Bagga, learned Amicus Curiae, has submitted that the appellant is innocent and has been falsely implicated in the crime. Sujit Mondal, PW-1, was not sure as to who had committed the offence. There was no motive for committing the crime and the weapon with which the offence had been committed has never been recovered. The depositions made by PWs 2 to 8, the so-called related persons or neighbours are merely based on hearsay as none of them had seen the commission of offence.

7. There are material contradictions in their depositions. Dilip Kumar, PW-4, had deposed that when he reached the place of occurrence, Ajit Mondal died within a short time after his arrival. However, none of the other witnesses have stated that when they reached the place of occurrence after hearing the hue and cry of Sujit Mondal, PW-1, Ajit Mondal was alive and had died after some time. All the three persons had been sleeping in the same room which was open. Therefore, it was possible for any outsider to enter into the house and the possibility that an outsider entered the house and committed the offence could not be ruled out. The appellant was an anti-social element and many persons had a grudge against him. So, any other person could have committed the crime. The

evidence to the effect that at the time of commission of offence, the lamp was burning and there was sufficient light, is also not free from doubt. Therefore, the appeal deserves to be allowed.

8. On the contrary, Shri Avijit Bhattacharjee, learned counsel for the State, has opposed the appeal and vehemently submitted that Sujit Mondal, PW-1, had no doubt or suspicion in his mind that his father had committed the offence. The depositions made by PWs 2 to 8, who are close relatives and neighbours who had reached the place of occurrence immediately after commission of the offence, cannot be doubted as each of them has deposed before the Trial Court that Sujit Mondal, PW-1, told them that the appellant, his father has committed the crime. The recovery of knife used in the commission of offence could not be made because the appellant remained absconding for a long time. The conduct of the appellant i.e. absconding for a long time itself establishes the guilt of the appellant.

9. All the witnesses had been put to cross-examination and nothing has been obtained to seek the credence of the evidence of any of them. The appellant just pleaded innocence and nothing else. He did not even disclose as under what circumstances he had absconded from his family home and had been living somewhere else, where he had been at the time of commission of offence and why did he not attend any ritual i.e. funeral etc. of the victims if he was innocent. The appeal lacks merit and is liable to be dismissed.

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

11. Sujit Mondal, PW-1, has lodged an Ejahar with Raninagar Police Station on 6.12.1999 giving full details of the commission of the offence and naming his father as the person who committed the offence. The said Ejahar had been written by Saidul Islam, PW-10. On scrutiny of evidence of PW-10, it becomes evident that he is an independent witness residing

in another village and could not have any grudge to support the case of the prosecution by deposing falsely. The conduct of Sujit Mondal, PW-1, remains very natural, probable and convincing. During cross-examination, nothing could be elicited from him seeking the credence of his statement. No reason came forward in the cross-examination or otherwise as to why a son would depose against his father. There is no suggestion by Sujit Mondal, PW-1, that he was not sure as to who has committed the offence, as in cross-examination he denied such a suggestion stating that it was not a fact that he told the name of the assailant as his father by suspicion. The other witnesses who were close relatives and neighbours of the appellant have supported the prosecution case. Sambhu Nath, PW-2, had deposed that he reached at about mid-night when Sujit Mondal, PW-1, shouted and he came out from his house and on enquiry from PW-1, he learnt that his mother and brother had been murdered by the appellant with a sharp cutting knife. PW-1 was also injured on his head and hands. Swapan Kumar, PW-3, deposed that on reaching the place of occurrence, he interrogated Sujit Mondal, who told him that his father had killed his mother, Usha Rani and brother, Ajit Mondal and there had been an attempt by his father to kill him (Sujit Mondal) also with a sharp cutting knife. Dilip Kumar, PW-4, Binay Mondal, PW-6, Anukul Chandra, PW-7 and Prasanna Kumar, PW-8, also deposed to the same effect. All these witnesses had been cross-examined but there is nothing on record to show that any part of their depositions could be doubted. We do not find any force in the submissions made by Shri Seeraj Bagga that there were material contradictions in their depositions as learned counsel for the appellant had pointed out that Dilip Kumar, PW-4, had deposed that when he reached the place of occurrence, Ajit Mondal was alive and he interrogated him as to who had caused the injury and he told him that his father assaulted him and left. He further deposed that Sujit Mondal told him that Ajit Mondal and Usha Rani were also attacked by the appellant and Ajit Mondal died within a short time and Usha Rani had died before his arrival.

12. The submissions made by Shri Seeraj Bagga is that none of the other witnesses had deposed that when any of them reached the place of occurrence, Ajit Mondal was alive. In fact, there is nothing on record to show as who was the person who reached first at the place of occurrence. It cannot be presumed that all of them reached the place of occurrence at the same time/simultaneously. No other question had been put to Dilip Kumar, PW-4, in his cross-examination. Therefore, it is quite possible that he was the first man to arrive at the place of occurrence and the statement made by him cannot be denied.

13. Bipin Mukherjee, PW-9, had been the Investigating Officer at a later stage when the first Investigating Officer had been transferred and he had deposed that he had submitted the charge sheet against the accused under Sections 302/324 IPC on 13.4.2000 showing the appellant as absconder. The appellant was given opportunity to cross-examine the said I.O.; but the opportunity was not availed. In fact, he was the best person to explain as to why there could not be any recovery of the knife, the weapon used in the crime.

14. Saidul Islam, PW-10, an independent witness belonging to another village has successfully proved the Ejahar written by him at Raninagar Public Health Centre. The ocular evidence given by Sujit Mondal, PW-1, is duly supported by the post mortem report and by Dr. Tarun Kumar, PW-5, examined by the prosecution, who had explained that several stab injuries had been caused in the chest, neck and heart of Usha Rani Mondal. He proved the post mortem report and opined that the cardio respiratory failure due to shock and haemorrhage due to injuries, had been the cause of death. He also opined that injuries were caused by sharp cutting weapon. Same remains the situation so far as the injuries on the body of Ajit Mondal are concerned.

15. For every question put to the appellant under Section 313 of Code of Criminal Procedure, 1973, the same reply was

given that he was innocent and he submitted that he would not adduce any evidence in his defence.

16. In view of the above, we reach the inescapable conclusion that there is nothing on record to show that there could be any reason for Sujit Mondal, PW-1, a son, to falsely implicate and rope his father into such a gruesome murder or the other witnesses, who had been so close relatives and neighbours of the appellant, would support the prosecution case.

17. During the cross-examination of all of the witnesses, nothing had transpired for which their evidence may be discarded. The witnesses were natural and most probable and their presence at the place of occurrence immediately after the commission of crime is expected, being close relatives and neighbours. No reason could be given as to why such close relations of the appellant would depose against him. Undoubtedly, there is nothing on record to show as what could be the motive behind the murder of his wife and son by the appellant. However, it can be difficult to understand the motive behind the offence. The issue of motive becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime. In such a case, particularly when a son and other closely related persons depose against the appellant, the proof of motive by direct evidence loses its relevance. In the instant case, the ocular evidence is supported by the medical evidence. There is nothing on record to show that the appellant had received any grave or sudden provocation from the victims or that the appellant had lost his power of self control from any action of either of the victims.

Motive :

18. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him

to commit a particular crime. In *Shivji Genu Mohite Vs. State of Maharashtra,* AIR 1973 SC 55, this Court held that in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy.

19. It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide *Hari Shankar Vs. State of U.P.,* (1996) 9 SCC 40; *Bikau Pandey & Ors. Vs. State of Bihar,* (2003) 12 SCC 616; and *Abu Thakir & Ors. Vs. State of Tamil Nadu,* (2010) 5 SCC 91).

20. In a case relating to circumstantial evidence, motive does assume great importance, but to say that the absence of motive would dislodge the entire prosecution story is giving this one factor an importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. (Vide *Ujagar Singh Vs. State of Punjab,* (2007) 13 SCC 90).

21. While dealing with a similar issue, this Court in *State of U.P. Vs. Kishanpal & Ors.,* (2008) 16 SCC 73 held as under:

> "The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

Abscondance by Accused :

22. In *Matru @ Girish Chandra Vs. The State of U.P.,* AIR 1971 SC 1050, this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person observing as under:

> "The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a

> determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence."

A similar view has been reiterated by this Court in *Rahman Vs. State of U.P.* AIR 1972 SC 110; and *State of M.P. Vs. Paltan Mallah & Ors.* AIR 2005 SC 733.

Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural.

Thus, in view of the above, we do not find any force in the submission made by Shri Bhattacharjee that mere absconding by the appellant after commission of the crime and remaining untraceable for such a long time itself can establish his guilt. Absconding by itself is not conclusive either of guilt or of guilty conscience.

23. The defence did not even make a suggestion to Sujit Mondal, PW-1, that he was not injured by the appellant with a knife. The evidence of PW-1, therefore, cannot be ignored. However, as the prosecution failed to produce any evidence to the effect that Sujit Mondal, PW-1, remained admitted in PHC Raninagar. That part of the evidence has been ignored by the Trial Court as well as by the High Court.

Testimony of Sole Witness :

24. Shri Bagga has also submitted that there was sole testimony of Sujit Mondal, PW-1, and the rest, i.e. depositions of PW-2 to PW-8, could be treated merely as a hearsay. The same cannot be relied upon for conviction.

25. In *Sunil Kumar Vs. State Govt. of NCT of Delhi,* (2003) 11 SCC 367, this Court repelled a similar submission observing that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

26. In *Namdeo Vs. State of Maharashtra,* (2007) 14 SCC 150, this Court re-iterated the similar view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

27. In *Kunju @ Balachandran Vs. State of Taml Nadu,* AIR 2008 SC 1381, a similar view has been re-iterated placing reliance on various earlier judgments of this court including *Jagdish Prasad Vs. State of M.P.,* AIR 1994 SC 1251; and *Vadivelu Thevar Vs. State of Madras,* AIR 1957 SC 614.

28. Thus, in view of the above, the bald contention made by Shri Bagga that no conviction can be recorded in case of a solitary eye-witness has no force and is negatived accordingly.

29. In view of the above, we are of the considered opinion that the facts and circumstances of the case do not present special features warranting the review of the judgments/orders

of the courts below. Appeal lacks merit and is accordingly dismissed.

30. Before parting with the case, we record our appreciation, thanks and gratitude to Shri Seeraj Bagga in rendering full assistance to the Court during the course of hearing.

D.G. Appeal dismissed.

AFCONS INFRASTRUCTURE LTD. AND ANR.
v.
CHERIAN VARKEY CONSTRUCTION CO. (P) LTD. AND ORS.
(Civil Appeal No. 6000 of 2010)

JULY 26, 2010

[R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.]

Code of Civil Procedure, 1908:

s.89 – Object of – Held: Is to try for settlement between the parties by resorting to appropriate ADR process before the case proceeds to trial.

s.89 – Anomalies in s.89 and its correct interpretation – Held: The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' under clauses (c) and (d) of sub-section (2) of s.89 – The second anomaly is that sub-section (1) of s.89 imports the final stage of conciliation referred to in s.73(1) of the Arbitration and Conciliation Act, 1996 into the pre-ADR reference stage under s.89 – The clauses (c) and (d) of sub-section (2) of s.89 would make perfect sense by interchanging the word "mediation" in clause (d) with the words "judicial settlement" in clause (c) – As regards second anomaly, it is not possible for the courts to formulate or re-formulate the terms of a possible settlement at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process – This anomaly was diluted in Salem Bar-II by equating "terms of settlement" to a "summary of dispute" – Alternative disputes resolution (ADR) processes – Interpretation of statutes.

s.89 – Reference to ADR process under – Whether mandatory – Held: Having a hearing after completion of pleadings, to consider recourse to ADR process u/s. 89 is mandatory – But actual reference to an ADR process in all

cases is not mandatory – Where the case falls under an excluded category, there need not be reference to ADR process – In all other case reference to ADR process is a must.

s.89 – ADR process – Governing statutes – Held: s.89 makes it clear that two of the ADR processes, arbitration and conciliation, would be governed by the provisions of the Arbitration and Conciliation Act, 1996 and two other ADR processes, Lok Adalat Settlement and Mediation would be governed by the Legal Services Authorities Act, 1987 – Judicial settlement is not governed by any enactment and the court has to follow such procedure as may be prescribed (by appropriate rules) – Arbitration and Conciliation Act, 1996 – Legal Services Authorities Act, 1987.

s.89, O.10, r.1A – Procedure to be followed by courts in implementing s.89 and Order 10, r.1A – Guidelines laid down.

s.89 and O.10, r.1A – Distinction between – Held: Rule 1A of O.10 requires the court to give the option to the parties, to choose any of the ADR processes – This would mean a joint option or consensus about the choice of the ADR process – On the other hand, s.89 vests the choice of reference to the court.

s.89 – Consent of the parties for reference to ADR processes – Held: For referring matter to arbitration or to conciliation, consent of all the parties to the suit is required – Lok Adalat, Mediation and Judicial Settlement do not require consent of the parties.

Alternative disputes resolution (ADR) processes: Whether the settlement in an ADR process is binding in itself – Held: When the court refers the matter to arbitration under s.89 of the Code, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal – Arbitration award is binding on the parties and is executable/enforceable as if a decree of a court – The other

four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non-adjudicatory ADR forum – As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms – Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3, CPC and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding – In regard to the matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by s.74 of AC Act (in respect of conciliation settlements) or s.21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator) – Only then such settlements would be effective – Arbitration and Conciliation Act, 1996 – s.74 – Legal Services Authorities Act, 1987 – s.21.

