# JAHID SHAIKH & ORS.
*v.*
# STATE OF GUJARAT & ANR.
(TRANSFER PETITION (CRL) NO.55 OF 2010)

JULY 6, 2011

**[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]**

*Code of Criminal Procedure, 1973 – s.406 – Bomb blasts – Sessions Case pending before the Special Judge, Ahmedabad – Transfer petition – Prayer for transfer of the Sessions Case for trial outside the State of Gujarat on ground of bias and vitiated communal atmosphere – Apprehension of the accused of being denied a free and fair trial within the State of Gujarat – Held: Absence of a congenial atmosphere for fair and impartial trial is a good ground for transfer of a case out of a State – However, such a ground, cannot be the only aspect to be considered – In the instant case, the offences with which the accused have been charged are of a very serious nature, but the communally surcharged atmosphere which existed at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously – Also, the Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial – On the other hand, in case the Sessions Trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are large in number, to any venue that may be designated outside the State of Gujarat and prejudice may be caused to the prosecution in presenting its case – Case for transfer of trial outside the State of Gujarat is based on certain incidents which had occurred in the past – The main ground on which the Petitioners sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad – However,*





*such allegation is now more speculative than real, nevertheless in order to dispel the apprehension of the petitioners, liberty given to them that in the event their apprehension are proved to be real during the course of the trial, they will be entitled to move afresh before Supreme Court for the relief sought for in the present Transfer Petition.*

**FIRs were lodged with different Police Stations in the State of Gujarat in connection with the bomb blasts that occurred in 2008 in the cities of Ahmedabad and Surat. The present Transfer Petition was filed under Section 406 of CrPC for transfer of Sessions Case arising out of said FIRs and pending before the Special Judge, Ahmedabad, for trial outside the State of Gujarat on ground of bias and vitiated communal atmosphere.**

**In support of the Transfer Petition, it was *inter alia* submitted that the local police authorities, jail authorities and the public prosecutor had conducted themselves in a manner which reflected total bias and prejudice against the accused and the same created more than a reasonable apprehension in their mind that they would not get a fair and free trial in the State of Gujarat; that charges were framed against the accused without supplying them with the essential documents required to be supplied under Section 207 of Cr.P.C.; that most of the accused did not have access to all the police papers at the time of framing of charges against them; that those favoured with copies of the police papers were unable to understand the same, as they were in Gujarati- a language not known to most of the accused, most of them being from outside the State of Gujarat; that the counsel for the accused were not permitted to meet their clients even for 10 minutes in their Court chambers, without the police being present; that several affidavits had been filed by the relatives of the accused which revealed the severe physical torture inflicted on the accused which were**

**supported by medical reports of doctors who examined the victims, but despite such evidence, the trial court did not order an independent probe into the incident; that in the event local communal feelings, which are borne out from the manner in which the accused were treated by the police, jail staff and the Courts are such that they create an atmosphere which is not conducive to the holding of a fair trial, the cases should be transferred to a neutral location in the interest of justice and finally that in the circumstances indicated, it was only just and proper that the Transfer Petition be allowed and that Sessions Case pending before the Special Judge, Ahmedabad, be transferred outside the State of Gujarat for trial.**

**The State of Gujarat and the Inspector General of Prisons opposed the Transfer Petition *inter alia* contending that a few orders, even if held to be incorrect, could not be a ground for transferring the entire prosecution out of the State of Gujarat as that would lead to various difficulties for the prosecution in producing witnesses at the time of trial; that there were a large number of witnesses in respect of the cases relating to Ahmedabad and Surat and it would be impossible for such a large number of witnesses to be produced before a Court outside the State of Gujarat for giving evidence before a Court where the language used was not Gujarati. It was further contended that the allegation of bias made against the Magistrate or Sessions Judge was no longer relevant since the matter had already been committed by the Magistrate to the Court of Sessions while the Sessions Judge had since been elevated as a Judge of the Gujarat High Court and the trial would be conducted by a Judge other than the said Judge against whom the allegation of bias had been made; that in the changed circumstances the arguments advanced in favour of transfer of the Sessions Case outside the State of Gujarat**



**could no longer be justified and were liable to be rejected; that even the allegation of torture in custody was not proved to the satisfaction of the Court; and that all the allegations made by the Petitioners against the Respondents were entirely false and merited rejection.**

**Disposing of the Transfer Petition, the Court**

**HELD:1.1. Apparently, at the initial stages of the investigation and filing of charge-sheets some amount of bias could well have been detected. However, once the matter had gone out of the hands of the Magistrate concerned, no further bias could be attributed to him. Similarly, the allegation of bias against the District & Sessions Judge was no longer available since the incumbent had been elevated as a Judge of the High Court and the trial will be conducted by another Judge. [Para 16] [19-C-D]**

**1.2. However, the manner in which the charges had been framed, without giving the Petitioners a meaningful opportunity of meeting the allegations made against them in the charge-sheet, will ultimately have a direct bearing on the trial itself. The duty of the Sessions Court to supply copies of the charge-sheet and all the relevant documents relied upon by the prosecution under Sections 207 and 208 Cr.P.C. is not an empty formality and has to be complied with strictly so that the accused is not prejudiced in his defence even at the stage of framing of charge. The fact that many of the accused persons were not provided with copies of the charge-sheet and the other relevant documents, as indicated in Sections 207 and 208 Cr.P.C., seriously affects the right of an accused to a free and fair trial. In the instant case, in addition to the above, it has also to be kept in mind that most of the accused persons in this case are from outside the State of Gujarat and are not, therefore, in a position to understand the documents relied upon by the**

**police authorities as they were in Gujarati which most of the accused were unable to comprehend. Their demand for translated copies of the documents met with no response, and ultimately it was the very same documents in Gujarati, which were supplied to some of the accused in some of the cases. [Para 17] [19-E-H; 20-A-B]**

**1.3. The physical torture which was said to have been inflicted on the Petitioners has come on record by way of affidavits to which there is no suitable explanation. Furthermore, the accused persons were not allowed to meet their lawyers without police presence, and as stated by them, it is only natural that an accused in custody will have second thoughts before making or reiterating allegations of torture against the very persons to whose custody they would have to return. [Para 18] [20-C-D]**

**1.4. Apart from the above, this Court also has to consider the submissions on behalf of the State of Gujarat and the Inspector General of Prisons regarding the convenience of the prosecution which intends to produce a large number of witnesses, who are all said to be residents of the State of Gujarat. It was submitted on behalf of the State of Gujarat and the Inspector General of Prisons that the examination of such a large number of witnesses could be compromised and/or jeopardized in the event they are required to travel outside the State of Gujarat in connection with the trial. There will also be a language problem for the witnesses to be examined outside the State of Gujarat, since the majority of the witnesses were acquainted mostly with Gujarati and would be at a disadvantage in providing a true picture of the series of incidents relating to the bomb blasts which were triggered off in the cities of Ahmedabad and Surat. [Para 19] [20-E-G]**

*K. Anbazhagan v. Supdt. Of Police* **(2004 (3) SCC 767: 2003 (5) Suppl. SCR 610;** *Surendra Pratap Singh v. State of U.P. & Ors.* **(2010) 9 SCC 475: 2010 (11) SCR 909 – cited.**



**2. In the Indian criminal justice delivery system the balance tilts in favour of the accused in case of any doubt in regard to the trial. The Courts have to ensure that an accused is afforded a free and fair trial where justice is not only done, but seen to be done and in the process the accused has to be given the benefit of any advantage that may enure to his/her favour during the trial. Article 21 of the Constitution enshrines and guarantees the precious right of life and liberty to a person, deprivable only on following the procedure established by law in a fair trial, assured of the safety of the accused. Except in certain matters relating to economic offences or in regard to national security, the burden lies heavily on the prosecution to prove its case to the hilt and it is rarely that the accused is called upon to prove his innocence. [Para 20] [20-H; 21-A-B]**

*Commissioner of Police v. Registrar, Delhi High Court* **(1996) 6 SCC 323: 1996 (7) Suppl. SCR 432 – relied on.**