The first respondent filed a recovery suit against the appellants. In the said suit, an order of attachment was made. Thereafter, the first respondent filed an application under Section 89, CPC praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter to the application contending that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under Section 89, CPC. Meanwhile, the High Court allowed the appeal filed by the appellant against the order of attachment. Thereafter, the trial court allowed the application under Section 89 and formulated sixteen issues and referred the matter to arbitration. The High court dismissed the revision petition holding that the apparent tenor of Section 89, CPC permitted the Court, in appropriate cases to refer even the unwilling parties

to arbitration and the concept of pre-existing arbitration agreement which was necessary for reference to arbitration under the Arbitration and Conciliation Act, 1996, was inapplicable to references under Section 89, CPC. The order of High Court was under challenge in the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. Resort to alternative disputes resolution 'ADR' processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament introduced Section 89 and Rules 1-A to 1-C in Order 10 in the Code of Civil Procedure to ensure that ADR process was resorted to before the commencement of trial in suits. The validity of Section 89, with all its imperfection was upheld in **Salem Bar-I,* **but was referred to a Committee constituted by the court as it was hoped that Section 89 could be implemented by ironing the creases. In** ***Salem Bar-II*, **the Supreme Court applied the principle of purposive construction in an attempt to make it workable.[Para 7] [1076-E-G]**

Salem Advocate Bar Association v. Union of India* **2003 (1) SCC 49; ***Salem Advocate Bar Association* v. *Union of India* **2005 (6) SCC 344, referred to.**

What is wrong with Section 89, CPC

1.2. The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89, CPC. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following

such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. The words are universally understood in a particular sense, and assigned a particular meaning in common parlance. The definitions of those words in section 89 with interchanged meanings had led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 was apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "mediation" in clause (d) and the words "judicial settlement" in clause (c) are interchanged, the said clauses would make perfect sense. These changes made by interpretative process shall remain in force till the legislature corrects the mistakes so that Section 89 is not rendered meaningless and infructuous. [Paras 8 and 16] [1076-H; 1077-A-F; 1086-B]

Black's Law Dictionary, **7th edition, Pages 1377 and 996, referred to.**

1.3. The second anomaly is that sub-section (1) of Section 89 imports the final stage of conciliation referred to in section 73(1) of the Arbitration and Conciliation Act, 1996 (AC Act) into the pre-ADR reference stage under

section 89. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-section (1) of Section 89 is to be literally followed, every trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process. [Paras 9, 10] [1077-G-H; 1078-A-C; 1078-D-E]

1.4. If the reference is to be made to arbitration, the terms of settlement formulated by the court would not be of any use, as what is referred to arbitration is the dispute and not the terms of settlement; and the arbitrator has to adjudicate upon the dispute and give his decision by way

of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court would be totally useless in any subsequent ADR process. The formulation of the terms of settlement by the court merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 CPC. This anomaly was diluted in *Salem Bar-II* by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a 'summary of disputes' and not 'terms of settlement'. [Paras 11,12] [1079-G-H; 1080-A; 1080-C-D]

Correct Interpretation of Section 89, CPC

2.1. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation pose a great risk as the changes may not be what the legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. [Para 13] [1080-E-F]

Shri Mandir Sita Ramji v. Lt. Governor of Delhi **(1975) 4 SCC 298, relied on.**

2.2. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof lead to confusion, absurdity, repugnancy with other

provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. [Para 13] [1080-H; 1081-A-C]

Tirath Singh v. Bachittar Singh **AIR 1955 SC 830 ;** *Shamrao V. Parulekar v. District Magistrate, Thana, Bombay* **AIR 1952 SC 324;** *Molar Mal* vs. *Kay Iron Works (P) Ltd.* **2004 (4) SCC 285, relied on.**

Mangin v. Inland Revenue Commission **1971 (1) All. ER 179;** *Stock* v. *Frank Jones (Tipton) Ltd*., **1978 (1) All ER 948, referred to.**

Maxwell on Interpretation of Statutes **12th Edn., page 228;** *Justice G.P. Singh* "*Principles of Statutory Interpretation*" **12th Edn. – 2010, Lexis Nexis, referred to.**

2.3. In *Salem Bar-II,* **by judicial interpretation, the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, Supreme Court in** *Salem Bar-II*, **adopted the definition of** '*mediation*' **suggested in the Model Mediation Rules, in spite of a different definition in section 89(2)(d) as the process by which a mediator appointed**

by parties or by the court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them. All over the country, the courts were referring cases under section 89 to mediation by assuming and understanding 'mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute. [Para 14] [1084-C-H; 1085-A]

2.4. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/ denials wherever required, and before framing issues, the court has to take recourse to section 89 CPC. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and

then refer them to one of the ADR processes. [Para 15] [1085-B-D]

Whether reference to ADR process is mandatory

3. Section 89 starts with the words "*where it appears to the court that there exist elements of a settlement*". **This clearly would show that cases which are not suited for ADR process should not be referred under section 89, CPC. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 CPC, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89, CPC. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89, CPC is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category, there need not be reference to ADR process. In all other case reference to ADR process is a must. [Para 17] [1086-D-G]**

How to decide the appropriate ADR process under Section 89, CPC

4.1. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes – conciliation, mediation, judicial settlement and Lok Adalat settlement. Section 89, CPC makes it clear that two of the ADR processes - arbitration and conciliation, would be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat

Settlement and Mediation would be governed by the Legal Services Authorities Act. As for the last of the ADR processes – judicial settlement, Section 89 makes it clear that it is not governed by any enactment and the court has to follow such procedure as may be prescribed (by appropriate rules). [Para 20] [1089-E-H; 1090-A]

4.2. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 CPC gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choice available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process. [Para 21] [1090-B-C]

Arbitration

4.3.1. Arbitration is an ADR process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an 'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10, CPC the matter would have stood referred to arbitration either by invoking section 8 or section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89, CPC. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the

choice of ADR processes is offered to them by the court under section 89, CPC. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 CPC; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in *Salem Bar-I*, the case would go outside the stream of the court permanently and would not come back to the court. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 CPC. [Paras 23, 24] [1090-F-H; 1091-A-C]

Jagdish Chander v. Ramesh Chander **2007 (5) SCC 719, relied on.**

CONCILIATION

4.3.2. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both the parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial. [Para 25] [1094-A-D]

THE OTHER THREE ADR PROCESSES:

4.3.3. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all the parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. If the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has to use its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution. [Para 26] [1094-E-H; 1094-A]

Whether the settlement in an ADR process is binding in itself :

5.1. When the court refers the matter to arbitration under Section 89 of the Act, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. The award of the arbitrator is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will

also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act. [Para 27] [1095-B-D]

5.2. The other four ADR processes are non-adjudicatory process. The court retains its control and jurisdiction over the case, even when the matter is before such non-adjudicatory ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement would also be placed before the court which referred the matter and that court would make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3, CPC and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to the matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct

that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements would be effective. [Paras 28] [1095-E-H; 1096-A-F]

SUMMATION

6.1. The procedure to be adopted by a court under Section 89, CPC is thus summarised as follows:

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In cases where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court

shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject matter of the suit, but also other disputes involving persons other than the parties to the suit, the Court may adopt the principle underlying Order 23 Rule 3 of the Code. This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is *ex facie* illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability. [Para 31] [1097-E-H; 1098-A-H; 1099-A-H; 1100-A]

6.2. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89, CPC:

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred

to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary. [Para 32] [1100-B-H; 1101-A-B]

6.3. These procedure and consequential aspects are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases. [Para 33] [1101-C-E]

Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr. **2003 (5) SCC 531, distinguished.**

7. In the instant case, the trial court did not adopt the proper procedure while enforcing Section 89 CPC. Failure to invoke Section 89 *suo moto* after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous. Further, while exercising power under Section 89 of the Code, the trial court cannot refer a suit to arbitration unless all the parties to the suit agree for such reference. [Para 35] [1103-A-C]

Case Law Reference:

2003 (5) SCC 531	**distinguished**	**Para 4, 34**
2003 (1) SCC 49	**referred to**	**Para 7, 24.1**
2005 (6) SCC 344	**relied on**	**Paras 7, 13.5, 14, 24.2**

(1975) 4 SCC 298	**relied on**	**Para 13**
AIR 1955 SC 830	**relied on**	**Para 13.1**
AIR 1952 SC 324	**relied on**	**Para 13.2**
2004 (4) SCC 285	**relied on**	**Para 13.3**
1971 (1) All. ER 179	**referred to**	**Para 13.4**
1978 (1) All ER 948	**referred to**	**Para 13.6**
2007 (5) SCC 719	**relied on**	**Para 24.3**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6000 of 2010.

From the Judgment & Order dated 11.10.2006 of the High Court of Kerala at Ernakulam in Civil Revision Petition No. 1219 of 2005.

Krishnanan Venugopal, Anil K. Bhatnagar, Amit Dhingra Manu Seshadri (for Dua Associates) for the Appellants.

T.L.V. Iyer, V.J. Francis, Anupam Mishra, C.N. Sree Kumar, P.R. Nayak, Dushyant Parashar for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. The general scope of Section 89 of the Code of Civil Procedure ('Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first

respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application under section 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under section 89 of the Code. In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent under section 89 of the Code.

4. The trial court heard the said application under section 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under section 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of section 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration. The High Court also held that the

concept of pre existing arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 ('AC Act' for short) was inapplicable to references under section 89 of the Code, having regard to the decision in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr*. [2003 (5) SCC 531]. The said order is challenged in this appeal.

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

(i) What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?

(ii) Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below :

"89. *Settlement of disputes outside the court.* - (1) *Where it appears to the Court that there exist elements of a settlement* which may be acceptable to the parties, the Court shall *formulate the terms of settlement* and give them to the parties for their observations and after receiving the observations of the parties, the Court may *reformulate the terms of a possible settlement* and refer the same for -

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) where a dispute has been referred -

(a) for *arbitration or conciliation*, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to *Lok Adalat*, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for *judicial settlement*, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for *mediation*, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Order 10 Rule 1A. Direction of the Court to opt for any one mode of alternative dispute resolution.—After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Order 10 Rule 1B. Appearance before the conciliatory forum or authority.—Where a suit is referred under rule

1A, the parties shall appear before such forum or authority for conciliation of the suit.

Order 10 Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.—Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

7.If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short 'ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in *Salem Advocate Bar Association v. Union of India* reported in [2003 (1) SCC 49 – for short, *Salem Bar - (I)*] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In *Salem Advocate Bar Association* v. *Union of India* [2005 (6) SCC 344 – for short, *Salem Bar-(II)*], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with section 89 of the Code?

8. The first anomaly is the mixing up of the definitions of

'mediation' and 'judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89 of the Code. Clause (c) says that for "*judicial settlement*", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to *"mediation*", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c). "*Judicial settlement*" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "*Mediation*" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "*mediation*" in clause (d) and the words "*judicial settlement*" in clause (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-section (1) of section 89 imports the final stage of conciliation referred to in section 73(1) of the AC Act into the pre-ADR reference stage under section 89 of the Code. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms

of a possible settlement and then refer the same for any one of the ADR processes. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

10. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage *prior* to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

Section 73(1) of Arbitration andConciliation Act, 1996 relating to the final stage of settlement process in . conciliation	**Section 89(1) of Code of Civil Procedure relating to a stage before reference to an ADR process.**
When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.	Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through

the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly in *Salem Bar (II)* by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a 'summary of disputes' and not 'terms of settlement'.

How should section 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context : "When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser." (See : *Shri Mandir Sita Ramji* vs. *Lt. Governor of Delhi* – (1975) 4 SCC 298). There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words

or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

(13.1) Maxwell on *Interpretation of Statutes* (12th Edn., page 228), under the caption 'modification of the language to meet the intention' in the chapter dealing with 'Exceptional Construction' states the position succinctly:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be

> reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

This Court in *Tirath Singh v. Bachittar Singh* [AIR 1955 SC 830] approved and adopted the said approach.

(13.2.) In *Shamrao V.Parulekar v. District Magistrate, Thana, Bombay* [AIR 1952 SC 324], this Court reiterated the principle from *Maxwell*:

> ".....if one construction will lead to an absurdity while another will give effect to what commonsense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."

(13.3) In *Molar Mal* vs. *Kay Iron Works (P) Ltd.* – 2004 (4) SCC 285, this Court while reiterating that courts will have to follow the rule of literal construction, which enjoins the court to take the words as used by the Legislature and to give it the meaning which naturally implies, held that there is an exception to that rule. This Court observed :

> "That exception comes into play when application of literal construction of the words in the statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole, it requires a different meaning."

(13.4.) In *Mangin* v. *Inland Revenue Commission [*1971 (1) All.ER 179], the Privy Council held:

> "……The object of the construction of a statute, be it to

ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If, therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."

(13.5.) A classic example of correcting an error committed by the draftsman in legislative drafting is the substitution of the words 'defendant's witnesses' by this Court for the words 'plaintiff's witnesses' occurring in Order VII Rule 14(4) of the Code, in *Salem Bar-II*. We extract below the relevant portion of the said decision :

"Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses, would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature."

(13.6.) *Justice G.P. Singh* extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "*Principles of Statutory Interpretation"* (12th Edn. – 2010, Lexis Nexis - page 144) from the decision of the House of Lords in *Stock* v. *Frank Jones (Tipton) Ltd*., [1978 (1) All ER 948] :

"……a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the

legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to section 89 of the Code. Therefore, in *Salem Bar –II,* by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, this Court in *Salem Bar-II*, adopted the following definition of '*mediation'* suggested in the model mediation rules, in spite of a different definition in section 89(2)(d) :

"Settlement by 'mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding 'mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial

settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. *Firstly*, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. *Secondly*, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:

> (c) for "*mediation*", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
>
> (d) for "*judicial settlement*", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

Whether the reference to ADR Process is mandatory?

17. Section 89 starts with the words "*where it appears to the court that there exist elements of a settlement".* This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should *invariably* refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard

to their nature :

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) *All cases relating to trade, commerce and contracts*, including

- disputes arising out of contracts (including all money claims);

- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/ licensor and licensees;
- disputes between insurer and insured;

(ii) *All cases arising from strained or soured relationships,* including

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/co-parceners/co-owners; and
- disputes relating to partnership among partners.

(iii) *All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes,* including

- disputes between neighbours (relating to easementary rights,encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/ associations/Apartmentowners Associations;

(iv) *All cases relating to tortious liability* including

- claims for compensation in motor accidents/ other accidents; and

(v) *All consumer disputes* including

- disputes where a trader/supplier/manufacturer/ service provider is keen to maintain his business/ professional reputation and credibility or 'product popularity.

The above enumeration of 'suitable' and 'unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

How to decide the appropriate ADR process under section 89?

20. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation (See : amended definition in para 18 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes – judicial settlement (See : amended definition in para 18 above), section 89 makes it clear that it is not governed by any

enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

23. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an 'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking section 8 or section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89 of the Code. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application

or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in *Salem Bar-I*, the case will go outside the stream of the court permanently and will not come back to the court.

24. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though section 89 of the Code mandates reference to ADR processes, reference to arbitration under section 89 of the Code could only be with the consent of both sides and not otherwise.

(24.1) In *Salem Bar (I),* this Court held :

"It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. x x x x x *If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court* but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

(Emphasis supplied)

(24.2) In *Salem Bar - (II),* this Court held :

"Some doubt as to a possible conflict has been expressed in view of used of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule 1-A when it states that "*the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89*".

The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to *one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or*

reformulated in terms of Section 89.

One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P.Anand Gajapathi Raju v. P.V.G. Raju* [2000 (4) SCC 539] the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. *Of course, the parties have to agree for arbitration."*

(Emphasis supplied)

(24.3) The position was reiterated by this Court in *Jagdish Chander v. Ramesh Chander* [2007 (5) SCC 719] thus :

"It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, *there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference."*

(Emphasis supplied)

(24.4) Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code.

Conciliation

25. *Conciliation* is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to *conciliation* only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.

The other three ADR Processes

26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute

resolution. The court has to use its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

Whether the settlement in an ADR process is binding in itself ?

27. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/ enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will also be binding and executable/ enforceable as if a decree of a court, under Section 30 of the AC Act.

28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non-adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement

when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party ('mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/ disputes which are not the subject matter of the suit/ proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective.

Summation

29. Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to

consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

30. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and *before* the respondent files objections/written statements. Be that as it may.

31. We may summarize the procedure to be adopted by a court under section 89 of the Code as under :

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is

no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 of the Code. This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is *ex facie* illegal or unenforceable, the court should draw the attention

of parties thereto to avoid further litigations and disputes about executability.

32. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code :

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on

the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that section 89 has been a non-starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases.