**3. The instant case is a case where the apprehension of the accused being denied a free and fair trial within the State of Gujarat has to be considered on the weight of the materials produced on behalf of the accused in support of such apprehension and the prejudice that may also be caused to the prosecution in presenting its case. That the facts involved in this case are of a sensitive nature, cannot be denied, but that by itself cannot be a ground for transfer of the trial outside the State of Gujarat. A good deal of care and caution has to be exercised to see whether the accused/petitioners have been able to make out a case of bias and prejudice on the part of the State or the prosecuting authorities**

**which raises a very real and plausible ground for transferring the trial pending before the Special Judge, Ahmedabad outside the State of Gujarat. Apart from the above, what has also to be taken into consideration is a conceivable surcharged communal climate which could have a direct bearing on the trial itself. The Court has to undertake a balancing act between the interest of the accused, the victims and society at large in the focus of Article 21 of the Constitution to ensure a free and fair trial to the accused. [Para 21] [21-C-F]**

*G.X. Francis & Ors. v. Banke Behari Singh & Anr.* **AIR 1958 SC 309;** *Gurcharan Dass Chadha v. State of Rajasthan* **(1966) 2 SCR678 = AIR 1966 SC 1418;** *Maneka Sanjay Gandhi & Anr. v. Miss Rani Jethmalani* **(1979) 4 SCC 169;** *K. Anbazhagan v. Superintendent of Police, Chennai & Ors.* **(2004) 3 SCC 788: 2004 (2) SCR 495;** *Abdul Nazar Madani v. State of T.N. & Anr.* **(2000) 6 SCC 204: 2000 (3) SCR 1028 – referred to.**

**4. In order to ensure a free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial is a good ground for transfer of a case out of a State. However, such a ground, though of great importance, cannot be the only aspect to be considered while deciding whether a criminal trial could be transferred out of the State which could seriously affect the prosecution case, considering the large number of witnesses to be examined to prove the case against the accused. Justice must not only be done, but must also be seen to be done. If the said principle is disturbed, fresh steps can always be taken under Section 406 Cr.P.C. and Order XXXVI of the Supreme Court Rules, 1966 for the same reliefs. [Paras 27, 28] [25-B-E]**



*Zahira Habibulla H. Sheikh vs. State of Gujarat* **(2004) 4 SCC 158: 2004 (3) SCR 1050 – relied on.**

**5. The offences with which the accused have been charged are of a very serious nature, but except for an apprehension that justice would not be properly administered, there is little else to suggest that the charged atmosphere which existed at the time when the offences were alleged to have been committed, still exist and was likely to prejudice the accused during the trial. All judicial officers cannot be tarred with the same brush and denial of a proper opportunity at the stage of framing of charge, though serious, is not insurmountable. The accused have their remedies elsewhere and the prosecution still has to prove its case. The communally surcharged atmosphere which existed at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously. The Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial. The conditions in Gujarat today are not exactly the same as they were at the time of the incidents, which would justify the shifting of the trial from the State of Gujarat. On the other hand, in case the Sessions Trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are large in number, to any venue that may be designated outside the State of Gujarat. At the present moment, the case for transfer of the trial outside the State of Gujarat is based on certain incidents which had occurred in the past and have finally led to the filing of charges against the accused. The main ground on which the Petitioners have sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad. However, such an allegation today is more speculative than real, but in**

**order to dispel such apprehension, this Court also keeps it open to the Petitioners that in the event the apprehension of the petitioners are proved to be real during the course of the trial, they will be entitled to move afresh before this Court for the relief sought for in the present Transfer Petition. [Para 29] [25-F-H; 26-A-E]**

**Case Law Reference:**

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| **2004 (3) SCR 1050** | **relied on** | **Paras 9, 14, 27** |
| **(1979) 4 SCC 169** | **referred to** | **Para 9, 25** |
| **AIR 1958 SC 309** | **referred to** | **Para 9, 23** |
| **2003 (5) Suppl. SCR 610** | **cited** | **Paras 10, 25** |
| **2010 (11) SCR 909** | **cited** | **Para 10** |
| **(1966) 2 SCR 678** | **referred to** | **Para 10, 24** |
| **1996 (7) Suppl. SCR 432** | **relied on** | **Para 20** |
| **2004 (2) SCR 495** | **referred to** | **Para 25** |
| **2000 (3) SCR 1028** | **referred to** | **Para 26** |

CRIMINAL ORIGINAL JURISDICTION : Transfer Petition (Criminal) No. 55 of 2010.

Under Section 406 Code of Criminal Procedure.

Prasahant Bhushan, Rohit Kumar Singh, Mayank Mishra for the Petitioner.

Ranjit Kumar, Hemantika Wahi, Suvhi Banerjee for the Respondents.

The Judgment of the Court was delivered by

**ALTAMAS KABIR, J.** 1. This Transfer Petition has been filed by one Jahid and 62 other Petitioners under Section 406



of the Code of Criminal Procedure for transfer of Sessions Case No.38 of 2009 pending before the Special Judge, Ahmedabad, for trial outside the State of Gujarat.

2. The aforesaid Sessions Case arises out of FIR Nos.1-236 of 2008 of Shahibaug Police Station and various other FIRs lodged with different Police Stations in the State of Gujarat. Apart from FIR Nos.I-236 of 2008 of Shahibaug Police Station, the aforesaid Sessions Case No.38 of 2009 also involves the following FIRs in which the Petitioners have been implicated :-

(a) I-203 of 2008, I-204 of 2008, I-205 of 2008 and I-206 of 2008 of Maninagar Police Station;

(b) I-338 of 2008 and I-339 of 2008 of Odhav Police Station;

(c) I-400 of 2008 and I-401 of 2008 of Naroda Police Station;

(d) I-321 of 2008 and I-322 of 2008 of Ramol Police Station;

(e) I-190 of 2008 of Isanpur Police Station;

(f) I-218 of 2008 of Vatva Police Station;

(g) I-273 of 2008 of Amraiwadi Police Station;

(h) I-71 of 2008 of Khadia Police Station;

(i) I-220 of 2008 of Bapunagar Police Station;

(j) I-123 of 2008 of Kalupur Police Station;

(k) I-140 of 2008 of Danilimbda Police Station;

(l) I-181 of 2008 of Sarkhej Police Station;

(m) I-200 of 2008 of Kalol Police Station;

(n) 176 of 2008, 175 of 2008, 179 of 2008 and 180 of 2008 of Kapodra Police Station;

(o) 365 of 2008, 363 of 2008, 364 of 2008, 369 of 2008 and 366 of 2008 of Varacha Police Station;

(p) 203 of 2008 and 208 of 2008 of Katargam Police Station;

(q) 651 of 2008 of Umrah Police Station;

(r) 3019 of 2008 of DCB Police Station;

(s) 208 of 2008 and 209 of 2008 of Mahidharpura Police Station.

All the aforesaid FIRs have been lodged in connection with the series of bomb blasts that occurred in 2008 all over the country in major cities like Delhi, Mumbai, Jaipur, Ahmedabad and Bengaluru, killing many and injuring several others. As a response to the aforesaid blasts which were declared to be acts of terrorism by the State Government, a large number of young men belonging to the Muslim community were arrested both from within and outside the State of Gujarat.

3. Appearing in support of the Transfer Petition, learned Advocate, Mr. Prashant Bhushan, submitted that the Transfer Petition seeking transfer of the trial of the accused in the Ahmedabad bomb blast cases, as well as in the cases relating to planting of bombs in Surat, out of the State of Gujarat, was necessitated on account of the attitude and conduct of the local authorities. Mr. Bhushan submitted that the local police authorities, jail authorities and the public prosecutor had conducted themselves in a manner which reflects total bias and prejudice against the accused and the same has created more than a reasonable apprehension in their mind that they would not get a fair and free trial in the State of Gujarat.