Conclusion

34. Coming back to this case, we may refer to the decision in *Sukanya Holdings* relied upon by the respondents, to contend that for a reference to arbitration under section 89 of the Code, consent of parties is not required. The High Court assumed that *Sukanya Holdings* has held that section 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. *Sukanya Holdings* does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under section 8 of the AC Act could be maintained even where

a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to Section 89 are as under:

> "Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under section 8 of the Act, there can be a reference under section 89 to arbitration if parties agree to arbitration. The observations in *Sukanya Holdings* do not assist the first respondent as they were made in the context of considering a question as to whether section 89 of the Code could be invoked for seeking a reference under section 8 of the AC Act in a suit, where only a part of the subject-matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement. The first respondent next contended that the effect of the decision in *Sukanya Holdings* is that "section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as Section 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under Section 89 of the Code in regard to the said four ADR processes.

35. In the light of the above discussion, we answer the questions as follows:

(i) The trial court did not adopt the proper procedure while enforcing Section 89 of the Code. *Failure* to invoke Section 89 *suo moto* after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous.

(ii) A civil court exercising power under Section 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference.

36. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process.

D.G. Appeal allowed.

BHAGMAL & ORS.
v.
KUNWAR LAL & ORS.
(Civil Appeal No. 5875 of 2005)

JULY 27, 2010

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

Code of Civil Procedure, 1908 – Or. IX r. 13 – Setting aside ex-parte decree – Application under – Dismissed by trial court holding it to be time barred – Allowed by appellate court – However, set aside by High Court – On appeal, held: Application u/o. IX r. 13 was filed on 08.07.1988, within 30 days from 22.06.1988 the date when appellants came to know about the decree, thus, was within time – Due to compromise between the parties, appellants did not attend the suit and were not aware about the proceedings at all – They clearly pleaded that they came to know about the decree when they were served with the execution notice, which was a valid explanation for delay – Thus, order of High Court is set aside and that of appellate court is restored – Delay/laches.

In a suit for declaration of title, possession and permanent injunction in respect of a house by respondents against the appellants, an *ex parte* decree was passed. The appellant came to know about the *ex parte* decree when the execution proceedings started. The appellants filed an application under Order IX r. 13 CPC for setting aside the decree. It was submitted that since there was an understanding between the parties that respondent no. 1 would withdraw the suit, the appellants did not attend the further proceedings. The trial court dismissed the application as being time barred. The appellate court allowed the application. The High Court upheld the order of trial court and set aside that of

the appellate court. It held that the appellate court had exceeded its jurisdiction in allowing the application without condoning the delay. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1 The appellate court was right in holding that due to the compromise effected, the appellants did not attend the suit and, therefore, were not knowing about the proceedings at all. The appellants were justified in not attending the court and that they did not even know about the decree having been passed and, therefore, the delay in presenting the application was also justified. [Paras 3 and 4] [1110-E-F; 1111-A-B]

1.2 The High Court interfered with the well considered order of the appellate court solely on the ground that there was no application for condonation of delay made by the appellants before the trial court in support of their application u/o. IX r. 13 CPC. The High Court observed that the appellate Court had not recorded any finding on the question as to whether the filing of the application u/s. 5 of the Limitation Act was necessary or not and went on to decide the application on merits and, therefore, it had exceeded its jurisdiction; that the *ex-parte* decree was decided on 19.4.1985, the application ought to have been filed within 30 days from the date of passing of the decree, while the application for setting aside the *ex-parte* decree was filed on 08.07.1988 and no application for condonation of delay u/s. 5 of the Limitation Act was filed, therefore, in the absence of prayer for condonation of delay, the appellate court could not have allowed the application u/o. IX r. 13. The High Court was not justified in taking a hypertechnical view. [Paras 5, 6 and 7] [1111-E-H; 1112-C]

1.3 It is quite clear from the trial court's order that the trial court entertained the application on merits. It referred

to the reply of the respondents to the effect that the application for setting aside the *ex-parte* decree was beyond the limitation. However, the view taken by the trial court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The trial court has more or the less based its findings regarding delay on the basis of the order sheets. That was not right as the order sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "*parties as before*". Therefore, the trial court did not throw the application u/o. IX r. 13 merely on the basis of the fact that no application for condonation of delay was made. It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence. The question of delay was completely interlinked with the merits of the matter. [Para 7] [1112-C-F]

1.4 The appellants had clearly pleaded that they did not earlier come to the court on account of the fact that they did not know about the order passed by the court proceeding *ex-parte* and also the *ex-parte* decree which was passed; and that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellants for making the O. IX r. 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing O. IX r. 13 application was rightly considered by the appellate court on merits and the appellate court was absolutely right in coming to the conclusion that appellants/defendants were fully justified in filing the application under O. IX r. 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree

and the orders starting the *ex-parte* proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. The application u/o. IX r. 13 itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent no. 1-plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days, that was sufficient. [Para 7] [1112-F-H; 1113-A-E]

1.5 Article 123 of the Limitation Act cannot persuade this Court to take the view that the limitation actually started from the date of knowledge, as the appellants/defendants had no notice of the decree or the proceedings which the respondents had promised to terminate. The limitation must be deemed to have started from the date when the appellants/defendants came to know about the decree on 22.6.1988. An application u/o. IX r. 13 was filed within 30 days from that date and, therefore, it is clear that it was within time. At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any. Thus, the judgment of the High Court is set aside and that of the appellate court is restored. [Paras 8 and 9] [1113-F-H; 1114-A-E]

Sneh Gupta vs. Devi Sarup and Ors. **2009 (6) SCC 194 – distinguished.**

Case Law Reference:

2009 (6) SCC 194 Distinguished. Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5875 of 2005.

From the Judgment & Order dated 19.10.2001 of the High Court of Madhya Pradesh at Jabalpur in Civil Revision No. 136 of 1997.

June Chaudhary, Shakil Ahmed Syed, S.A. Saud, Prabhat K. Rai, Shuaibuddin for the Appellants.

M.P. Acharya, Pradeep Acharya, Kuldeep Acharya, Dharmendra Kumar Sinha, D.M. Nargolkar (NP) for the Respondents.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. The order passed by the High Court allowing a Civil Revision and thereby restoring the order of the Trial Court is challenged herein. A Civil Suit bearing No. 321-A of 1984 came to be filed by the respondents against the father of the petitioner No. 1 namely Kallu. Kallu died during the pendency of the suit and his legal heirs were brought on record. The suit was for declaration of title, possession and permanent injunction against the appellants/defendants in respect of the house in dispute. The Court proceeded ex-parte and the decree came to be passed. It is only when the execution proceeding started that the appellants/defendants allegedly came to know about the decree and moved an application under Order IX Rule 13 read with Section 151 of the Civil Procedure Code (hereinafter called 'CPC' for short) for setting aside the ex-parte decree.

2. According to the appellants/defendants, this application was moved within 30 days from the date of their knowledge of ex-parte decree. The appellants/defendants had pointed out that

there was a compromise effected on 10.12.1983, which was an out-of-Court settlement, wherein it was agreed between the parties that the respondent No. 1/plaintiff would withdraw the suit on account of the understanding having been arrived at between the parties. The appellants/defendants further pleaded that since it was the understanding between the parties that the respondent No. 1/plaintiff would withdraw the suit or get it dismissed, they did not attend the further proceedings, which the respondent No. 1/plaintiff continued surreptitiously and hence they did not even know about the ex-parte order and the decree passed against them. It was the stand of the appellants/defendants that since the application had been moved within 30 days from the knowledge, a separate application for condonation of delay was not required. The application under Order IX Rule 13 was dismissed by the Trial Court, which held the said application to be barred by time. A Misc. Civil Appeal came to be filed in the Court of District Judge, Bhopal against that order. There was some delay in filing the said appeal and, therefore, the application under Section 5 of the Limitation Act for condonation of delay was also filed. The appellate Court held that the application filed by the appellants/defendants under Order IX Rule 13 deserved to be allowed and held that the Trial Court had erred in law in not allowing the application. The appeal came to be allowed and the appellate Court directed the Trial Court to decide the case on merits after hearing the parties.

3. A Civil Revision came to be filed under Section 115 CPC before the High Court. The High Court took the view that the application filed by the appellants/defendants under Order IX Rule 13 was barred by time and the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and, therefore, the appellate Court had exceeded its jurisdiction in allowing the application without condoning the delay. On that count, the impugned order of the appellate Court was set aside and that of the Trial Court was

restored. Ms. June Chaudhary, learned Senior Counsel appearing on behalf of the appellants invited out attention to the order of the appellate Court, by which the Order IX Rule 13 application of the appellants/defendants was allowed. The learned Senior Counsel pointed out that the appellate Court had, on merits, discussed all the issues and had come to the finding that there indeed was a compromise effected in between the parties, in which there was an understanding arrived at that the respondent No. 1/plaintiff would withdraw his suit in pursuance of the understanding between the parties. The learned Senior Counsel also pointed out that, therefore, the appellants/defendants never attended the Court after 10.12.1983. This was tried to be countered with Shri M.P. Acharya, the learned Counsel appearing on behalf of the respondents that the order sheet of the suit showed as if the appellants/defendants were present even after 10.12.1983. Our attention was invited to the order sheets of the dates after 10.12.1983, wherein it was recorded '*parties as before*'. On that basis Shri Acharya contended that the appellants/defendants remained present in the Court and they had the knowledge of the proceedings. However, our attention was also invited to the finding by the appellate Court that those entries could not be relied upon because admittedly there were no signatures of the parties on any of those order sheets. Therefore, one thing was certain that the appellate Court was right in holding that due to the compromise effected, the appellants/defendants did not attend the suit and, therefore, were not knowing about the proceedings at all.

4. The appellate Court also has pointed out that the evidence was led before the Trial Court in support of the application under Order IX Rule 13 and in that, the appellants/defendants had examined the witnesses like Rambharose (AW-1), Shanta Bai (AW-2), Jabia (AW-3), Babulal (AW-4), Bhagmal (AW-5), Genda Lal (AW-6), Dashrat Singh (AW-7), Bhurra @ Aziz (AW-8) and Nand Kishore (AW-9). The appellate Court also recorded the finding that the compromise deed was

also got proved by the appellants/defendants in those proceedings through the witnesses who asserted that the compromise deed bore their signatures. The witnesses went on to say that the compromise deed was also signed by the present respondents. The appellate Court, therefore, rightly came to the conclusion that the appellants/defendants were justified in not attending the Court and that they did not even know about the decree having been passed and, therefore, the delay in presenting the application was also justified. The appellate Court also referred to the evidence of respondent Kunwar Lal and came to the conclusion therefrom that indeed a compromise deed was executed between the parties. The appellate Court also went on to express that the inference by the Trial Court that the compromise deed was doubtful, was also not correct. The appellate Court has also dealt with the cross objections raised before it by the present respondents to the effect that the compromise deed (Exhibit A-1) was prepared fraudulently. The appellate Court has rejected that contention in the cross objections and in our opinion, rightly.

5. This well considered order of the appellate Court came to be interfered with by the High Court solely on the ground that there was no application for condonation of delay made by the appellants/defendants before the Trial Court in support of their application under Order IX Rule 13 CPC. The High Court observed that the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and went on to decide the application on merits and, therefore, it had exceeded its jurisdiction. The High Court also commented on the fact that the ex-parte decree was decided on 19.4.1985, while the application for setting aside the ex-parte decree was filed on 8.7.1988 and that no application for condonation of delay under Section 5 of the Limitation Act was filed.

6. Relying on Article 123 of the Limitation Act, the High Court took the view that the application ought to have been filed

within 30 days from the date of passing of the decree and since it was not so filed, at least a condonation of delay application should have been made under Section 5 of the Limitation Act and, therefore, in the absence of prayer for condonation of delay, the appellate Court could not have allowed the application under Order IX Rule 13.

7. In our opinion, the High Court was not justified in taking a hypertechnical view. We have seen all the orders. It is quite clear from the Trial Court's order that the Trial Court entertained the application on merits. The Trial Court undoubtedly has referred to the reply of the respondents to the effect that the application for setting aside the ex-parte decree was beyond the limitation. However, the view taken by the Trial Court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The Trial Court has more or the less based its findings regarding delay on the basis of the order sheets. That was not right as the order sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "*parties as before*". Therefore, the Trial Court did not throw the application under Order IX Rule 13 merely on the basis of the fact that no application for condonation of delay was made. It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellants/defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellants/defendants for making the Order IX Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order IX Rule 13 application was,

in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in coming to the conclusion that appellants/defendants were fully justified in filing the application under Order IX Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.

8. Shri Acharya, learned Counsel appearing on behalf of the respondents tried to argue on the basis of Article 123 of the Limitation Act. However, in our opinion, Article 123 cannot be, in the facts of this case persuade us to take the view that the limitation actually started from the date of knowledge, as the appellants/defendants had no notice of the decree or the proceedings which the respondents had promised to terminate. Shri Acharya then tried to persuade us by suggesting that unless the application was filed for condonation of delay, the court had no jurisdiction to entertain the application for setting aside the decree. He has based this contention on the basis

of a reported decision of this Court in *Sneh Gupta Vs. Devi Sarup & Ors.* [2009 (6) SCC 194] and more particularly, the observations made in para 70 therein. In our opinion, the facts of this case were entirely different, as it was held in that case that the appellant had knowledge of passing of the compromise decree and yet she had not filed the application for condonation of delay. That is not the situation here. Even in this case, there is a clear cut observation in para 57, as follows:-

> "However, in a case where the summons have not been served, the second part shall apply."

The Court was considering Article 123 of the Limitation Act. In our opinion, in this case, the limitation must be deemed to have started from the date when the appellants/defendants came to know about the decree on 22.6.1988. An application under Order IX Rule 13 was filed within 30 days from that date and, therefore, it is clear that it was within time. At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any.

9. We, therefore, allow this appeal, set aside the judgment of the High Court and restore that of the appellate Court. The suit will now proceed before the Trial Court in pursuance of these orders. Under the circumstances, the proceedings of the suit shall be expedited. There shall be no costs.

N.J. Appeal allowed.

LOUIS PETER SURIN

v.

STATE OF JHARKHAND

(Criminal Appeal No. 498 of 2006)

JULY 27, 2010

[HARJIT SINGH BEDI AND C.K. PRASAD, JJ.]

Code of Criminal Procedure, 1973:

s. 482 – Petition for quashing criminal proceedings against a retired public servant – FIR filed in 1984 alleging commission of offences punishable under the provisions of the Prevention of Corruption Act and the Penal Code – Charge-sheet submitted in November 2001 – Cognizance taken by the Special Judge in December 2001 – Challenged on the ground of 17 years delay – High Court rejecting the petition – HELD: The public servant had superannuated in 1997 and cognizance was taken by Special Judge four year thereafter in a matter arising out of an FIR registered in April 1984 even though the request for sanction had been rejected by State Government on two occasions – In view of the peculiar facts, initiation of proceedings was not justified – Order of High Court set aside – Proceedings quashed – Constitution of India, 1950 – Article 136.

Mahendra Lal Dua vs. State of Bihar & Ors. **(2001) Supp (4) SCR 157 = (2002) 1 SCC 149; and** *Ramanand Chaudhary vs. State of Bihara and Ors.* **(2002) 1 SCC 153, relied on.**

Case Law Reference:

(2001) Supp (4) SCR 157	**relied on**	**para 4**
(2002) 1 SCC 153	**relied on**	**para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 498 of 2006.