4. Among the more glaring examples of bias and prejudice pointed out by Mr. Prashant Bhushan was the allegation that charges were framed against the accused without supplying them with the essential documents which were required to be supplied under Section 207 of the Code of Criminal Procedure (Cr.P.C.), particularly when the majority of the accused were not being represented through counsel. Mr. Bhushan submitted that in cases instituted upon a police report, Section 207 Cr.P.C. makes it obligatory on the part of the Magistrate to provide the accused, without delay, free of cost, copies of the police report, the First Information Report recorded under Section 154 Cr.P.C., the statements recorded under Sub-Section (3) of Section 161 Cr.P.C. of all the persons whom the prosecution proposed to examine as its witnesses, the confessions and statements recorded under Section 164 Cr.P.C., as well as any other document or relevant extract forwarded to the Magistrate with the police report under Sub-Section (5) of Section 173 Cr.P.C. Mr. Bhushan urged that under Section 227 Cr.P.C. the accused have a right to oppose the framing of charges on the basis of the evidence gathered during investigation, which requires the accused to have copies of all the documents mentioned in Section 207 of the Code. Mr. Bhushan submitted that the said right to have the police papers had been violated by the Respondents, inasmuch as, most of the accused did not have access to all the papers at the time of framing of charges against them. Mr. Bhushan submitted that those who had been favoured with copies of the police papers were unable to understand the same, as they were in Gujarati which language was not known to most of the accused, most of them were from outside the State of Gujarat. Mr. Bhushan also submitted that the learned Advocates of those who were provided with copies of the charge-sheets in Gujarati were barely given four days' time to consider the same to prepare their case for discharge of the accused.

5. Despite the fact that on the date of framing of charges, many of the accused had not been served with copies of the

charge-sheet and connected papers, such as the statement of witnesses and confessional statements of the accused recorded under Section 164 Cr.P.C., and other documents, and those who had been served, were served with copies of the same in Gujarati, the learned Designated Judge framed charges against the accused persons on 11th January, 2010. Mr. Bhushan submitted that the majority of the accused were provided with lawyers and copies of the charge-sheet and other documents *after charge had already been framed.* [Emphasis Supplied] Mr. Bhushan submitted that some of the accused, who did not receive the said documents, moved an Application on 15th February, 2010, but the same was rejected without such copies being supplied.

6. Mr. Bhushan urged that apart from the above, one other serious grievance which the accused had, which has led to the apprehension of bias, was that the counsel for the accused were not permitted to meet their clients even for 10 minutes in their Court chambers, without the police being present, despite the applications made on behalf of the accused that they would not be in a position to speak freely in the presence of the police for fear of subsequent reprisal at the hands of the police. Mr. Bhushan submitted that although the Court was fully aware of the fact that the accused would not be able to speak freely about the torture inflicted on them while in custody, it decided to look the other way to prevent the learned advocates for the accused to obtain a true picture of the allegations made by the accused of torture at the hands of police while in custody. Mr. Bhushan submitted that the Court chose to disregard the reality that after their production in Court, the accused would have to go back to the custody of police and to suffer the consequences of their disclosures in Court. Mr. Bhushan submitted that even in the light of the serious allegations made against the police of torture and the evidence in support thereof, the Court did not think it necessary to even order an independent investigation to verify the truth or otherwise of such allegations. Mr. Bhushan urged that on account of the disinterest shown by the Courts



with regard to the complaints of torture made by the accused, the jail authorities became emboldened and subjected the accused to other indignities, including the storming of the barracks of the accused on 27th March, 2009, and severely beating the inmates thereof.

7. Mr. Bhushan submitted that several affidavits had been filed by the relatives of the accused which revealed the severe physical torture inflicted on the accused which were supported by medical reports of doctors who examined the victims, but despite such evidence, the trial court did not order an independent probe into the incident and, instead, sought a report from the jail authorities who, as it could have been expected, stated that it was the accused who had revolted and had to be subdued by the jail authorities. It was the aforesaid explanation of the jail authorities which was ultimately upheld by the Court. Mr. Bhushan submitted that the jail authorities had placed reliance on a report by the Additional Principal Judge into an incident which had taken place prior to the incident of 27th March, 2009. In other words, the matter referred to in the order dated 5th December, 2009, passed by the Gujarat High Court had no connection with the incident forming the basis of the transfer petition.

8. Mr. Bhushan contended that apart from the above, there were several other instances of bias indicated hereinbelow, which had given rise to the apprehension in the minds of the accused that they would not get a free and fair trial as is guaranteed under Article 21 of the Constitution, before the learned Designated Judge, namely,

(a) On the date of hearing, the Investigating Officer, Mr. Tolia, was seen leaving the Chamber of the learned Designated Judge, which fact was admitted, but was attempted to be explained on the ground that such visits were in connection with other matters pertaining to the bomb blast cases. An application

made thereafter, requesting the learned Judge to recuse herself from the cases remained undecided.

(b) On 15th February, 2010, this Court stayed the proceedings before the Designated Judge and, although, the same was orally conveyed to the learned Judge, she rejected all the applications praying for adjournment, and completed framing of charge and fixed 19th February, 2010, for evidence. Within two weeks thereafter on 21st March, 2010, the Designated Judge also rejected the applicationfor transit remand for 11 accused to be brought to Delhi for framing of charge in connection with the case pending in Delhi, on the ground that charge had already been framed against them and the trial had been stayed by this Court.

(c) Although, out of 64 accused, 42 were from outside Gujarat from eight different States, copies of the charge-sheet in Gujarati were attempted to be served on some of the accused in a show of compliance with the provisions of Section 173 Cr.P.C. which would not enable the accused to make an effective representation at the time of framing of charge. Even the copies which were served on 22 of the accused, who were Gujaratis, were found to be illegible.

(d) The accused were severely prejudiced by the fact that although the orders passed by the Metropolitan Magistrate or the Designated Judge were appealable, it was impossible for them to seek any further relief since the majority of the accused were from outside Gujarat and their cases were being looked after by Legal Aid counsel or by counsel appearing pro bono.



9. Mr. Bhushan submitted that it is now well- settled by this Court in the case of *Zahira Habibulla H. Sheikh Vs. State of Gujarat* [(2004) 4 SCC 158] and *Maneka Sanjay Gandhi & Anr. Vs. Miss Rani Jethmalani* [(1979) 4 SCC 169], etc., that in the event local communal feelings, which are borne out from the manner in which the accused were treated by the police, jail staff and the Courts are such that they create an atmosphere which is not conducive to the holding of a fair trial, the cases should be transferred to a neutral location in the interest of justice. Mr. Bhushan submitted that as was held in *Maneka Sanjay Gandhi's* case (supra) and quoted with approval in *Zahira Habibulla H. Sheikh's* case (supra), one of the more serious grounds which disturbed the conscience of the Court in more ways than one, is the alleged absence of a congenial atmosphere for a fair and impartial trial. Mr. Bhushan submitted that such a sentiment had been expressed as far back as in 1958 by Justice Vivian Bose in the case of *G.X. Francis & Ors. Vs. Banke Behari Singh & Anr.* [1958 Crl.L.J. 569= AIR 1958 SC 309], where his Lordship observed that good grounds for transfer had been made out because of the bitterness of the local communal feeling and the tenseness of the atmosphere there. His Lordship also observed that public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly amongst reasonable Christians all over India, *not because the Judge was unfair or biased, but because the machinery of justice is not geared to work in the midst of such conditions.* [Emphasis Supplied]

10. In support of his aforesaid contention, Mr. Prashant Bhushan also referred to the decisions of this Court in *K. Anbazhagan Vs. Supdt. Of Police* [(2004 (3) SCC 767], *Surendra Pratap Singh Vs. State of U.P. & Ors.* [(2010) 9 SCC 475], and *Gurcharan Dass Chadha Vs. State of Rajasthan* [(1966) 2 SCR 678 = AIR 1966 SC 1418]. Mr. Bhushan submitted that the law as settled by this Court for transferring a trial did not require the Petitioner to prove that he would be deprived of a free and fair trial, but the test is whether there

are circumstances which create a reasonable apprehension that he might not get a free and fair trial. Learned counsel further submitted that the contention of the State that the case was no longer before the Metropolitan Magistrate and that even the Designated Judge had since been changed, was of little consequence, since trial by a different Judge would not restore the invaluable rights which had been denied to the accused at the stage of framing of charge.

11. Mr. Prashant Bhushan submitted that in the circumstances indicated, it was only just and proper that the Transfer Petition be allowed and that Sessions Case No.38 of 2009 pending before the Special Judge, Ahmedabad, be transferred outside the State of Gujarat for trial.

12. Appearing for the State of Gujarat and the Inspector General of Prisons, Ms. Hemantika Wahi, learned Advocate, strongly opposed the Transfer Petition and contended that it was only after intensive investigation that charge-sheets had been filed against the accused persons who had travelled to different parts of Gujarat as a part of a criminal conspiracy under false and vexatious names and planted bombs at different locations in thickly-populated public places to cause the maximum amount of damage and terror. It was submitted that the allegation made relating to the alleged bias and/or lack of confidence in getting a free and fair trial before the Magistrate and the Designated Sessions Judge, was entirely without foundation, as were the allegations also made against the Jail Authorities. Ms. Wahi submitted that a few orders, even if held to be incorrect, could not be a ground for transferring the entire prosecution out of the State of Gujarat as that would lead to various difficulties for the prosecution in producing witnesses at the time of trial. Ms. Wahi submitted that there were a large number of witnesses in respect of the cases relating to Ahmedabad and Surat and that it would be impossible for such a large number of witnesses to be produced before a Court outside the State of Gujarat for giving



evidence before a Court where the language used was not Gujarati. Apart from the above, in all the offences which had been consolidated in one Sessions Case, there were 144 charge-sheets/supplementary charge-sheets, each containing on an average 2000 to 3000 pages. It was submitted that if the prayer made in the Transfer Petition was allowed, it would result in complete injustice, as it was most likely that the trial would end in acquittal of the accused.

13. Ms. Wahi also contended that the allegation of bias made against the Magistrate or Sessions Judge was no longer relevant since the matter had already been committed by the Magistrate to the Court of Sessions while the learned Sessions Judge had since been elevated as a Judge of the Gujarat High Court and the trial would be conducted by a Judge other than the said Judge against whom the allegation of bias had been made. Ms. Wahi submitted that it was not as if the Petitioners were aggrieved by the entire judiciary in the State, inasmuch as, such an allegation would be entirely misplaced and in the changed circumstances the arguments advanced in favour of transfer of the Sessions Case outside the State of Gujarat could no longer be justified and were liable to be rejected.

14. Ms. Wahi submitted that the decision in *Zahira Habibulla H. Sheikh's* case (supra) was on a completely different set of facts, and, in any event, each case would have to be treated on its own set of facts and merits. Even the allegation of torture in custody has not been proved to the satisfaction of the Court.

15. Ms. Wahi submitted that the case attempted to be made out on behalf of the Petitioners for transfer of the Sessions Trial outside the State of Gujarat, is based on suppression of material facts relating to the alleged non-supply of charge-sheet papers. It was urged that the same had been refused despite having been offered to the Petitioners and that an opportunity was duly given to the Petitioners to engage

Advocates of their choice on their refusal to accept legal aid as offered by the Court or even from the State Legal Services Authority. In fact, most of the accused persons subsequently engaged Advocates of their choice to represent and defend them at the time of trial, which fact had been withheld from the Court. Ms. Wahi submitted that all the allegations made by the Petitioners against the Respondents were entirely false and merited rejection.

16. Having regard to the nature of the relief sought for by the Petitioners, we have considered the submissions made on behalf of respective parties and the materials on record with care and caution. It appears to us that at the initial stages of the investigation and filing of charge-sheets some amount of bias could well have been detected. However, once the matter had gone out of the hands of the Magistrate concerned, no further bias could be attributed to him. Similarly, the allegation of bias against the District & Sessions Judge was no longer available since the incumbent had been elevated to the Bench and the trial will be conducted by another learned Judge.

17. However, as pointed out by Mr. Prashant Bhushan, learned counsel appearing for the Petitioners, the manner in which the charges had been framed, without giving the Petitioners a meaningful opportunity of meeting the allegations made against them in the charge-sheet, will ultimately have a direct bearing on the trial itself. The duty of the Sessions Court to supply copies of the charge-sheet and all the relevant documents relied upon by the prosecution under Sections 207 and 208 Cr.P.C. is not an empty formality and has to be complied with strictly so that the accused is not prejudiced in his defence even at the stage of framing of charge. The fact that many of the accused persons were not provided with copies of the charge-sheet and the other relevant documents, as indicated in Sections 207 and 208 Cr.P.C., seriously affects the right of an accused to a free and fair trial. In the instant case, in addition to the above, it has also to be kept in mind that most



of the accused persons in this case are from outside the State of Gujarat and are not, therefore, in a position to understand the documents relied upon by the police authorities as they were in Gujarati which most of the accused were unable to comprehend. Their demand for translated copies of the documents met with no response, and ultimately it was the very same documents in Gujarati, which were supplied to some of the accused in some of the cases.

18. The physical torture which was said to have been inflicted on the Petitioners has come on record by way of affidavits to which there is no suitable explanation. Furthermore, the accused persons were not allowed to meet their lawyers without police presence, and as stated by them, it is only natural that an accused in custody will have second thoughts before making or reiterating allegations of torture against the very persons to whose custody they would have to return.

19. Apart from the above, we also have to consider Ms. Wahi's submissions regarding the convenience of the prosecution which intends to produce a large number of witnesses, who are all said to be residents of the State of Gujarat. It has been submitted by Ms. Wahi that the examination of such a large number of witnesses could be compromised and/or jeopardized in the event they are required to travel outside the State of Gujarat in connection with the trial. There will also be a language problem for the witnesses to be examined outside the State of Gujarat, since the majority of the witnesses were acquainted mostly with Gujarati and would be at a disadvantage in providing a true picture of the series of incidents relating to the bomb blasts which were triggered off in the cities of Ahmedabad and Surat on 26th July, 2008.

20. However, in our criminal justice delivery system the balance tilts in favour of the accused in case of any doubt in regard to the trial. The Courts have to ensure that an accused is afforded a free and fair trial where justice is not only done, but seen to be done and in the process the accused has to be

given the benefit of any advantage that may enure to his/her favour during the trial. As was observed by this Court in *Commissioner of Police Vs. Registrar, Delhi High Court* [(1996) 6 SCC 323], Article 21 of the Constitution enshrines and guarantees the precious right of life and liberty to a person, deprivable only on following the procedure established by law in a fair trial, assured of the safety of the accused. Except in certain matters relating to economic offences or in regard to national security, the burden lies heavily on the prosecution to prove its case to the hilt and it is rarely that the accused is called upon to prove his innocence.

21. This is a case where the apprehension of the accused being denied a free and fair trial within the State of Gujarat has to be considered on the weight of the materials produced on behalf of the accused in support of such apprehension and the prejudice that may also be caused to the prosecution in presenting its case. That the facts involved in this case are of a sensitive nature, cannot be denied, but that by itself cannot be a ground for transfer of the trial outside the State of Gujarat. A good deal of care and caution has to be exercised to see whether the accused/petitioners have been able to make out a case of bias and prejudice on the part of the State or the prosecuting authorities which raises a very real and plausible ground for transferring the trial pending before the Special Judge, Ahmedabad outside the State of Gujarat. Apart from the above, what has also to be taken into consideration is a conceivable surcharged communal climate which could have a direct bearing on the trial itself. The Court has to undertake a balancing act between the interest of the accused, the victims and society at large in the focus of Article 21 of the Constitution to ensure a free and fair trial to the accused.

22. The question involved in this case has earlier fallen for consideration in various other cases before this Court which have been referred to hereinbefore. It will be profitable to refer to some of the observations made by this Court in such cases.



23. In this regard, we may first refer to a three-Judge Bench decision in the case of *G.X. Francis & Ors.* (supra), where also this Court was considering a Transfer Petition filed on the apprehension of bias in the minds of the accused. The said petition involved the transfer of a complaint wherein the accused were said to have been concerned in one way or the other in defamatory statements against the complainant regarding a publication known as the "Niyogi Report". Authoring the judgment on behalf of the Bench, Vivian Bose, J. observed that where there is unanimity of testimony from both sides about the nature of the surcharged communal tension in the area in question and the local atmosphere is not conducive to a fair and impartial trial, there is a good ground for transfer. The learned Judge also observed that public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India, not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting and even if justice were done it would not be "seen to be done".