From the Judgment & Order dated 23.11.2004 of the High Court of Jharkhand at Ranchi in Crl. M.P. No. 1120 of 2003.

Vikas Singh, Yunus Malik, Ravi Kishore, Samir Malik, Amrita Narayan, Shiva Lakshmi Udita Singh, Prashant Chaudhary for the Appellant.

Gopal Prasad for the Respondent.

The Order of the Court was delivered

O R D E R

This appeal arises out of the following facts:

On 8th July, 1983 an agreement was executed by the Deputy Commissioner, Palamu with M/s. Bharat Drilling for doing some drilling work in the District. The appellant was then employed as the Managing Director of the District Rural Development Agency, Palamu, and as per his statement had absolutely no role to play in the award of the contract to M/s. Bharat Drilling. By order dated 16th July, 1983 the appellant was transferred from his post as Managing Director and he handed over the charge from that very date to some other officer.

A first Information Report was registered on 14th April, 1984 under the Prevention of Corruption Act and the Indian Penal Code against the Deputy Commissioner who had signed the contract with M/s. Bharat Drilling on 8th July 1983 and against the District Rural Development Agency alleging that the Deputy Commissioner and the appellant had entered into a conspiracy in awarding the contract to M/s. Bharat Drilling for consideration. The Investigating Agencies moved the State of Bihar for sanction to prosecute the appellant but the same was declined by the Governor on 2nd February, 1990 on the

premise that no prima facie case was made out against any of the accused. A review of the order dated 2nd February 1990 was again sought which too was rejected vide order dated 28th July 1992 for the same reason, the appellant superannuated from service on 1st December 1997. On 16th June, 1999 the dispute between M/s. Bharat Drilling and the Government of Bihar was referred to Arbitration to the then Superintendent Engineer who made an award in favour of M/s. Bharat Drilling thereby settling the issue in its favour. Apparently piqued with what had happened and taking advantage of the fact that the appellant had retired in the meanwhile and that sanction for prosecution ws no longer required, a charge-sheet was submitted de hors the sanction on 9th November 2001. The Special Judge Ranchi thereafter took cognizance of the matter on 13th December, 2001. The order of the Special Judge was challenged before the High Court which by its order dated 23rd November, 2004 rejected the challenge. The matter is before us in this appeal in the above circumstances.

Mr. Vikas Singh, the learned senior counsel for the appellant has raised primarily one plea before us today. He has pointed out that cognizance had been taken by the Special Judge a full seventeen and half years after the filing of the FIR and about four years after the appellant had retired from service and in the light of the judgments of this Court reported in (2002) 1 SCC 149 (*Mahendra Lal Dua vs. State of Bihar and Ors.*) and (2002) 1 SCC 153 (*Ramanand Chaudhary vs. State of Bihar and Ors.*) this was impermissible and the proceedings were liable to be quashed as being belated and stale. He has highlighted that after the State Government had on two occasions, declined the sanction, on the ground that no prima facie case existed, there was no change in circumstances except that the appellant had superannuated in the meanwhile which was a factor which could not justify cognizance after such a long delay.

The learned counsel for the State of Jharkahnd has

however supported the orders of the Special Judge and the High Court and has pointed out that the State Government had not considered the matter in its proper perspective, when it had declined sanction on the two occasions.

We see from the judgments cited by Mr. Vikas Singh that they proceed on facts which are akin to the present one. In both cases sanction was granted after a delay of thirteen years while the officials concerned were still in service under the State Government. We find in the matter before us that the appellant had superannuated in the year 1997 and the cognizance had been taken by the Special Judge four years thereafter in a matter arising out of an F.I.R. registered in April 1984 even though the request for sanction had been rejected by the State Government on two occasions. In view of these peculiar facts we are of the opinion that the initiation of proceedings against the appellant was not justified.

We may however clarify that this judgment should not be read to mean that sanction would be required in a case where an employee has in the meanwhile superannuated.

We accordingly allow this appeal, set aside the impugned orders and quash the proceedings against the appellant.

R.P. Appeal allowed.

SIDDANKI RAM REDDY
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 1852 of 2008)

JULY 27, 2010

[R.M. LODHA AND A.K. PATNAIK, JJ.]

Penal Code, 1860:

s.302 – Murder – Conviction by courts below – Interference with – HELD: When evidence produced by prosecution neither has quality nor credibility, it would be unsafe to rest conviction upon such evidence, and judgments of courts below will have to be interfered with – In the instant case, trial court and High Court mechanically relied upon the prosecution evidence that it was the appellant who had attacked the deceased in court premises, without appreciating that it was unsafe to rest conviction upon the evidence of the witnesses with regard to the identification of the accused – Conviction set aside – Constitution of India, 1950 – Article 136 – Evidence – Test identification parade.

Evidence:

Identification of accused – Test identification parade – Purpose of – HELD: Is to have corroboration to the evidence of the eye-witnesses in the form of earlier identification – In the instant case, out of the three witnesses who had participated in the test identification parade, two failed to identify the accused as the assailant and the third had seen the accused earlier in the police station – Besides, they had seen the assailant for a very short time – When an attack is made on the deceased by a mob in a crowded place and the eye witnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by

the test identification parade – Penal Code, 1860 – s.302.

A charge-sheet was filed against fifteen persons, including the appellant, for murder of the son of the complainant in court premises. A-11 to A-15 were absconding. The trial court convicted and sentenced the appellant (A-1) u/s. 302 IPC and acquitted A-2 to A-10. The judgment was affirmed by the High Court.

In the appeal filed by A-1, it was contended for the appellant that there was no reliable evidence to inculpate the appellant, as none of the eye-witnesses, namely, PWs 1, 5 and 6, could identify the appellant; and that the test identification parade was not fair as only the appellant and another out of the 8 suspects arrested, were subjected to the test identification parade.

Allowing the appeal, the Court

HELD: 1.1. It is true that concurrent findings of fact arrived at on the basis of evidence by the trial court and the High Court are not normally interfered with by this Court in appeal. But, as has been held by this Court in *A.Subair,** **when the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence and the judgments of the courts below will have to be interfered with. This is one such case in which both the trial court and the High Court have mechanically relied on the evidence of PWs 1, 5 and 6 that it was the appellant who had attacked the deceased with an axe in the court premises without appreciating that it was unsafe to rest conviction upon the evidence of PWs 1, 5 and 6 with regard to the identification of the assailant. [para 22] [1133-F-H; 1134-A-C]**

A. Subair v. State of Kerala* **(2009) 6 SCC 587; *Mankamma v. State of Kerala* **2009 (14) SCR 1152 = (2009) 10 SCC 164, relied on.**

1.2. The evidence of PW-1, the father of the deceased, naming the appellant as the assailant is not reliable because though he has stated that he knew the appellant by name, in the FIR which was lodged in less than an hour after the incident he has not mentioned the name of the appellant. The proceedings of the test identification parade show that PW-1 has not identified any of the suspects. The version given by PW-1 in the witness box that the appellant was the assailant of the deceased appears to be based on his suspicion that the appellant out of grudge might have killed the deceased. This suspicion of PW-1 is borne out by his own testimony. [Para 14-15] [1129-B, C; F-G]

Ram Kumar Pandey v. State of Madhya Pradesh **1975 (8) SCR 519; (1975) 3 SCC 815, relied on.**

1.3. PW-5, who at the relevant time was working as a court constable, claims to have seen the appellant on the date of occurrence when he attacked the deceased by an axe. In the test identification parade, he identified the appellant as the assailant. His evidence, however, is that he was present when the appellant and other accused persons were produced for remand in the court on 11.3.2005 and he, therefore, knew the physical features of the appellant on 11.3.2005. It is thus clear that when the test identification parade took place on 23.4.2005, PW-5 had not only seen the appellant but also had knowledge that he was the accused in the murder which took place in the court premises on 28.2.2005. His evidence that the appellant was the assailant is, therefore, not reliable. [Para 17-18] [1130-G-H; 1131-A-F]

Lal Singh and Ors. v. *State of U. P.* **(2003) 12 SCC 554, relied on.**

1.4. PW-6, another constable on court duty, also stated that he saw the assailant attacking the deceased

with an axe in the court premises. It is difficult to believe the evidence of PW-6 regarding the identification of the appellant as the assailant because in the test identification parade he has stated that the suspect has injury mark on his right cheek; whereas the Magistrate (PW-34) conducting the test identification parade has stated in his evidence that according to his Report (Ex. P64) none of the two suspects had injury mark on the right cheek. [Para 4 and 19] [1125-B-C; 1132-B-C]

2.1. This Court has held in *Daya Singh** **that the purpose of test identification is to have corroboration to the evidence of the eye-witnesses in the form of earlier identification and that the substantive evidence of a witness is the evidence in the court. In the facts of the instant case, a mob attacked the deceased in the crowded corridors of the court and PW-1, PW-5 and PW-6 in their evidence in the court claim to have seen the appellant chasing the deceased and assaulting him with an axe on his neck. All these three eye-witnesses have also stated that soon after the assault the appellant ran away from the court premises. Thus, they saw the assailant for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape from the court premises. When an attack is made on the deceased by a mob in a crowded place and the eye-witnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case. [Para 20] [1132-D-H; 1133-A]**

Daya Singh v. State of Haryana* **2001 (1) SCR 1115=2001 (3) SCC 468; *Lal Singh and Ors.* v. *State of U. P.* **2003 (12) SCC 554, relied on.**

2.2. Further, the test identification parade has not been fair to the appellant. Although eight suspects were arrested, only the appellant and one other were produced before the witnesses at the test identification parade. This gives room for a lot of doubt on the case of the prosecution that none other than the appellant was the assailant. Therefore, the corroboration of the substantive evidence of PWs 1, 5 and 6 on the identification of the suspect by the test identification parade is not trustworthy. [Para 21] [1133-B-E]

State of Maharashtra v. Suresh **2002 (1) SCC 471, distinguished.**

Case Law Reference:

1975 (8) SCR 519	**relied on.**	**Para 14**
(2003) 12 SCC 554	**relied on.**	**Para 18**
2001 (1) SCR 1115	**relied on.**	**Para 20**
2002 (1) SCC 471	**distinguished**	**Para 21**
(2009) 6 SCC 587	**relied on.**	**Para 22**
2009 (14) SCR 1152	**relied on.**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1852 of 2008.

From the Judgment & Order dated 4.7.2008 of the High Court of A.P. at Hyderabad in Criminal Appeal No. 147 of 2006.

Suhsil Kumar, Aditya Kumar, Guntur Prabhakar for the Appellant.

Rama Krishna Reddy, Altaf Fatima (for D. Bharathi Reddy) for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is a Criminal Appeal against the judgment dated July 4, 2008 of the High Court of Andhra Pradesh in Criminal Appeal No. 147 of 2006.

2. The facts very briefly are that on February 28, 2005 one Komidi Sai Baba Reddy (deceased) was killed in the court premises of R.R. District at Cyberabad. The father of the deceased lodged a First Information Report (FIR) before the Station House Officer, P.S. L.B. Nagar alleging that on February 28, 2005 at 11.00 a.m. when the deceased was coming to the court, Narsimha Reddy's son, Srinivas Reddy and others sprinkled chilly powder in the eyes of the deceased and cut him by an axe and all this was done due to old vengeance. After investigation, a charge sheet was filed against 15 accused persons including the appellant in the court of the Second Metropolitan Magistrate, R.R. District, Cyberabad. As accused nos. 11 to 15 were absconding, the case was split up and accused nos. 1 to 10 were tried for several charges in Sessions Case No.195 of 2005. After the trial the 5th Additional Sessions Judge (FTC) acquitted accused nos. 2 to 10 of the charges and convicted the appellant, who was the accused no.1, under Section 302 of the Indian Penal Code, 1860 and sentenced him to undergo Rigorous Imprisonment for life and to pay a fine of Rs.25,000/- and in default to suffer Simple Imprisonment for one year.

3. Mr. Sushil Kumar, learned counsel for the appellant, submitted that it will be clear from the evidence led by the prosecution that the deceased was killed in the court premises by a mob and there is no reliable evidence on record to show that it was the appellant who had killed the deceased. He took us through the evidence of PW-1, PW-5 and PW-6, who according to the prosecution are the eye witnesses, to show that none of them have been able to identify the assailant of the deceased. He referred to the FIR (Ext.P1) to show that the appellant-Ram Reddy had not been named in the FIR lodged

by PW-1. He submitted that in the FIR the accused persons named are Narsimha Reddy's son and Srinivas Reddy, and the appellant is neither Narsimha Reddy's son nor Srinivas Reddy and, therefore, the evidence of PW-1 that the appellant was the assailant is not at all reliable.

4. He submitted that PWs 5 and 6 were police constables performing court duty and they did not know the appellant personally and yet they have deposed before the court that the appellant was the assailant of the deceased. He submitted that PW5 has stated that the appellant was wearing a *Kurta* and *Lachi,* whereas the Inspector of Police (PW-36), who arrested the appellant, has stated in his evidence that at the time of arrest, the appellant was neither wearing a *Kurta* nor a *Lachi*.

5. He next submitted that the Test Identification Parade was not at all fair because the appellant was arrested and eight others had also been arrested but only the appellant and one other accused were produced before the witnesses in the Test Identification Parade before the Judicial Magistrate (PW-34). He submitted that though the appellant was arrested on March 9, 2005, he was produced in the Test Identification Parade on April 23, 2005 about 54 days after the arrest and this inordinate delay in conducting the Test Identification Parade has not been explained by the prosecution.

6. He submitted that in any case in the Test Identification Parade PWs 1, 5 and 6 have not been able to properly identify the appellant. He submitted that PW-1, father of the deceased, has not identified the appellant at all. He argued that PWs 5 and 6 had enough opportunity to see the appellant prior to the Test Identification Parade and in fact when the appellant was produced before the court alongwith other accused persons after the arrest, PW-5 was one of the members of the police escort party and therefore he knew who was the accused before the Test Identification Parade. He submitted that PW-6 has stated before the Magistrate (PW-34) carrying out the Identification Parade that he can identify the appellant on the

basis of a scar on the cheek, but PW-34 has stated in his evidence that the appellant did not actually have any such scar or wound mark.

7. Mr. Sushil Kumar vehemently argued that in the absence of any reliable evidence to establish beyond reasonable doubt that it was the appellant who was the assailant amongst the mob in the court premises, the conviction under Section 302 of the Indian Penal Code, 1860 cannot be sustained. According to him, this is a fit case in which the appeal should be allowed and the impugned judgment set aside and the appellant should be acquitted.

8. Mr. Rama Krishna Reddy, learned counsel appearing for the State of Andhra Pradesh, on the other hand, supported the judgments of the trial court and the High Court. He submitted that the murder of the deceased took place at 11.00 a.m. in broad day light in the court premises during the court hours and in full view of the public and the evidence of PW-1 clearly establishes that the appellant killed the deceased out of revenge because the appellant's brother-in-law, Narsimha Reddy, had been killed on September 22, 2004. He submitted that the contention on behalf of the appellant that he is not named in the FIR by PW-1 is not correct. He submitted that in the FIR [Ex.P1] the brother-in-law of Narsimha Reddy was named as one of the accused and in the confessional statement of the appellant [Ex.P20] recorded by the Inspector of Police (PW-36) the appellant has admitted that he is the brother-in-law of Narsimha Reddy. He further submitted that pursuant to the confession, the axe with which the murder was committed (M.O.-1) was also recovered.