24. We may now refer to another three-Judge Bench decision of this Court in the case of *Gurcharan Dass Chadha Vs. State of Rajasthan* [(1966) 2 SCR 678 = AIR 1966 SC 1418], which also involved a Transfer Petition based on the ground of reasonable apprehension on the part of the petitioner that justice would not be done to him by the Court before whom the trial was pending under the provisions of the Penal Code and the Prevention of Corruption Act. While disposing of the matter, this Court observed as follows :

> "A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that

he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not."

25. The aforesaid question once again cropped up in *Maneka Sanjay Gandhi & Anr. Vs. Miss Rani Jethmalani* [(1979) 4 SCC 169], in a Transfer Petition filed, inter alia, on three grounds, namely,

(i) that the parties (complainant and petitioners) reside in Delhi and some formal witnesses also belong to Delhi;

(ii) that the petitioner is not able to procure competent legal service in Bombay; and

(iii) that the atmosphere in Bombay is not congenial to a fair and impartial trial of the case against her.

Referring to the decision in *G.X. Francis's* case (supra) a Three-Judge Bench of this Court, dismissed the Transfer Petition upon holding that none of the allegations made by the petitioner made out a case that a fair trial was not possible in the Court where the matter was pending. The mere words of an interested party was insufficient to convince the Court that she was in jeopardy or the Court might not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. This Court, however, went on to say that it could not view with unconcern the potentiality of a flare up and the challenge to a fair trial. In such circumstances, this Court made certain precautionary observations to protect the petitioner and to ensure for her a fair trial. In *K. Anbazhagan Vs. Superintendent of Police, Chennai & Ors.* [(2004) 3 SCC



788], while disposing of two transfer petitions, the learned Judges observed as follows :

> "A free and fair trial is a sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the minds of the petitioner."

26. Before we proceed to the latest views expressed by this Court in a Transfer Petition also praying for transfer of a trial outside the State of Gujarat on account of bias and a vitiated communal atmosphere, we may refer to a slightly different view taken by this Court by a Bench of two-Judges in the case of *Abdul Nazar Madani Vs. State of T.N. & Anr.* [(2000) 6 SCC 204]. While disposing of a Transfer Petition filed by the accused in the Coimbatore Serial Bomb Blasts case on the allegation that the atmosphere in the State of Tamil Nadu in general and in Coimbatore in particular, being so communally surcharged that his fair and impartial trial there would be seriously impaired, this Court held that the purpose of a criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. This Court observed that the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. The mere existence of a surcharged atmosphere without there being proof of inability of the Court of holding a fair and impartial trial, could not be made a ground for transfer of a case. The alleged communally surcharged atmosphere has to be considered in the light of the accusations made and the nature of the crimes committed by the accused

seeking transfer of the case. It was observed that no universal and hard and fast rules can be prescribed for deciding a Transfer Petition which has always to be decided on the basis of the facts of each case.

27. As has been stated hereinbefore, in *Zahira Habibulla H. Sheikh's* case (supra), in order to ensure a free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial was held to be a good ground for transfer of the case from Gujarat to Maharashtra.

28. However, such a ground, though of great importance, cannot be the only aspect to be considered while deciding whether a criminal trial could be transferred out of the State which could seriously affect the prosecution case, considering the large number of witnesses to be examined to prove the case against the accused. The golden thread which runs through all the decisions cited on behalf of the parties, is that justice must not only be done, but must also be seen to be done. If the said principle is disturbed, fresh steps can always be taken under Section 406 Cr.P.C. and Order XXXVI of the Supreme Court Rules, 1966 for the same reliefs.

29. The offences with which the accused have been charged are of a very serious nature, but except for an apprehension that justice would not be properly administered, there is little else to suggest that the charged atmosphere which existed at the time when the offences were alleged to have been committed, still exist and was likely to prejudice the accused during the trial. All judicial officers cannot be tarred with the same brush and denial of a proper opportunity at the stage of framing of charge, though serious, is not insurmountable. The accused have their remedies elsewhere and the prosecution still has to prove its case. As mentioned earlier, the communally surcharged atmosphere which existed



at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously. The Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial. The conditions in Gujarat today are not exactly the same as they were at the time of the incidents, which would justify the shifting of the trial from the State of Gujarat. On the other hand, in case the Sessions Trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are large in number, to any venue that may be designated outside the State of Gujarat. At the present moment, the case for transfer of the trial outside the State of Gujarat is based on certain incidents which had occurred in the past and have finally led to the filing of charges against the accused. The main ground on which the Petitioners have sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad. However, such an allegation today is more speculative than real, but in order to dispel such apprehension, we also keep it open to the Petitioners that in the event the apprehension of the petitioners are proved to be real during the course of the trial, they will be entitled to move afresh before this Court for the relief sought for in the present Transfer Petition.

30. The Transfer Petition is disposed of with the aforesaid observations. There will be no order as to costs.

B.B.B. Transfer petition disposed of.

PREM PRAKASH @ LILLU & ANR.
*v.*
STATE OF HARYANA
(Criminal Appeal No. 91 of 2007)

JULY 7, 2011

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

*Penal Code, 1860 – ss.376(2)(g) and 366 – Gang-rape pursuant to kidnapping – Testimony of prosecutrix – Three accused 'D', 'P' and 'H' – Trial court convicted all the accused – Conviction upheld by High Court – All three accused filed appeals before Supreme Court – Appeal of 'D' dismissed in limine – 'P' died – Appeal therefore survived only qua 'H' – Held: No reason to disbelieve the version of prosecutrix – Statement of prosecutrix before the Court fully supported by other prosecution witnesses and even the medical evidence on record – Medical evidence clearly showed that the prosecutrix had suffered injuries during the alleged incident – Doctor also stated that there was a possibility of intercourse having taken place with the prosecutrix on the alleged date of rape – Involvement of 'H' in the entire chain of events was material and as per the prosecutrix he had also raped her – According to the doctor, he was capable of performing sexual intercourse – The entire evidence and the attendant circumstances point towards the guilt of the accused — Concurrent finding of conviction against the accused was based upon proper appreciation of evidence – Conviction of 'H' upheld.*

*Evidence – Appreciation of – Held: The evidence must be viewed collectively – Statement of a witness must be read as a whole – Reliance on a mere line in the statement of the witness, out of context, would not serve the ends of justice and the conclusion of the Court based on such appreciation of evidence could be faulted.*





*Code of Criminal Procedure, 1973 – s.154 – FIR – Case of gang rape – Apathy in the functioning of the investigating agencies – Prosecutrix and her father were made to run from pillar to post by the police authorities, before their case could be registered – Held: The father of the prosecutrix, surely must have felt trauma and frustration – In terms of the provisions of s.154, CrPC, it is obligatory for the police to register a case when the facts constituting a cognizable offence are brought to its notice. .*

**The three accused, namely 'D', 'P' and 'H' were charged under Sections 366 and 376(2)(g) of the IPC. The prosecution case was that 'D' took the prosecutrix PW4 in his arms while 'P' gagged her mouth with his hand whereafter PW4 was lifted and dragged into car and subsequently raped by all the accused. The trial court held all the three accused guilty of the offences of kidnapping and gang rape of PW4. The conviction was upheld by the High Court.**

**All the accused filed appeals before this Court. During pendency of the appeal, 'P' expired. The appeal of 'D' was dismissed *in limine.* Thus, the instant appeal survived only qua 'H'.**

**Dismissing the appeal, the Court**

**HELD: 1. The argument of the appellant, that there was hardly any evidence directly involving the accused 'P' in the commission of the crime, cannot be accepted. Firstly, the prosecutrix when examined as PW4 stated in Court that the appellant 'H' was driving the car in which she was kidnapped and subsequently taken to the jungle. Her version is also supported by her father, PW7, though, of course, PW7 was not an eye – witness to the occurrence. There is no reason for this Court to disbelieve the version given by the prosecutrix. [Para 7] [38-B-D]**

**2. Though some contradictions were pointed out between the statements of the prosecution witnesses, the trial court rightly observed that these discrepancies, viewed from any angle, were not significant. PW4 did deny some portion of her statement Ex.DA, particularly, that she was raped in the car one after the other by all the three accused. However, this statement does not find support from any of the prosecution witnesses or from the investigation of the Investigating Officer. Thus, this contradiction does not render the statement of the prosecutrix unreliable or untrustworthy. [Para 7] [38-D-F]**