9. He next submitted that the trial court and the High Court have relied on the evidence of PWs 5 and 6, who were none other than the court constables and who had chased the appellant for a while after the incident. He argued that PWs 5 and 6 were therefore natural witnesses of the occurrence and

they had no axe to grind against the appellant and their evidence ought to be believed.

10. Regarding the delay in conducting the Test Identification Parade, he submitted that there was no unusual delay in conducting the Test Identification Parade as the appellant alongwith eight others were arrested on 9/10 March, 2005 and were produced before the Magistrate on March 11, 2005 and thereafter on April 7, 2005 a requisition was made by the Inspector of Police (PW-36) for conducting the Test Identification Parade and on April 23, 2005 the Test Identification Parade was conducted by the Magistrate. He submitted that in any case the defence has not put any question to Investigation Officer (PW-36) seeking his explanation for the delay, if any.

11. Mr. Reddy cited *State of Maharashtra v. Suresh* [(2000) 1 SCC 471] wherein this Court has observed that if potholes were to be ferreted out from the proceedings of the Magistrates holding Test Identification Parades then possibly no Test Identification Parade can escape from one or two lapses and Test Identification Parades would become unusable**.** He also relied on *Daya Singh v. State of Haryana* [(2001) 3 SCC 468] in which this Court has held that a Test Identification Parade held 7 to 8 years after the incident was not vitiated where an enduring impression of the identity of the accused was gained during the incident.

12. He submitted that this Court has held in *Mohd. Aslam v. State of Maharashtra* [(2001) 9 SCC 362] that where the testimony of an eye witness is supported by another eye witness with regard to the occurrence as well as the role of the accused in the occurrence, minor lapses, if any, in the conduct of the Test Identification Parade, cannot be a reason for acquitting the accused. He submitted that in the present case, PWs 1, 5 and 6, who were eye witnesses to the occurrence, have clearly spoken about the attack by the appellant on the deceased and their evidence is corroborated by the evidence

of other witnesses including PWs 34 and 36. According to him, this is not a fit case in which this Court should interfere with the concurrent findings of the trial court and the High Court holding the appellant guilty of the offence punishable under Section 302 of the Indian Penal Code, 1860.

13. The first witness on whom the High Court has relied on to convict the appellant is PW-1, the father of the deceased. The evidence of PW-1 is that on 28.02.2005 a case against his son and Sridevi was posted in the 2nd Metropolitan Magistrate Court and he had gone along with his son and Sridevi to the court premises and they attended the court as soon as the case was called and came out of the court at about 11.00 a.m. and at that time Narsing Yadav, accused No.2, who was standing at the flag-post, sprayed chilly powder into their eyes and while his deceased son was trying to obliterate the chilly powder from his face, the accused No.1 (the appellant) chased him with an axe and he ran after the appellant and when the deceased came to the corridor of the court, he bent his head to a side to save from the blow of the axe, due to which that blow was received by another person. Thereafter, the deceased took a turn to the left towards the 2nd Additional District Judge's Court and the *chappal* of the deceased slipped in that process and he bent and immediately the appellant hacked the deceased on left side of the neck. On seeing PW-1, the accused No.1 raised the axe but PW-1 went a little bit back and then the appellant hacked the deceased three times on the left side of the neck and near the ear. PW-1 has further stated that this took place in the corridor of the Court Hall of 2nd Additional District Judge's Court. The appellant then started ringing the axe in the air showing threatening gestures so as to cause terror and create fear in the mind of the people and although an advocate tried to catch the appellant he could not catch him and the appellant jumped the compound wall of the court opposite to the main entrance and went away.

14. The evidence of PW-1 naming the appellant Ram

Reddy as the assailant of the deceased is not reliable because though PW-1 has stated that he knew that accused No.1 (the appellant) was the brother-in-law of Narsimha Reddy and that his name was Ram Reddy, in the FIR (Ex.P-1) which was lodged in less than an hour after the incident at about 11.45 a.m. he has not mentioned the name of the appellant as Ram Reddy. The evidence of the Investigation Officer (PW-36) also is that PW-1 did not state the name of the appellant as Ram Reddy before him at the time of the inquest. If PW-1 knew the appellant as Ram Reddy at the time of the occurrence, he would have named Ram Reddy in the FIR (Ex.P1) which he lodged within an hour of the incident and would have also named him as the assailant before the Investigation Officer (PW-36) The omission on the part of PW-1 not to mention the name of appellant as Ram Reddy in the FIR (Ex.P1) before the Investigation Officer soon after the incident or at the time of inquest is relevant for deciding whether the evidence of PW-1 that the appellant was the assailant is reliable. In *Ram Kumar Pandey v. State of Madhya Pradesh* [(1975) 3 SCC 815] cited by Mr. Sushil Kumar, this Court has held that omissions of important facts in the FIR affecting the probabilities of the case are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case. In that case, the omission to mention any injury inflicted on Harbinder Singh by the appellant in the FIR was held to be very significant in the circumstances of the case.

15. Moreover, it appears that PW-1 did not actually know the appellant at the time of the incident and therefore did not name the appellant in the FIR (Ex.P-1). The Investigation Officer (PW-36) has stated in his evidence that PW-1 did not know the accused previously and therefore he requested the inclusion of PW-1 in the Test Identification Parade. In the Test Identification Parade, PW-1 could not identify any person as the assailant of the deceased. The evidence of the Magistrate (PW-34), who conducted the Test Identification Parade, is that PW-1 did not state before him that he can identify the appellant-Ram Reddy. The proceedings of the Test Identification Parade (Ex.P64)

show that PW-1 has not identified any of the suspects. The version given by PW-1 in the witness box that the appellant was the assailant of the deceased appears to be based on his suspicion that the appellant out of grudge may have killed the deceased. This suspicion of PW-1 is borne out by his own testimony to the effect that Ram Reddy (accused No.1) is the brother-in-law of the deceased Narsimha Reddy and bearing grudge in regard to his brother-in-law being killed accused No.1 has done this.

16. The next eye-witness on which the High Court has placed reliance is PW-5. His evidence is that he was working as a police constable in L.B. Nagar P.S. since 11.06.2001. On 28.02.2005, he was on court duty working as court constable in the court of the 2nd Metropolitan Magistrate and he came to the court at about 10.00 a.m. or 10.30 a.m. At about 11.00 a.m. he was at the front of the entrance of the court and he saw people running into the court building towards the 2nd A.D.J., court. He saw a person with white *kurta* and *pajama* running to the court building chasing another person in white clothes and the person with white *kurta* and *pajama* hacking the person in front of him with an axe on his neck near the 2nd A.D.J. Court Hall and after hacking the assailant was running out through the main entrance towards the compound wall and then he and Mahender (PW-4), who was an advocate, chased the assailant but the assailant ran and went to the motorcycle on the other side of the compound wall. Mahender (PW-4) threw a stone on the assailant which hit him on the back and then he returned to the 2nd A.D.J. Court Hall where he saw the victim lying on the ground with faint breathing. While giving his evidence PW-5 pointed out towards the appellant who was standing in the Court Hall and identified him as the assailant.

17. PW-5, who was a constable attending to his duties in the court, was not expected to know the appellant before the incident, but he claims to have seen the appellant on 28.02.2005 when he attacked the deceased by an axe. He was summoned

to Cherlapally Jail for the Test Identification Parade and he has identified the appellant as the assailant during the Test Identification Parade. If PW-5 saw the appellant for the first time in the Test Identification Parade on 23.04.2005 his evidence would have been trustworthy. His evidence, however, is that he was present when the accused No.1 (the appellant) and other accused persons were produced for remand in the court on 11.03.2005 and he therefore knew the physical features of appellant on 11.03.2005. It is thus clear that when the Test Identification Parade took place on 23.04.2005, PW-5 had not only seen the appellant but also had knowledge that the appellant was the accused in the murder which took place in the court premises on 28.02.2005.

18. In *Lal Singh & Ors.* v. *State of U. P.* [(2003) 12 SCC 554] cited by Mr. Sushil Kumar, this Court has held that the Court has to rule out the possibility of the witnesses having been shown to the witnesses before holding a Test Identification Parade. In fact, in *State of Maharashtra v. Suresh* cited by Mr. Reddy, this Court has noted that all precautions were taken that the witnesses could not see the suspect during transit from the lock-up to the place for Test of Identification Parade. But as we have seen, PW-5 had already seen the appellant in court on 11.03.2005 and already knew that the appellant was the accused when the Test Identification Parade was conducted on 23.04.2005. The evidence of PW-5 that the appellant was the assailant is, therefore, not reliable.

19. The last eye witness on whom the High Court has relied upon is PW-6. His evidence is that on 28.02.2005 he came to court by 10.30 a.m. and attended the J.F.C.M., East and North, and at about 11.00 a.m. he went to the section of 2nd A.D.J. court on some work and was returning when he saw a person armed with an axe coming from the main entrance side towards the 2nd A.D.J. Court Hall and he hacked the person whom he was chasing with the axe on his neck. The victim collapsed to the ground and he and a civilian by the name

Kumar tried to catch hold of the assailant, but the assailant by ringing the axe around terrorised everyone and created fear in the mind of the people. The further evidence of PW-6 is that when the assailant gave a blow he bent to the aside and then the assailant went through the main entrance. He was summoned to Cherlapally Jail for the Test Identification Parade in which he identified the accused No.1 (the appellant) as the assailant. It is difficult to believe the evidence of PW-6 regarding the identification of the appellant as the assailant because in the Test Identification Parade he has stated that the suspect has injury mark on his right cheek and the Magistrate (PW-34) conducting the Test Identification Parade has stated in his evidence that according to his Report (Ex. P64) none of the two suspects had injury mark on the right cheek.

20. This Court has held in *Daya Singh* v. *State of Haryana* (supra) cited by Mr. Reddy that the purpose of test identification is to have corroboration to the evidence of the eye witnesses in the form of earlier identification and that the substantive evidence of a witness is the evidence in the Court and if that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. In the facts of the present case, a mob attacked the deceased in the crowded corridors of the court of the 2nd Additional District Judge and PW-1, PW-5 and PW-6 in their evidence in the court claim to have seen the accused No.1 (appellant) chasing the deceased with an axe and assaulting the deceased with axe on his neck. All these three eye witnesses have also stated that soon after the assault the appellant ran away from the court premises. The three eye witnesses thus saw the injured/deceased for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape from the court premises. When an attack is made on the injured/deceased by a mob in a crowded place and the eye witnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding

the test identification parade may be held to be fatal to the prosecution case. In *Lal Singh & Ors.* v. *State of U. P.*, this Court has held that where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously.

21. Further, the test identification parade in this case has not been fair to the appellant. Although eight suspects were arrested, only the appellant and one other were produced before the witnesses at the Test Identification Parade. This gives room for a lot of doubt on the case of the prosecution that none other than the appellant was the assailant. In *State of Maharashtra v. Suresh* (supra), on which reliance was placed by Mr. Reddy, the Court found that the suspect was permitted to stand anywhere among seven persons and the witnesses were then asked to identify the person whom they saw on the crucial day and on these facts this Court held that the test identification parade was conducted in a reasonably foolproof manner. This is not what has been done in the present case and, therefore, the corroboration of the substantive evidence of PWs 1, 5 and 6 on the identification of the suspect by the test identification parade is not trustworthy.

22. It is true, as has been submitted by Mr. Reddy, that both the trial court and the High Court have arrived at concurrent findings on the basis of the evidence of PWs 1, 5, 6 and other witnesses that the appellant was the assailant of the deceased and that concurrent findings of fact arrived at on the basis of evidence by the trial court and the High Court are not normally interfered with by this Court in appeal. But as has been held by this Court in *A. Subair v. State of Kerala* [(2009) 6 SCC 587], when the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence and the judgments of the courts below will have to be interfered with. This Court has also held in *Mankamma v. State of Kerala* [(2009) 10 SCC 164] that ordinarily this Court does not interfere in a matter by re-

appreciating the evidence but when it is found that the evidence has been appreciated by the High Court in a mechanical manner and without proper consideration of facts and circumstances on record, this Court will have to re-appreciate the evidence in the interest of justice. This is one such case in which both the trial court and the High Court have mechanically relied on the evidence of PWs 1, 5 and 6 that it was the appellant who had attacked the deceased with an axe in the court premises without appreciating that it was unsafe to rest conviction upon the evidence of PWs 1, 5 and 6 with regard to the identification of the assailant.

23. In the result, we allow this appeal and set-aside the impugned judgments of the High Court and the trial court and direct that the appellant, who is in custody, be released forthwith if not required in any other case.

R.P. Appeal allowed.

ITTIANAM AND ORS.
v.
CHERICHI @ PADMINI
(Civil Appeal No. 7226 of 2002)

JULY 27, 2010

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

Succession Act, 1925 – s.90 – Effect of, on interpretation of the Will – Held: In absence of a contrary intention in the Will, the description of the properties in the Will would be deemed to refer to and include the property answering that description at the death of the testator – The Will would then be deemed to speak from the date of the testator's death – English Wills Act (U.K) – s.24.

Will – Statutory presumption against intestacy – Held: While construing a Will, the Court should lean against any intestacy – However, the presumption against intestacy cannot be raised ignoring the intention in the Will.

Interpretation of Statutes – Deeming provision – Interpretation and effect of – Legal fiction.

Words and Phrases – "deemed" and "comprise" – Meaning of.

Dispute arose between the parties over some properties bequeathed in terms of a Will. In the Will, seven items of property were bequeathed. Pursuant to an application filed by the appellants under Section 278 of the Indian Succession Act, 1925, the District Judge granted the letters of administration in respect of all the seven items of property in the Will.

On appeal, the High Court affirmed the grant of letters of administration in respect of items 1 to 3. It declined to

grant the letters of administration in respect of items 4 to 7 on the ground that on the date of the Will, the testator's title over item nos.4 to 7 was not perfected; and that it was perfected only on the registration of the sale deed (executed in favour of the testator), which was after the execution of the Will.

In the instant appeals, the question which arose for consideration was whether in view of the provisons of s.90 of the Indian Succession Act, 1925, the judgment of the High Court was erroneous and liable to be set aside.

Disposing of the appeals, the Court

HELD:1.1. Section 90 of the Indian Succession Act, 1925 is based on Section 24 of the English Wills Act. Prior to the English Wills Act under the common law, testamentary disposition of real property spoke from the date of the Will. But the English Wills Act changed that by a statutory presumption to the effect, that unless a contrary intention appears from the recitals of the Will, the Will speaks from the date of the testator's death. [Para 13] [1142-F]

1.2. Section 90 uses the legal fiction "deemed" and that is used with the specific purpose of raising a presumption against intestacy. On an analysis of the provisions of Section 90, it is clear that the property described in the Will shall be deemed to refer to and comprise the property answering that description at the death of the testator. In the absence of a contrary intention in the Will, the description of the properties in the Will shall be deemed to refer to and include the property answering that description at the death of the testator. [Paras 14, 16] [1142-G-H; 1143-C]

Shorter Oxford Dictionary on Historical Principles, **p.386;** *Webster's Comprehensive Dictionary Encyclopedic* ***Edition*****,**

p.269 and *Law of Wills by Williams*, **3rd edition, p.429, referred to.**

2. When the legislature uses a deeming provision to create a legal fiction, it is always used to achieve a purpose. The obvious purpose herein is to avoid intestacy in respect of properties referred to and comprised in the Will. Once the purpose is ascertained, the Court must give full effect to the statutory fiction and the fiction is to be carried to its logical end. Going by this test, the High Court did not properly appreciate the purport of Section 90 in the context of the Will when it is common ground that the Will does not contain any contrary intention in respect of the bequest of items 4 to 7 of the properties. [Paras 17, 18, 19] [1143-E-H; 1144-A-C]

State of Travancore-Cochin and others v. Shanmugha Vilas Cashewnut Factory, Quilon **AIR 1953 SC 333 and** *State of Bombay v. Pandurang Vinayak and others* **AIR 1953 SC 244, relied on.**

East End Dwellings Co. Ld. v. Finsbury Borough Council **1952 AC 109, referred to.**

3. On general principles also, a Will speaks only from the date of the death of the testator. In the present case, assuming that the testator had not acquired title in respect of half of the property, namely, items 4 to 7 of the property bequeathed by him in the Will on 8.5.1967, but the sale deed having been registered on 8.5.1967, the title reverts back to the date of execution of the sale deed on 2.5.67 under Section 47 of the Registration Act. And the testator died on 20.7.71. Therefore, much before his death, the testator acquired full title over items 4 to 7 of the property. Therefore, the High Court was in clear error in not appreciating the effect of Section 90 on the interpretation of the Will. [Para 21] [1114-F-H]

4. It is one of the well established principles that while construing a Will, the Court should lean against any intestacy. The presumption against intestacy cannot be raised ignoring the intention in the Will. That is why Section 90 stipulates that the deeming clause will operate only where there is no contrary intention. In this case, it is common ground that no contrary intention could be discerned in the Will in respect of items 4 to 7. In construing a Will both the English Courts and the Supreme Court of India lean against any presumption favouring intestacy in the absence of a manifest contrary intention in the Will. The judgment of the High Court is thus set aside and that of the District Judge is restored. [Paras 32, 34 and 39] [1147-F-H; 1148-A, F-G; 1149-F]

Ram Saran Lall and others v. Mst. Domini Kuer and others, **AIR 1961 SC 1747, distinguished.**

Hamda Ammal v. Avadiappa Pathar and 3 others **(1991) 1 SCC 715, and** *A. Jithendernath v. Jubilee Hills Coop. House Building Society and another* **(2006) 10 SCC 96, held inapplicable.**

Gnambal Ammal v. T Raju Ayyar and others, **AIR 1951 SC 103;** *N. Kasturi v. D. Ponnammal and others*, **AIR 1961 SC 1302;** *Pearey Lal v. Rameshwar Das* **AIR 1963 SC 1703 and** *Navneet Lal alias Rangi v. Gokul and others* **AIR 1976 SC 794, relied on.**

Alavandar Gramani Vs. Danakoti Ammal and others **(AIR 1927 Madras 383);** *Abdulsakur Haji Rahimtulla and others v. Abubakkar Haji Abba and others* **AIR 1930 Bombay 191;** *Rangoo Ramji Vs. Harisa and another,* **AIR 1932 Nagpur 163, referred to.**

Re Harrison Turner Vs. Hellard, **(1885) 30 Chancery Division 390;** *Re Fleming's Will Trusts Ennion Vs. Hampstead Old People's Housing Trust Limited and Another*

(1974) 3 All ER 323 and *Venkata Narasimha Appa Row vs. Parthasarthy Appa Row and another* **41 Indian Appeals 51, referred to.**

Case Law Reference:

AIR 1953 SC 333	**relied on**	**Para 17**
AIR 1953 SC 244	**relied on**	**Para 18**
1952 AC 109	**referred to**	**Para 18**
(1885) 30 Chancery Division 390	**referred to**	**Para 22**
(1974) 3 All ER 323)	**referred to**	**Para 23**
AIR 1927 Madras 383	**referred to**	**Para 26**
AIR 1930 Bombay 191	**referred to**	**Para 27**
AIR 1932 Nagpur 163	**referred to**	**Para 28**
41 Indian Appeals 51	**referred to**	**Para 31**
AIR 1951 SC 103	**relied on**	**Para 32**
AIR 1961 SC 1302	**relied on**	**Para 33**
AIR 1963 SC 1703	**relied on**	**Para 33**
AIR 1976 SC 794	**relied on**	**Para 33**
AIR 1961 SC 1747	**distinguished**	**Para 35**
(1991) 1 SCC 715	**held inapplicable**	**Para 38**
(2006) 10 SCC 96	**held inapplicable**	**Para 38**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7226 of 2002.

From the Judgment & Order dated 6.12.2000 of the High Court of Kerala at Ernakulam in M.F.A. No. 44 of 1990.

WITH

C.A. No. 4432 of 2003

T.L. Vishwanatha Iyer, T.G. Narayanan Nair, K.N. Madhusoodanan, Romy Chacko, Jasaswini Mishra for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J.

CIVIL APPEAL NO.7226 OF 2002

1. This appeal is directed against the judgment of the Division Bench of the Kerala High Court dated 6th December, 2000 rendered in Miscellaneous First Appeal No. 44 of 1990.

2. The dispute is over some of properties bequeathed by the Will dated 8.5.1967 by one Kakkassery Ippuru.

3. The material facts on which there is not much dispute are that the testator Ippuru's first wife Kunhiri died, leaving behind daughter Molutty and son Vareed who died on 8.1.86. The wife and children of Vareed, since deceased, are the plaintiffs. The second wife of Ippuru, Kunjila, is the 7th plaintiff. She has two daughters Mariyamma, the 8th plaintiff and the other daughter is Padmini @ Cherichi, the defendant and respondent herein.

4. By a sale deed, being Exhibit-B1, dated 2.5.67, Kunjila, the second wife of Ippuru, sold to Ippuru half of her rights in respect of item Nos. 4 to 7 of the properties in the Will bequeathed by Ippuru. The other half of the property belonged to her son Vareed. Both the sale deed and the Will were registered on 8.5.1967, Ippuru died on 20.7.71.

5. In the Will of Ippuru, seven items of properties were bequeathed and out of which items 1 to 3 were given to one Molutty, daughter of the testator by his first wife. Items 4 to 7 of the properties were previously owned in equal moieties by

Vareed and Kunjila, the second wife of Ippuru. Kunjila, as noted above, sold her share to Ippuru on 2.5.67 but the sale deed was registered on 8.5.67, the same day when the Will was registered.

6. After the death of Vareed on 1.8.1986, his wife and children appellants, 1 to 5 herein, jointly applied under Section 278 of the Indian Succession Act (the Act) for grant of Letters of Administration of the Will of the testator. That petition was contested by the Padmini @ Cherichi, one of the daughters of the testator's second wife. Thus the proceeding became contentious and was registered as a suit being O.S. 10 of 1988 in the District Court, Thrichur.

7. The District Judge granted the letters of administration in respect of all the items of property in the Will. An appeal was taken to the High Court whereupon by the impugned judgment the High Court upheld the genuineness of the Will but modified the grant of letters of administration only to items 1 to 3. The High Court declined to grant the letters of administration in respect of items 4 to 7 and the reasoning given by the High Court inter alia was that on the date of the Will i.e. 8.5.67 the testator's title to half of the property, namely over item Nos. 4 to 7 was not perfected. It was perfected only on the registration of sale deed, which is after the execution of the Will, even though the sale deed was executed on 2.5.1967. The correctness of the finding of the High Court is questioned in this appeal.

8. When the appeal was taken up for hearing on 25.2.2010, the learned counsel for the appellant urged that in view of provisions of Section 90 of the Act, the judgment of the High Court is erroneous. But that point was not specifically taken either before the High Court or in the Special leave petition. As such the learned counsel for the appellant prayed for leave to file an application for urging additional grounds.

9. Since the question is purely one of law and is arising

from the records of the case and can be urged without raising any new factual controversy, this Court granted leave to urge the additional grounds. The respondents were granted liberty to file its response to the application for additional grounds.

10. Pursuant thereto, application for urging additional grounds was filed and the respondent, though was given opportunity to file response to those grounds, did not choose to do so. But the respondent's counsel was heard on those grounds and he sought to controvert those grounds orally.

11. Admittedly, the parties are Christians and are governed by the Act. Along with the application for additional grounds a translated copy of the Will was also filed.

12. Section 90 of the Act provides:

> *"90. Words describing subject refer to property answering description at testator's death.* – The description contained in a Will of property, the subject of gift, shall, unless a contray intention appears by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator."

13. This Section is based on Section 24 of the English Wills Act. Prior to the English Wills Act under the common law, testamentary disposition of real property spoke from the date of the Will. But the English Wills Act changed that by a statutory presumption to the effect, that unless a contrary intention appears from the recitals of the Will, the Will speaks from the date of the testator's death.

14. Section 90 of the Act uses the legal fiction "deemed" and that is used with the specific purpose of raising a presumption against intestacy. Therefore, on an analysis of the provisions of Section 90 it is clear that the property described in the Will shall be deemed to refer to and comprise the property answering that description at the death of the testator.

15. In the context of Section 90, the word 'comprise' will obviously mean 'to include, embrace, to comprehend compendiously, to contain, to consist of, to extend, cover" (See Shorter Oxford Dictionary on Historical Principles, page 386). In Webster's Dictionary the word 'comprise' means to "include and contain, consist of and embrace". (Webster's Comprehensive Dictionary Encyclopedic Edition, page 269).

16. Therefore, on a plain reading of the Section, the meaning is clear. It is, that in the absence of a contrary intention in the Will, the description of the properties in the Will shall be deemed to refer to and include the property answering that description at the death of the testator.

17. It is well known when legislature uses a deeming provision to create a legal fiction, it is always used to achieve a purpose. In *State of Travancore-Cochin and others Vs. Shanmugha Vilas Cashewnut Factory, Quilon,* reported in AIR 1953 SC 333, the Constitution Bench opined, when a legal fiction is created, one is led to ask at once for what purpose it is created (see para 38 page 343).

18. In this case the obvious purpose is to avoid intestacy in respect of properties referred to and comprised in the Will. Once the purpose is ascertained, the Court must give full effect to the statutory fiction and the fiction is to be carried to its logical end. In *State of Bombay Vs. Pandurang Vinayak and others,* reported in AIR 1953 SC 244, this Court laid down the aforesaid propositions at page 246 of the report. In doing so, this Court relied on the famous dictum of Lord Asquith which has virtually become locus classicus on statutory interpretation of 'deeming' provisions. Lord Asquith's formulations in *East End Dwellings Co. Ld. Vs Finsbury Borough Council*, 1952 AC 109 are:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must

> inevitably have flowed from or accompanied it……The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

19. Going by this test, in our judgment, the High Court did not properly appreciate the purport of Section 90. In the context of the Will when it is common ground that the Will does not contain any contrary intention in respect of the bequest of items 4 to 7 of the properties.

20. The principle of Section 90 which, as noted above, has been taken from Section 24 of the English Wills Act has been very lucidly discussed in Williams, Law of Wills (3rd Edition). At page 429 of the treaties, the learned author by properly appreciating the deeming clause commented:

> "A Will must be construed with reference to the property comprised within it, to speak and to take effect as it has been executed immediately before the date of death of the testator and as if the conditions of things to which it refers in this respect is that existing immediately before the date of the testator, unless a contrary intention appears from the Will".

21. On general principles also a Will speaks only from the date of the death of the testator (See AIR 1964 SC 136). In this case assuming but not admitting that the testator had not acquired title in respect of half of the property, namely, items 4 to 7 of the property bequeathed by him in the Will on 8.5.1967, but the sale deed having been registered on 8.5.1967, the title reverts back to the date of execution of the sale deed on 2.5.67 under Section 47 of the Registration Act. And the testator died on 20.7.71. Therefore, much before his death, the testator acquired full title over items 4 to 7 of the property. Therefore, the High Court was in clear error in not appreciating the effect of Section 90 on the interpretation of the Will.

22. It is one of the well established principles that while construing a Will, the Court should lean against any intestacy. This has been put beyond any doubt by Lord Esher, Master of Rolls in *Re Harrison Turner Vs. Hellard,* reported in (1885) 30 Chancery Division 390 wherein learned Master of Rolls held:

> "……when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,- that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

23. The learned counsel for the appellant in support of his argument on Section 90 of the Act relied on a decision in the case of *Re Fleming's Will Trusts Ennion Vs. Hampstead Old People's Housing Trust Limited and Another* (1974) 3 All ER 323).

24. In that case by a Will made in September 1969, the testator bequeathed to the first defendants his leasehold house at 54 Narcissus Road when the testator had his house under a lease term expiring on 28th September, 2008 subject to covenants to repair. In April 1971, the testator purchased the freehold and that was registered with acquisition of title.

25. The leasehold interest was unregistered and the testator died in February, 1973. As a sole executor of the Will, the plaintiff applied for determination of interest that passed on to the first defendants. The residuary beneficiaries under the Will claimed that the first defendants was only entitled to leasehold interest. Repelling that contention, Templeman J, while delivering the judgment held:

> "In my judgment, a gift of property discloses an intention to give the estate and interest of the testator in that property at his death; a mere reference in the will to the estate and interest held by the testator at the date of his

> will is not sufficient to disclose a contrary intention. It follows that the freehold in the case passes to the first defendants. (page 326 Placitum g)

26. The learned counsel for the appellants also relied on the decision in the case of *Alavandar Gramani Vs. Danakoti Ammal and others* (AIR 1927 Madras 383). Construing Section 90 of the Act, the Division Bench of Madras High Court held:

> "...Under Section 90 of the Succession Act, XXXIX of 1925, there is a presumption, unless a contrary intention appears by the Will, that it comprises all property as at the testator's death..."

27. The learned counsel also relied on the decision of Bombay High Court in the case of *Abdulsakur Haji Rahimtulla and others Vs. Abubakkar Haji Abba and others* reported in AIR 1930 Bombay 191. At page 196 of the report, Bombay High Court decided:

> "...In this connection it is necessary to remember certain general principles that attach to wills. A will speaks from the date of the death of the deceased. There might be accretions to or diminutions from the property of the testator as they existed at the date of the will. Another principle to remember in this connection is that a testator is presumed to dispose of all the property that he may die possessed of and not only what he possessed at the date of the will..."

28. Reliance was last placed on the decision of the Nagpur High Court in the case of *Rangoo Ramji Vs. Harisa and another* reported in AIR 1932 Nagpur 163. Explaining the purport of Section 90, the High Court observed that Section 90 is in accordance with Section 24 of the English Wills Act of 1837. According to such principle "the Will has to be construed with reference to the real estate and personal estate comprised in it to speak and to take effect, as if it had been executed

immediately before the death of the testator, and as if the condition of things to which it refers in this respect before the death of the testator unless contrary intention appears by the Will" (page 165 of the report). The decision in *Rangoo Ramji* (supra) was based on the Madras High Court decision in *Gramani* (supra).

29. All the decisions discussed above, namely those of English Court and of the High Courts of Madras, Bombay and Nagpur support the contention of the appellants.