**3. Significantly, the accused 'D', in his statement under Section 313 of the Cr.P.C. has not chosen to say that none of the other two accused, namely, 'H' and the deceased 'P', were present at the time of the occurrence or that they have been falsely implicated on account of some land dispute, as referred to by the other two accused in their statements under Section 313 of the Cr.P.C. [Para 8] [38-G]**

**4. As per the medical evidence of PW5 "abrasions which were brownish in colour with clothes, blood on right shin anteriorly, clotted dry blood sticking from the abrasions described above (sic) 3 cm. below right knee joint" were found on the person of the prosecutrix. There was also abrasion on right side of cheek, 5 cm brownish in colour and the prosecutrix complained of pain on the right side of her neck. In her cross – examination, the duration of injury no.1 was stated to be more than 24 hours and it was also stated that the injury no.1 could be result of a fall while the injury no. 2 cannot be self inflicted. This medical evidence clearly shows that she had suffered injuries during the alleged incident and she was taken for medical examination by the Investigating Officer after expiry of 24 hours. PW-6 had examined the appellant – accused 'H' and found him fit to perform sexual intercourse.[Para 9] [38-H; 39-A-C]**



**5. X – ray examination of PW-4 was conducted and according to the report, Ex.P8, PW4 was aged more than 18 years. After examining the forensic reports, Exs.PH and PJ, from the Forensic Science Laboratory, the doctor also stated that there was a possibility of intercourse having taken place with PW4 on the alleged date of rape. [Para 10] [39-D-E]**

**6. There are certain significant averments which show the manner in which the offence was committed. Firstly, PW4 has stated that the car was being driven by 'P'. Secondly, that she was wearing same clothes at the time of her medical examination which she was wearing at the time of rape. Her salwar was blood – stained. These clothes were taken into custody by the doctor herself, who subsequently handed over the same to the investigating agency. Similarly, the father of the prosecutrix, PW7, has specifically stated that his daughter had told him that 'D' had caught hold of her and dragged her to the car, her mouth was gagged by 'P' and still there was another person with small pox marks on his face who was driving the car. About the identity of 'P', it is clear that PW7 had known him for the last 10 years as he had settled in the Village. In other words, there could hardly be any dispute with regard to the identity of the person accused. But for the contribution made by the present accused, 'H' who was driving the car and had taken away the prosecutrix to the jungle/fields, probably the incident could have been avoided. Thus, it is clear that involvement of the present accused 'H' in the entire chain of events was material and as per the prosecutrix he had also raped her. According to the doctor, he was capable of performing sexual intercourse. This entire evidence**

**and the attendant circumstances point towards the guilt of the accused. [Para 11] [39-E-H; 40-A-C]**

**7. The appellant had placed emphasis on the fact that the doctor had opined that the prosecutrix was accustomed to sexual intercourse and that there was no sign of fresh intercourse. But this argument has rightly been rejected by the High Court by noticing that there was no fresh intercourse but she had been subjected to intercourse more than 24 hours ago. The doctor had examined PW4 on the third day after the alleged date of rape. Thus, the statement of the doctor has to be read and understood in that background and the doctor also specifically stated, that there was a possibility that she was subjected to intercourse on the date of alleged rape. [Para 12] [40-D-E]**

**8. The evidence, essentially, must be viewed collectively. The statement of a witness must be read as a whole. Reliance on a mere line in the statement of the witness, out of context, would not serve the ends of justice and the conclusion of the Court based on such appreciation of evidence could be faulted. Another aspect of this case which has specifically not been noticed by the High Court, is that the prosecutrix and her father were made to run from pillar to post by the police authorities, before their case could be registered. The prosecutrix, PW4, has specifically stated that report made by her father was not recorded by the police and the next day they went to Jhajjar along with her mother and appeared before the police officers but again, no action was taken. According to her, the application which she had given in the Tehsil office was thumb marked by her. The father of the prosecutrix stated that he had even convened a panchayat of the brotherhood but the panchayat having failed to arrive at a decision, he had proceeded to the police station along with his daughter and his report was not recorded at the police station by the police. He returned to the village and again went to the Jhajjar Sub Division Headquarter and met the DSP and narrated the entire occurrence to him. But still no action was taken and then they claim to have gone to the SDM, Jhajjar and made a complaint in writing. Thereafter, his daughter was medically examined and subsequently, the case was registered. This event certainly describes and points towards the apathy in the functioning of investigating agencies in heinous crimes, to which the complainant was subjected. In terms of the provisions of Section 154, Cr.P.C., it is obligatory for the police to register a case when the facts constituting a cognizable offence are brought to its notice. The father of the girl, surely must have felt trauma and frustration when he was subjected to the above treatment, besides the knowledge of his daughter's rape by the accused. [Para 13] [40-F-H; 41-A-E]**



**9. The appellant had also tried to rely upon some contradictions and embellishments in the statements of the prosecutrix and her father. The Court cannot ignore the fact that the prosecutrix cannot be expected to make a perfect statement after a lapse of time without even a normal variance. Furthermore, she had specifically stated that, the statements recorded by the appellants were not read over to her nor were any thumb impressions taken for the same. In fact, she had given an application to the tehsil office which was thumb marked and even that complaint had not been produced in evidence before the Court by the prosecution. These are the lacunae and impropriety committed by the investigating agency itself. Thus, no burden or fault could be shifted to the prosecutrix. Her statement before the Court is fully supported by other prosecution witnesses and even the medical evidence produced on record. There is a concurrent finding of conviction against the accused,**

**which is based upon proper appreciation of evidence. No reason for interference by this Court. [Para 14] [41-F-H; 42-A-B]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 91 of 2007.

From the Judgment & Order dated 27.7.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 290-SB of 1992.

Dinesh Chander Yadav, Vibhuti Sushant Gupta, (for Dr. Kailash Chand) for the Appellants.

Rajeev Gaur 'Naseem', (for Kamal Mohan Gupta) for the Respondent.

The Judgment of the Court was delivered by

**SWATANTER KUMAR, J.** 1. Three accused, namely Dharambir @ Pappu, Prem Prakash @ Lillu and Herchand @ Poley, were charged for an offence punishable under Sections 366 and 376(2)(g) of the Indian Penal Code, 1860 (in short the 'IPC'). Upon trial, the learned Additional Sessions Judge, Rohtak, by judgment and order dated 31st July, 1992 held all the three accused guilty of the offences of kidnapping and gang rape of Kumari Sudesh and, thus, they were sentenced to undergo rigorous imprisonment of 10 years with a fine of Rs.500/- each. In case of default of payment of fine, they were ordered to undergo rigorous imprisonment for a further period of one month. The accused were also awarded two years' rigorous imprisonment each for the offence committed under Section 366 of the IPC. Both the substantial sentences were ordered to run concurrently. Dissatisfied with the judgment of the trial court, the accused preferred an appeal before the High Court. The High Court found no merit in the appeal and consequently, dismissed the same vide its judgment dated 27th July, 2005, giving rise to the present appeal by all the accused.