30. Faced with this argument the learned counsel for the respondent wanted to rely on the observation of the Privy Council and contended that this leaning towards intestacy is purely a product of British Jurisprudence based on English necessities and English habit of thoughts and there would be no justification in taking them as guide in the case of Indian Wills.

31. The aforesaid observations were made by Lord Moulton while considering the effect of adoption in the context of an Indian Will in the case of *Venkata Narasimha Appa Row Vs. Parthasarthy Appa Row and another* reported in 41 Indian Appeals 51 (at page 71 of the report). These observations were by way of obiter dicta by the learned judge and were made in 1913 when the Act was not there.

32. Section 90 of the Act is on the principles of English Law and this Court in *Gnambal Ammal Vs. T Raju Ayyar and others* (AIR 1951 SC 103) speaking through Justice B.K. Mukherjea (as His Lordship then was) clarified the position. This Court considered the decision of Privy Council in *Venkat Narasimha* (supra) and held that the presumption against intestacy may be raised if it is justified from the context of the document or the surrounding circumstances and where there is ambiguity about the intention of the testator (see para 11 page 106 of the report). It is true that presumption against intestacy cannot be raised ignoring the intention in the Will. That

is why Section 90 stipulates that the deeming clause will operate only where there is no contrary intention. In this case it is common ground that no contrary intention could be discerned in the Will in respect of items 4 to 7.

33. In subsequent decisions while discussing presumption against intestacy this Court made the position further clear in *N. Kasturi Vs. D. Ponnammal and others*, reported in AIR 1961 SC 1302. Justice Gajendragadkar, as His Lordship then was, speaking for the Bench, opined if two constructions are reasonably possible and one of them avoids intestacy while the other suggests it, "the Court would certainly be justified in preferring that construction which avoids intestacy" and the decision rendered in *Gnambal Ammal* (supra) was relied upon (para 15 page 1307 of the report). Same view was endorsed by this Court in *Pearey Lal Vs. Rameshwar Das* reported in AIR 1963 SC 1703 wherein Justice Subba Rao, as His Lordship then was, speaking for the Bench observed where one of the two reasonable constructions would lead to intestacy that should be discarded in favour of the construction which prevents the hiatus (para 7 page 1706 of the report). The same principle has been quoted with approval by this Court in the case of *Navneet Lal alias Rangi Vs. Gokul and others* reported in AIR 1976 SC 794. Speaking for the Bench, Justice Goswami, at para 4 page 797 of the report, quoted the aforesaid principle laid down in *Pearey Lal* (supra).

34. Therefore, both the English Courts and this Court in construing a Will lean against any presumption favouring intestacy in the absence of a manifest contrary intention in the Will. The argument on behalf of the learned counsel for the respondent has therefore no substance.

35. The learned counsel also relied on the decision in the case of *Ram Saran Lall and others Vs. Mst. Domini Kuer and others,* reported in AIR 1961 SC 1747.

36. A perusal of the decision in *Ram Saran* (supra) makes

it clear that the same was rendered on totally different facts and against a completely different legal background. In *Ram Saran* (supra), parties were Hindus, but they were governed by the Mohammedan Law of pre-emption as available to them by custom. The main question discussed in *Ram Saran* (supra) was when can the demand for pre-emption be exercised. The majority opinion of the Court, by a 3:2 verdict, decided that such demand can be made only after completion of the sale. The majority was of the view that a sale is complete not only after registration of the sale deed under Section 47 of the Registration Act but it is complete only after the registered document is copied in the Registration Office, as provided under Section 61 of the Registration Act.

37. We fail to appreciate the relevance of the ratio in *Ram Saran* (supra) to the facts of the present case.

38. Two other judgments cited by the learned counsel for the respondent rendered in the case of *Hamda Ammal Vs. Avadiappa Pathar and 3 others* reported in (1991) 1 SCC 715, and that of *A. Jithendernath Vs. Jubilee Hills Coop. House Building Society and another* reported in (2006) 10 SCC 96, are on Section 47 of the Registration Act to the effect that the title passes retrospectively with effect from the date of execution and not from the date of registration. These are accepted legal principles on which there can be no debate but they have no application to the facts of this case.

39. For the reasons discussed above the appeal is allowed. We are constrained to set aside the judgment of the High Court and restore that of the District Judge. No order as to costs.

CIVIL APPEAL NO.4432 OF 2003

40. For the reasons discussed above and in view of the order passed in Civil Appeal No. 7226 of 2002, this appeal is dismissed. No order as to costs.

B.B.B. Appeal disposed of.

VIJAY @ CHINEE

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 660 of 2008)

JULY 27, 2010

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860 – s. 376(g) – Commission of gang rape by appellant and others – Conviction and sentence u/s. 376/34 by courts below, as regard appellant – Justification of – Held: Justified – Statement of the doctor that at the relevant time, prosecutrix was a minor – Consistent statement of prosecutrix that intercourse was against her wishes, she was forcibly caught, threatened and thereafter, subjected to gang rape – Place and incident of occurrence not disputed – Discrepancies in the statement of prosecutrix and evidence on record immaterial – Failure to hold test identification parade – Effect of.

According to the prosecution case, the appellant and others committed gang rape of the victim. Thereupon, a case for offence punishable u/s. 376/34 IPC was registered. The prosecutrix was medically examined. The appellant and the other accused were arrested. The investigation was carried out. The trial court convicted the appellant and the other accused u/s. 376/34 IPC and sentenced them to undergo 10 years' rigorous imprisonment along with fine of Rs. 500/-. The High Court upheld the conviction of the appellant and co-accused R. Accused A died during the pendency of the appeal. The remaining four accused were acquitted. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1. The statement of prosecutrix, if found to be

worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix. [Para 15] [1164-F-H]

State of Maharashtra vs. Chandraprakash Kewalchand Jain **AIR 1990 SC 658;** *State of U.P. vs. Pappu @Yunus and Anr.* **AIR 2005 SC 1248;** *State of Punjab vs. Gurmit Singh and Ors.* **AIR 1996 SC 1393;** *State of Orissa vs. Thakara Besra and Anr.* **AIR 2002 SC 1963;** *State of Himachal Pradesh vs. Raghubir Singh* **(1993) 2 SCC 622;** *Wahid Khan vs. State of Madhya Pradesh* **(2010) 2 SCC 9;** *Rameshwar vs. State of Rajasthan* **AIR 1952 SC 54, relied on.**

2. The Test Identification Parade is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. The actual evidence is what is given by the witnesses in the court. [Paras 16 and 19] [1164-G-H; 1165-A-B; 1166-D]

State of H.P. vs. Lekh Raj **AIR 1999 SC 3916;** *Malkhan Singh vs. State of M.P.* **AIR 2003 SC 2669;** *Mulla and Anr. vs. State of Uttar Pradesh* **(2010) 3 SCC 508;** *Matru @ Girish Chandra vs. The State of Uttar Pradesh* **AIR 1971 SC 1050;** *Santokh Singh vs. Izhar Hussain and Anr.* **AIR 1973 SC 2190, relied on.**

3.1. Even if there are some omissions, contradictions

and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. [Para 24] [1169-C-F]

Sohrab and Anr. vs. The State of M.P. **AIR 1972 SC 2020;** *Bharwada Bhogini Bhai Hirji Bhai vs. State of Gujarat* **AIR 1983 SC 753;** *Prithu @ Prithi Chand and Anr. vs. State of Himachal Pradesh* **(2009) 11 SCC 588;** *State of U.P. vs. Santosh Kumar and Ors.* **(2009) 9 SCC 626, relied on.**

3.2. The evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole. [Para 25] [1168-G-H]

State of Rajasthan vs. Om Prakash **AIR 2007 SC 2257;** *State of U.P. vs. M.K. Anthony* **AIR 1985 SC 48;** *State vs. Saravanan and Anr.* **AIR 2009 SC 152, relied on.**

4. The absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. [Para 26] [1168-G-H]

Gurcharan Singh vs. State of Haryana **AIR 1972 SC 2661;** *Devinder Singh and Ors. vs. State of Himanchal Pradesh* **AIR 2003 SC 3365, relied on.**

5. The age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/ school registers etc. [Para 28] [1169-F-G]

Modi's Medical Jurisprudence and Toxicology, **23rd Edn., referred to.**

6. A person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. In rape cases, it is impossible to lay down with precision the chain of events, more particularly, when illiterate villagers with no sense of time are involved. [Para 31] [1171-C-D]

Dimple Gupta (minor) vs. Rajiv Gupta **(2007) 10 SCC 30;** *Virendra @ Buddhu and Anr. vs. State of U.P.* **(2008) 16 SCC 582, referred to.**

7.1. As the statement of PW 3-doctor who examined the prosecutrix makes it clear that at the relevant time the prosecutrix had very little developed breast and the growth of her armpit hair was at its initial/first stage, the court believed that she was below 16 years of age. The prosecutrix stated in her deposition that she was sent for a Radiological Test to place J and she could not explain as to why the report of the Radiological Test could not be produced before the trial court. The circumstances, under which the report of the Radiological Test could not be produced before the trial court, would have been explained only by the Investigating Officer. There is nothing on record to show that the defence had put any such question to the I.O.

during his examination before the trial court. The I.O. was the only competent person to throw light on the issue of the non-production of the report of the Radiological Test and in the facts and circumstances of the case, no adverse inference could be drawn against the prosecution in the said issue. More so, the prosecution had no control over prosecuting agency. The position for not holding the Test Identification Parade in this regard is the same. [Para 32] [1171-H; 1172-A-D]

7.2. Under s. 114-A of the Evidence Act, 1872, inserted by amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. In the instant case, the prosecutrix had been consistent throughout in her statement that intercourse was against her wishes and that there was no consent as she had forcibly been caught and threatened and thereafter, she had been subjected to gang rape. The courts below reached the correct conclusion that the prosecutrix was a minor. There is nothing on record to establish the consent of the prosecutrix. [Paras 34 and 35] [1172-G-H; 1173-A-B]

7.3. The medical examinations of the appellant and other accused were also conducted soon after their arrest on the next day and it was found that the appellant and others were fit and competent to perform sexual intercourse. There is nothing on record to contradict or disprove the statement of the prosecutrix that the appellant and others took her behind the Railway School and when she cried out, one of the accused showed her a knife and in the meanwhile, accused, the appellant pressed her mouth and raped her. Thereafter, the other

accused persons raped her turn by turn and all of them ran away when the police reached there. [Para 36] [1173-C-D]

7.4. The contradictions, inconsistencies and discrepancies between the statement of the prosecutrix and the other evidence on record are immaterial for the reason that the trial court as well as the High Court considered these aspects and came to the conclusion that none of those contradictions goes to the root of the case. The prosecutrix was at the place of the incident and the appellant and other accused had intercourse with her. Even if it is presumed that she was major, there is nothing on record to show that she had given her consent. There is nothing on record to show that she had some basic education or had a sense of time and place. Such improvements have to be ignored as they do not go to the root of the case. There are concurrent findings of fact by both the courts below. The courts below have applied settled principles of law in the correct perspective. [Paras 38 and 40] [1174-A-C; 1175-A]

Sunil vs. State of Haryana **(2010) 1 SCC 742;** *Sukhwant Singh vs. State of Punjab* **(1995) 3 SCC 367, distinguished.**

7.5. An illiterate rustic village girl having no sense/ estimate/assessment of time and place, found herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of non-resistance on the part of the prosecutrix because of fear and conduct of the prosecutrix cannot be held to be unnatural. [Para 44] [1176-C-D]

7.6. There is no dispute regarding the place of occurrence and the incident that occurred. The defence could not establish that it was a case of consent. FIR was

lodged most promptly. Appellant and other accused were arrested on the next day. The prosecutrix as well as the appellant and other accused were medically examined on the next day. The appellant or any other accused were not known to the prosecutrix. No reason could be there for which the prosecutrix would have enroped them falsely. It could not be a case of consent by the prosecutrix, even if it is assumed that she was major. The discrepancies in the statement of the prosecutrix have to be ignored. There is no material on record on the basis of which, a different view or conclusion from that of the courts below could be taken. [Paras 45 and 46] [1176-E-G]

Case Law Reference:

AIR 1990 SC 658	**Relied on.**	**Para 9**
AIR 2005 SC 1248	**Relied on.**	**Para 10**
AIR 1996 SC 1393	**Relied on.**	**Para 11**
AIR 2002 SC 1963	**Relied on.**	**Para 12**
(1993) 2 SCC 622	**Relied on.**	**Para 13**
(2010) 2 SCC 9	**Relied on.**	**Para 14**
AIR 1952 SC 54	**Relied on.**	**Para 14**
AIR 1999 SC 3916	**Relied on.**	**Para 16**
AIR 2003 SC 2669	**Relied on.**	**Para 17**
(2010) 3 SCC 508	**Relied on.**	**Para 18**
AIR 1971 SC 1050	**Relied on.**	**Para 18**
AIR 1973 SC 2190	**Relied on.**	**Para 18**
AIR 2007 SC 2257	**Relied on.**	**Para 21**
AIR 1985 SC 48	**Relied on.**	**Para 22**

AIR 2009 SC 152	**Relied on.**	**Para 23**
AIR 1972 SC 2020	**Relied on.**	**Para 24**
AIR 1983 SC 753	**Relied on.**	**Para 24**
(2009) 11 SCC 588	**Relied on.**	**Para 24**
(2009) 9 SCC 626	**Relied on.**	**Para 24**
AIR 1972 SC 2661	**Relied on.**	**Para 26**
AIR 2003 SC 3365	**Relied on.**	**Para 27**
(2007) 10 SCC 30	**Referred to.**	**Para 31**
(2008) 16 SCC 582	**Referred to.**	**Para 31**
(2010) 1 SCC 742	**Distinguished.**	**Para 41**
(1995) 3 SCC 367	**Distinguished.**	**Para 41**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 660 of 2008.

From the Judgment & Order dated 5.9.2006 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 15 of 1991.

Anip Sachthey, Mohit Paul, Shagun Matta, Sharin Danial for the Appellant.

Siddhartha Dave, Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 5.9.2006 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 15/1991 by which it had affirmed the judgment of the Trial Court i.e. Additional Sessions Judge, Sihore, Camp Katni dated 14.12.1990 in Sessions Case No. 85/1989, wherein the appellant had been convicted under

Section 376/34 of the Indian Penal Code, 1860 (hereinafter called as 'IPC') and sentenced to undergo 10 years' RI along with fine of Rs.500/-. In the event of default in payment of fine, the appellant would further undergo RI for three months. A part of the fine imposed on the appellant and his co-accused was directed to be paid to the prosecutrix Asha @ Gopi as compensation.

2. Facts and circumstances giving rise to this appeal are that on 6.12.1988, an FIR under Section 376/34 IPC was registered against the appellant and six others at Police Station Katni, District Jabalpur, on the information of one Asha @ Gopi that she had been subjected to gang rape by the appellant and six others at about 6.00 p.m. on the said date. The police after recording the FIR, sent the prosecutrix to the hospital at Katni for medical examination. The appellant was arrested on 7.12.1988 and subjected to medical tests along with the other accused on 8.12.1988. After the completion of the investigation, the police filed a charge sheet against the appellant and six others. As they denied the charges, refuted the prosecution story and pleaded innocence, all of them were put to trial.