2. The learned counsel for the appellants pointed out that



during the pendency of the appeal before this Court, one of the accused, i.e., Prem Prakash @ Lillu had expired and therefore, the present appeal survives only qua the third accused, i.e. Herchand @ Poley. In so far as the appeal by the accused Dharambir @ Pappu is concerned, the same was dismissed *in limine*. The brief facts in the present case are that the aforesaid three accused were asked to face trial on the aforestated charges based on the case of the prosecution. According to the prosecution, Kumari Sudesh, daughter of Pratap Singh, resident of Village Chhuchhak accompanied by her brother Satish, aged about 5 years, had gone out of her house at about 8-9 p.m. on 25th July, 1990 to ease herself at a distance of about two or three *killas* away from their house and by the side of a nearby *pucca* road. After she answered the call of nature and washed herself a car approached her from behind and stopped beside her. The accused Dharambir got down and took her in his arms. The accused Poley followed him and gagged her mouth with his hand. She was lifted and dragged into the car. The car was being driven by the accused Lillu. The car was taken beyond the village abadi, across a petrol pump and into the fields by the side of the road. All the three accused raped Kumari Sudesh one by one in that field. Accused Dharambir was left there and the other two took the prosecutrix in the car to an unknown jungle and kept her there for that night and the following afternoon. She was again raped by these two accused in that jungle. At about 4.00 p.m. on 26th July, 1990, she was dropped on the bridge of a canal, at a distance of about one kilometer from her house and was threatened of being kidnapped, raped and killed if she narrated the occurrence to anybody. She reached home and recounted the incident to her father Pratap. A *panchayat* of the brotherhood was convened but no decision was arrived at. On the next day, the father of the prosecutrix went to the Police Station Beri with her, to lodge a complaint. However, their request for registration of a case was not entertained. On 27th July, 1990, they went to Jhajjar Sub Divisional Headquarter and approached the Deputy Superintendent of Police but to no

avail. Thereafter, they approached the Sub Divisional Magistrate (in short the 'SDM') with a written application dated 28th July, 1990, Ex.PE/1, to get the prosecutrix medically examined and for taking action against the culprits. The SDM referred the matter to the incharge of the hospital at Jhajjar and a lady doctor, Dr. A.K. Bhutani, examined the prosecutrix and prepared her report, Ex.PE. The clothes of the prosecutrix were also taken by the doctor, who later on handed over the same to the police, who in turn transferred them for examination by the PSL. It is stated that while Pratap Singh was again going towards the police station, on the way at the bus stand of Village Jahagarh, he met a police party and Assistant Sub Inspector Hawa Singh recorded his statement, Ex.PO/1 and an F.I.R., Ex.PO/2 dated 28th July, 1990, was registered.

4. In brief, the prosecution had examined a number of witnesses including PW1, Dr. R.B.S. Jakhar, who had medically examined the accused Dharambir and had opined that he was fit to commit sexual intercourse. PW2 was the police officer incharge of the Police Station and he presented the original challan before the Court. The prosecutrix was examined as PW4 and her father Pratap Singh was examined as PW7. Besides this, the lady doctor who had examined the prosecutrix, was PW5, Dr. A.P. Sharma, who had medically examined the other two appellants was PW6, SI Hawa Singh, who was the Investigating Officer was examined as PW8. The prosecution, on the basis of these witnesses attempted to bring home the guilt of the accused.

5. In the statements made under Section 313 of the Code of Criminal Procedure, (for short 'Cr.P.C.'), the accused Prem Prakash and Herchand stated that all witnesses were false. They denied the incident in its entirety and took a specific stand that Pratap Singh, father of Kumari Sudesh was carrying on cultivation on the land belonging to the family of the accused and since he had stopped them from carrying on the agricultural activity, Pratap Singh had developed animosity towards them.



6. However, in his statement under Section 313 of the Cr.P.C., the accused Dharambir offered no explanation and also chose not to lead any defence. The trial court vide its detailed judgment found that the accused were guilty of the offence with which they were charged. The accused had further raised a defence on behalf of Prem Prakash, that he was not named in the FIR and has been falsely implicated. It was also contended that the prosecutrix was more than 19 years of age and in fact there was no reliable evidence to convict the accused and there were contradictions in the case of the prosecution. The trial court dealt with these two issues as follows: -

> "23. Then I have been pointed out some points of contradictions in the statements of the witnesses. The first point of contradiction is as to who was driving the car. In the F.I.R. which was recorded on the basis of statement of Partap, it isstated that Poley was driving the car. Otherwise both the father and the daughter are consistent in stating that it was the third accused (Lilu) who was driving the said car. The police had not been co-operating with the prosecutrix. It has been discussed above. Hence may be that the police deliberately recorded wrongly that Poley, in place of Lilu, was driving the car. Otherwise too, the version given by Partap, was given to him by the prosecutrix, and may be that on this point Partap made wrong statement. This contradiction cannot affect the merits of the case. The second point of contradiction is with regard to the timing of the kidnapping. P.W.4 Smt. Sudesh in the court stated that she had been kidnapped at about 8.00/9.00 A.M. and otherwise the case of the prosecution throughout is that she was kidnapped at 8.00 or 9.00 P.M. If the prosecution story is read as a whole and if the statement of this witness is also read keeping in view to the sequence of the happenings, it shall be clear that she was kidnapped at 8.00 or 9.00 P.M. and not at 8.00/9.00 A.M. It is only a clerical or typical *(sic)* mistake that the time

has been written as A.M., in place of P.M. So, it is not a contradiction.

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31. On the basis of this medical evidence it has been argued that this lady was habitual to sexual intercourse and since there was no injury found on her private part, so it may be held that it is a case ofconsent and she being of more than 18 years of age was an equal party to the sexual intercourse and, therefore, even if it assumed that the accused have committed sexual intercourse with this lady, they cannot be said to have committed any offence. The learned counsel for the accused has placed reliance on *Sukhjit Singh vs. The State of Haryana,* 1987 (i) R.C.R. 352. That was a case where two real brothers were alleged to have committed rape on a lady. No injury was found on the person of that lady. It was reported that she was used to sexual intercourse. It was held that probably it was a case of consent.

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39. Lastly argument has been advanced on behalf of accused Lilu. He was not named in the F.I.R. How and when he came into picture 7 (*sic*). The F.I.R. was recorded on 28.7.90. The police resorted to the supplementary statement of the prosecutrix of her father just the next day, i.e. 29.7.1990 and these statements were to the effect that two accused, other than Dharmabir, were innocent. This way Lilu was not arrested by the police. Two months after, as stated by the prosecutrix, she had identified him in the street when she was coming along with her father. Then her father had told that the name of this accused was Lilu. This way Lilu came into picture in the case of the prosecution. Since the police has submitted the challan only against one person, so: Lilu could be named only be(sic) the prosecutrix in the court itself. It cannot be said that Lilu had not been identified so his name being named in the court for the first time by the prosecutrix would create any doubt in the truthfulness of the case of the complainant that Lilu was also one of the persons who kidnapped and raped her."



7. The main argument on behalf of the appellant, while challenging the above findings, is that there is hardly any evidence directly involving the accused Prem Prakash @ Lillu in the commission of the crime. This argument does not impress us. Firstly, the prosecutrix when examined as PW4 stated in Court that the appellant was driving the car in which she was kidnapped and subsequently taken to the jungle. Her version is also supported by her father Pratap Singh, PW7, though, of course, Pratap Singh was not an eyewitness to the occurrence. There is no reason for this Court to disbelieve the version given by the prosecutrix. Some contradictions have been pointed out between the statements of the prosecution witnesses. The trial court has rightly observed that these are some discrepancies which, viewed from any angle, are not significant. It is also on record that PW4 did deny some portion of her statement Ex.DA, particularly, that she was raped in the car one after the other by all the three accused. This statement does not find support from any of the prosecution witnesses or from the investigation of the Investigating Officer. Thus, this contradiction does not render the statement of the prosecutrix unreliable or untrustworthy.

8. Another important aspect of the case is that the accused Dharambir, in his statement under Section 313 of the Cr.P.C. has not chosen to say that none of the other two accused, namely, the appellant herein and the deceased Prem Prakash, were present at the time of the occurrence or that they have been falsely implicated on account of some land dispute, as referred to by the other two accused in their statements under Section 313 of the Cr.P.C.

9. As per the medical evidence of PW5, Dr. A.K. Bhutani,

"abrasions which were brownish in colour with clothes, blood on right shin anteriorly, clotted dry blood sticking from the abrasions described above (sic) 3 cm. below right knee joint" were found on the person of the prosecutrix. There was also abrasion on right side of cheek, 5 cm brownish in colour and the prosecutrix complained of pain on the right side of her neck. In her cross-examination, the duration of injury no.1 was stated to be more than 24 hours and it was also stated that the injury no.1 could be result of a fall while the injury no. 2 cannot be self inflicted. This medical evidence clearly shows that she had suffered injuries during the alleged incident and she was taken for medical examination by the Investigating Officer after expiry of 24 hours. Dr.A.P. Sharma had examined the appellant-accused Herchand and found him fit to perform sexual intercourse.