3. The Trial Court after concluding the proceedings vide judgment and order dated 14.12.1990 convicted all the accused persons including the appellant herein for committing gang rape and sentenced each of them to 10 years' RI and fine of Rs.500/- each.

4. Aggrieved by the said judgment and order dated 14.12.1990 passed by the Sessions Court, the appellant and other accused preferred Appeal Nos. 15/1991, 3/1991, 1185/1990 and 1194/1990 before the High Court of Madhya Pradesh at Jabalpur. The High Court vide impugned judgment and order dated 5.9.2006 dismissed the appeal of the appellant and one other co-accused, Raju @ Ramakant. One accused, namely Anil, died during the pendency of the said appeal. The High

Court acquitted the remaining four accused. Hence, this appeal by the appellant herein.

5. Shri Anip Sachthey, learned counsel appearing for the appellant has submitted that the prosecutrix was a major and it was a case of consent. He has further submitted that conviction cannot be based on the sole deposition of the prosecutrix. There is no other evidence to corroborate her version. The prosecutrix's statement suffers from material discrepancies. On the date of examination of the prosecutrix no physical injury was found on her person or on her private parts. The prosecutrix had given a most improbable and unacceptable version of events that the appellant continued to rape her for about two hours. Then one another accused raped her for about an hour. Also, in spite of the fact that the appellant and others had been arrested on the next date of the incident, the Investigating Officer did not conduct the Test Identification Parade. The prosecutrix was examined on the next day i.e. on 7.12.1988 by Dr. Rupa Lalwani, Medical Officer (PW-3), and the said Medical Officer referred her for a Radiological Test to determine her age, but the report of the said test has never been brought on record. Thus, an adverse inference is to be drawn against the prosecution. The appeal deserves to be allowed. The appellant had falsely been enroped in the crime.

6. On the other hand, Shri Siddhartha Dave along with Ms. Vibha Datta Makhija, learned counsel appearing for the State of M.P., vehemently opposed the appeal contending that the prosecutrix was a minor on the date of the incident. The non-production of the report of the Radiological test and not holding the Test Identification Parade would not discredit the investigation or the prosecution case. The non-existence of any injury on the person of the prosecutrix cannot be a ground to dis-believe her version. The prosecutrix had such a social background that she did not have any sense of time, duration etc. and, thus, she was not able to give a precise account of each activity of the incident. She had lost her father; and was

an uneducated, rustic villager, who came from a very poor family. The discrepancies in the statement of the witnesses or the prosecutrix are such that the same are not sufficient to demolish the prosecution's case. In a rape case, an accused can be convicted on the sole testimony of the prosecutrix. The appeal lacks merit and is liable to dismissed.

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

8. Before we proceed to examine the impugned judgments of the courts below and facts of the case, it may be desirable to refer to the settled legal principles which have to be applied in the instant case.

LEGAL ISSUES:

Sole Evidence of Prosecutrix :

9. In *State of Maharashtra Vs. Chandraprakash Kewalchand Jain* AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under :-

> "A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact

that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

10. In *State of U.P. Vs. Pappu @Yunus & Anr.* AIR 2005 SC 1248, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under :-

"It is well settled that a prosecutrix complaining of having

been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."

11. In *State of Punjab Vs. Gurmit Singh & Ors.* AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under :-

"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to

discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.....The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case……..Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury……Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

** ** ** **

The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the

trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

12. In *State of Orissa Vs. Thakara Besra & Anr.* AIR 2002 SC 1963, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In *State of Himachal Pradesh Vs. Raghubir Singh* (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

14. A similar view has been reiterated by this Court in *Wahid Khan Vs. State of Madhya Pradesh* (2010) 2 SCC 9, placing reliance on earlier judgment in *Rameshwar Vs. State of Rajasthan* AIR 1952 SC 54.

15. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

Test Identification Parade:

16. Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the Court is the real person involved in the commission

of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. (Vide *State of H.P. Vs. Lekh Raj* AIR 1999 SC 3916).

17. In *Malkhan Singh Vs. State of M.P.* AIR 2003 SC 2669, this Court has observed as under:

> "It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine."

18. In *Mulla & Anr. Vs. State of Uttar Pradesh* (2010) 3 SCC 508, this court (one of us, Hon'ble P. Sathasivam, J.) placed reliance on *Matru@Girish Chandra Vs. The State of Uttar Pradesh* AIR 1971 SC 1050**;** and *Santokh Singh Vs. Izhar Hussain & Anr.* AIR 1973 SC 2190**,** wherein it had been held that the Tests Identification Parades do not constitute substantive evidence. They are primarily meant for the purpose of providing the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. The Test Identification Parade can only be used as corroboration of the statement in Court.
The necessity for holding the Test Identification Parade can arise only when the accused persons are not previously known to the witnesses. The test is done to check the veracity of the witnesses. The court further observed as under :-

> "The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police.

> The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court."

19. Thus, it is evident from the above, that the Test Identification is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court.

Discrepancies and inconsistencies in depositions of witnesses:

20. It is settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety.

21. In *State of Rajasthan Vs. Om Prakash* AIR 2007 SC 2257, while dealing with a similar issue, this Court held that "*irrelevant details which do not in any way corrode the credibility of a witness cannot be levelled as omissions or contradictions."*

22. In *State of U.P. Vs. M.K. Anthony* AIR 1985 SC 48, this Court laid down certain guidelines in this regard, which require to be followed by the courts in such cases. The Court observed as under :-

> "While appreciating the evidence of a witness, the

approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."

23. In *State Vs. Saravanan & Anr.* AIR 2009 SC 152, while dealing with a similar issue, this Court observed as under :-

"…..while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon

appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."

24. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses (vide *Sohrab & Anr. Vs. The State of M.P.* AIR 1972 SC 2020; *Bharwada Bhogini Bhai Hirji Bhai Vs. State of Gujarat* AIR 1983 SC 753; *Prithu @ Prithi Chand & Anr. Vs. State of Himachal Pradesh* (2009) 11 SCC 588; and *State of U.P. Vs. Santosh Kumar & Ors.* (2009) 9 SCC 626).

25. Thus, in view of the above, the law on the point can be summarised to be that the evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole.

Injury on the person of the Prosecutrix

26. In the case of *Gurcharan Singh Vs. State of Haryana* AIR 1972 SC 2661, this Court has held that "*the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape*"

27. In *Devinder Singh & Ors. Vs. State of Himanchal Pradesh* AIR 2003 SC 3365, a similar issue was considered by this Court and the court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that prosecutrix was used to sexual intercourse. This Court held that the fact that no injury was found on her body only goes to show that she did not put up resistance.

Determination of Age

28. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

Teeth- (Dental - Age)

29. So far as permanent teeth are concerned, eruption

generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

Central incisors	-	6th to 8th year
Lateral incisors	-	7th to 9th year
Canines	-	11th to 12th year
Second Molars	-	12th to 14th year
Third Molars or Wisdom Teeth	-	17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

Secondary Sex Characters

30. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

(a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

(b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

(c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

(i) Breasts and papilla are elevated as a small mound, and

there is enlargement of areolar diameter.

(ii) More elevation and enlargement of breast and areola, but their contours are not separate.

(iii) Areola and papilla project over the level of the breast.

(iv) Adult stage – only the papilla projects and the areola merges with the general contour of the breast.

Evidence of Rustic/ illiterate villager

31. In *Dimple Gupta (minor) Vs. Rajiv Gupta,* (2007) 10 SCC 30, this Court held that a person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. The court observed that in a case like rape, "it is impossible to lay down with precision the chain of events, more particularly, when illiterate villagers with no sense of time are involved."

A similar view has been re-iterated by this Court in *Virendra @ Buddhu & Anr. Vs. State of U.P.* (2008) 16 SCC 582.

32. The case requires to be considered in the light of the aforesaid settled legal propositions.

Shri Anip Sachthey, learned counsel for the appellant, submitted that the prosecutrix was a major on the date of incident and that it was a clear case of consent. The Trial Court as well as the High Court examined the issue involved herein very minutely. Dr. Rupa Lalwani (PW-3), who had examined the prosecutrix on 7.12.1988, has stated that in the examination she found that there were in all 28 teeth in both the jaws; her breast had developed a little; the armpit hairs were in its initial stage; but there were pubic hair present around her vagina. On the basis of this, she opined that at relevant time, prosecutrix was aged between 12 and 14 years. As the statement of Dr. Rupa Lalwani (PW-3) makes it clear that the prosecutrix Asha @ Gopi

had very little developed breast and the growth of her armpit hair was at its initial/first stage, the Court believed that she was below 16 years of age. Undoubtedly, Asha @ Gopi, the prosecutrix had stated in her deposition that she was sent for a Radiological Test to Jabalpur and she could not explain as to why the report of the Radiological Test could not be produced before the Trial Court. In fact, the circumstances under which the report of the Radiological Test could not be produced before the Trial Court, would have been explained only by the Investigating Officer. Unfortunately, there is nothing on record to show that the defence had put any such question to the I.O. during his examination before the Trial Court. In our opinion, the I.O. was the only competent person to throw light on the issue of the non-production of the report of the Radiological Test and in the facts and circumstances of this case, no adverse inference can be drawn against the prosecution in this issue. More so, the prosecution had no control over prosecuting agency. Same remains the position for not holding the Test Identification Parade in this case.

33. Dr. Rupa Lalwani (PW-3) had stated that hymen of the prosecutrix was found completely torn and fresh blood was oozing out of it and she further opined that the vagina of a girl becomes loose even after one intercourse and two fingers can easily enter into her vagina. She had further opined that loosening of vagina and entering two fingers into vagina of a girl cannot give presumption that the girl was habituated to sexual intercourse.

34. Under Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

35. Asha @Gopi, the prosecutrix had been consistent throughout in her statement that intercourse was against her wishes and that there was no consent as she had forcibly been caught and threatened and thereafter, she had been subjected to gang rape. In view of the above, we are of the view that the Courts below reached the correct conclusion that the prosecutrix was a minor. Be that as it may, there is nothing on record to establish the consent of the prosecutrix in this case.

36. The medical examinations of the appellant and other accused were also conducted soon after their arrest on the next day and it was found that the appellant and others were fit and competent to perform sexual intercourse. There is nothing on record to contradict or disprove the statement of the prosecutrix that the appellant and others took her behind the Railway School and when she cried out, one of the accused showed her a knife and in the meanwhile, accused Vijay, the appellant pressed her mouth and raped her. Thereafter, the other accused persons raped her turn by turn and all of them ran away when the police reached there.

37. Shri Sachthey, learned counsel for the appellant, would point out the discrepancies between the statement of the prosecutrix and the other evidence on record. In the Court, she stated that she had gone to work at a business place for sorting apples and when she went to answer the call of nature, the accused met her and took her near the school and raped her. This statement was inconsistent with her version in the FIR, wherein, it was mentioned that when she was going to get her chappals repaired, she was forcibly taken by the accused to the school and was raped. There was also a contradiction in her statement regarding the dress she was wearing at that time as at one stage, she had stated that she was wearing sari, but at another stage, she stated that she was wearing a frock and vest. Shri Sachthey further submitted that as per the prosecutrix, the appellant had sexual intercourse with her for two hours and one other accused had it for about one hour. Such a course is wholly unnatural and improbable and, therefore, the evidence

given by the prosecutrix cannot be held to be reliable.

38. We have considered the contradictions, inconsistencies and discrepancies pointed out by Shri Anip Sachthey, however, they are immaterial for the reason that the Trial Court as well as the High Court have considered these aspects and came to the conclusion that none of those contradictions goes to the root of the case. Admittedly, the prosecutrix was at the place of the incident and the appellant and other accused had intercourse with her. Even if it is presumed that she was major, there is nothing on record to show that she had given her consent. There is nothing on record to show that she had some basic education or had a sense of time and place. Such improvements have to be ignored as they do not go to the root of the case. The Trial Court has recorded the following findings in this regard:

> "(1) Her father is not alive. All these facts clearly prove that she was uneducated, poor and helpless child labour and, therefore, minor contradictions only given by her are very natural. …… All depends upon the observance and memory of an individual.
>
> (2) The level of understanding of the prosecutrix is very-very low. It appears that in fact she wants to clarify that invariably one may not believe or presume that her consent was there in the gang rape and perhaps therefore she tried to give such a statement……..This clearly demonstrates that a testimony and understanding is of a very low level and on the same basis she has been stating about her age also."

39. The High Court has considered the discrepancies in her statement as to whether she was going to get her chappal repaired or was easing herself and came to the conclusion that such contradictions had no material bearing on the prosecution's case as "the fact remains that at that time she was going through that area.".

40. There are concurrent findings of fact by both the courts below. The courts below have applied settled principles of law in the correct perspective which we have explained hereinabove.

41. We do not find any force in the submissions made by Shri Anip Sachthey, learned counsel appearing for the appellant, that the instant case was squarely covered by the judgment of this Court in *Sunil Vs. State of Haryana* (2010) 1 SCC 742, wherein in a similar case, for non-production of the report of Radiological Test, an adverse inference was drawn against the prosecution and the appellant therein had been acquitted. In the said case, this Court had relied upon the judgment in *Sukhwant Singh Vs. State of Punjab* (1995) 3 SCC 367, wherein it has been held as under:

> "…..failure to produce the expert opinion before the trial Court in such cases affects the creditworthiness of the prosecution case to a great extent."

42. The facts of the case are quite distinguishable. In the said case, the basic issue was merely as to whether the prosecutrix was a minor. The prosecutrix was examined by Dr. Sadhna Verma (PW-1), and found that her Secondary Sex Characters were well developed. She carried out a local examination and in her opinion, the prosecutrix was major. The report reads :

> "Labia majora was well developed. Pubic hair was present. Carunculae myrtiformes was present. Vagina admitting two fingers. Uterus was normal and retroverted, furnaces free.
>
> For her age verification, she was referred to dental surgeon and radiologist opinion."

43. The report of the Medical Officer in the said case was quite contrary. That was a case under Sections 363, 366-A and 376 IPC and in her statement under Section 164 of Code of

Criminal Procedure, 1973, the prosecutrix had stated that she was in love with the appellant therein and she had always been a consenting party. This Court itself, after appreciating the statement of Dr. Sadhna Verma (PW1), came to the conclusion that the prosecutrix therein was major. Thus, it is evident that the ratio of the said judgment has no application in the instant case.

44. If we examine the whole case in the totality of the circumstances and consider that an illiterate rustic village girl having no sense/estimate/assessment of time and place, found herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of non-resistance on the part of the prosecutrix because of fear and the conduct of the prosecutrix cannot be held to be unnatural.

45. There is no dispute regarding the place of occurrence and the incident that occurred. The defence could not establish that it was a case of consent. FIR had been lodged most promptly. Appellant and other accused were arrested on the next day. The prosecutrix as well as the appellant and other accused were medically examined on the next day. The appellant or any other accused was not known to the prosecutrix. No reason could be there for which the prosecutrix would have enroped them falsely. Definitely, it could not be a case of consent by the prosecutrix, even if it is assumed that she was major. The discrepancies in the statement of the prosecutrix have to be ignored as explained hereinbefore.

46. There is no material on record on the basis of which, this Court may take a different view or conclusion from the courts below. We do not find any force in this appeal, which is accordingly dismissed.

N.J. Appeal dismissed.