10. The doctor also stated that she had conducted X-ray examination of Kumari Sudesh and according to report, Ex.P8, Sudesh was aged more than 18 years. After examining the forensic reports, Exs.PH and PJ, from the Forensic Science Laboratory, the doctor also stated that there was a possibility of intercourse having taken place with Sudesh on 25th July, 1990.

11. There are certain significant averments which show the manner in which the offence was committed. Firstly, she has stated that the car was being driven by Prem Prakash @ Lillu. Secondly, that she was wearing same clothes at the time of her medical examination which she was wearing at the time of rape. Her salwar was blood-stained. These clothes were taken into custody by the doctor herself, who subsequently handed over the same to the investigating agency. Similarly, the father of the prosecutrix, PW7, has specifically stated that his daughter had told him that Dharambir had caught hold of her and dragged her to the car, her mouth was gagged by Poley and still there was another person with small pox marks on his face who was driving the car. About the identity of Lillu @ Prem Prakash, it



is clear that PW7 had known him for the last 10 years as he had settled in the Village. In other words, there could hardly be any dispute with regard to the identity of the person accused. But for the contribution made by the present accused, who was driving the car and had taken away the prosecutrix to the jungle/ fields, probably the incident could have been avoided. Thus, it is clear that involvement of the present accused in the entire chain of events was material and as per the prosecutrix he had also raped her. According to the doctor, he was capable of performing sexual intercourse. This entire evidence and the attendant circumstances point towards the guilt of the accused.

12. The learned counsel appearing for the appellant had placed emphasis on the fact that the doctor had opined that the prosecutrix was accustomed to sexual intercourse and that there was no sign of fresh intercourse. This argument has rightly been rejected by the High Court by noticing that there was no fresh intercourse but she had been subjected to intercourse more than 24 hours ago. The doctor had examined her on 27th July, 1990 while the incident took place on 25th July, 1990. Thus, the statement of the doctor has to be read and understood in that background and the doctor also specifically stated, that there was a possibility that she was subjected to intercourse on 25th July, 1990.

13. The evidence, essentially, must be viewed collectively. The statement of a witness must be read as a whole. Reliance on a mere line in the statement of the witness, out of context, would not serve the ends of justice and the conclusion of the Court based on such appreciation of evidence could be faulted. Another aspect of this case which has specifically not been noticed by the High Court, is that the prosecutrix and her father were made to run from pillar to post by the police authorities, before their case could be registered. The prosecutrix, PW4, has specifically stated that report made by her father was not recorded by the police and the next day they went to Jhajjar along with her mother and appeared before the police officers

but again, no action was taken. According to her, the application which she had given in the Tehsil office was thumb marked by her. Pratap Singh, father of the prosecutrix, stated that he had even convened a panchayat of the brotherhood but the panchayat having failed to arrive at a decision, he had proceeded to the police station along with his daughter and his report was not recorded at the police station by the police. He returned to the village and again went to the Jhajjar Sub Divisions Headquarter and met the DSP and narrated the entire occurrence to him. But still no action was taken and then they claim to have gone to the SDM, Jhajjar and made a complaint in writing. Thereafter, his daughter was medically examined and subsequently, the case was registered. This event certainly describes and points towards the apathy in the functioning of investigating agencies in heinous crimes, to which the complainant was subjected. In terms of the provisions of Section 154, Cr.P.C., it is obligatory for the police to register a case when the facts constituting a cognizable offence are brought to its notice. The father of the girl, surely must have felt trauma and frustration when he was subjected to the above treatment, besides the knowledge of his daughter's raped by the accused. We do express a pious hope, that such occurrences will not be repeated in any police station in the country.

14. The counsel for the appellant had also tried to rely upon some contradictions and embellishments in the statements of the prosecutrix and her father. Reference was made to exhibits D1 and PO in this regard. The Court cannot ignore the fact that the prosecutrix cannot be expected to make a perfect statement after a lapse of time without even a normal variance. Furthermore, she had specifically stated that, the statements recorded by the appellants were not read over to her nor were any thumb impressions taken for the same. In fact, she had given an application to the tehsil office which was thumb marked and even that complaint had not been produced in



evidence before the Court by the prosecution. These are the lacunae and impropriety committed by the investigating agency itself. Thus, no burden or fault could be shifted to the prosecutrix. Her statement before the Court is fully supported by other prosecution witnesses and even the -medical evidence produced on record. There is a concurrent finding of conviction against the accused, which is based upon proper appreciation of evidence. We see no reason to interfere.

15. Consequently, the appeal is dismissed.

B.B.B. Appeal dismissed.

ARULMIGHU DHANDAYUDHAPANISWAMY THIRUKOIL, PALANI, TAMIL NADU, THR. ITS JOINT COMMISSIONER
*v.*
THE DIRECTOR GENERAL OF POST OFFICES, DEPARTMENT OF POSTS & ORS.
(Civil Appeal No. 4995 of 2006)

JULY 13, 2011

**[P. SATHASIVAM AND A.K. PATNAIK, JJ.]**

*Consumer Protection Act, 1986 – s. 2(1)(g) – Deficiency in service – Deposit of huge amount by the appellant-temple for five years under the Post Office Time Deposit Scheme – Appellant informed by Post Master that the Scheme had been discontinued for investment by institutions, thus amount deposited by temple refunded without interest – Complaint filed by the appellant claiming interest on the ground of deficiency in service on part of the Post Master – Dismissed by the State Commission as also National Commission – On appeal held: In the light of the communication dated 01.12.1995 and in view of r. 17, failure to pay interest cannot be construed as a case of deficiency in service in terms of s. 2(1)(g) – The factual finding arrived at by the State and the National Commission that the Post Master was ignorant of any Notification and as such the appellant did not get any interest for the substantial amount are upheld and thus, the respondents cannot be fastened for deficiency in service in terms of law or contract – Post Office Savings Bank General Rules, 1981 – r. 17.*

**Appellant-Temple had deposited a huge sum of money amounting to Rs.1,40,64,300/- with the Post Master from 05.05.1995 to 16.08.1995 for a period of five years under the Post Office Time Deposit Scheme. The Post Master, Post Office accepted the said amount under the**





**Scheme and issued the receipt for the same but later it was found that the Scheme had been discontinued for investment by institutions from 01.04.1995 and as such the amount deposited by the Temple was refunded without interest. The appellants filed complaint claiming interest on the ground of deficiency in service on the part of the Post Master. The State Commission as also the National Commission dismissed the same. Therefore, the appellants filed the instant appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1 Since the deposits in the case on hand relate to Post Office Time Deposit Account, Rule 17 of the Post Office Savings Bank General Rules, 1981 is squarely applicable. The reading of Rule 17 makes it clear that if any Account is found to have been opened in contravention of any Rule, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made be refunded to the depositor without interest [Para 6] [50-F-G]**

**1.2 It is clear from the communication dated 01.12.1995 of the Post Master 3rd respondent that with effect from 01.04.1995 i.e. even prior to the deposits made by the appellant-Temple, investment by institutions under the Scheme was not permissible and in fact discontinued from that date. The appellant-Temple is also an institution administered and under the control of the Hindu Religious and Charitable Endowments Department of the State. Vide the above said communication, the Post Master, Palani informed the appellant to close all those accounts since the same was not permissible. The communication dated 01.12.1995 also shows that all such accounts should be closed and the amounts so deposited are to be refunded without interest. The deposit accounts have been caused to be closed and the**

**amounts deposited have been returned to the depositors without interest. Though the appellant claimed interest and insisted for the same on the ground of deficiency in service on the part of the Post Master, Palani, in view of Rule 17, the respondents are justified in declining to pay interest for the deposited amount since the same was not permissible. In the light of Rule 17 of the Rules, it cannot be held that there was deficiency in service on the part of the respondents, 3rd respondent in particular. [Para 7] [52-C-G]**

*Postmaster Dargamitta, H.P.O., Nellore vs. Raja Prameeelamma (Ms.)* **(1998) 9 SCC 706 – held applicable.**

**1.3 It is true that when the appellant deposited a huge amount with the 3rd Respondent from 05.05.1995 to 16.08.1995 under the Scheme for a period of five years, it was but proper on the part of the Post Master to have taken a note of the correct Scheme applicable to the deposit. It was also possible for the Post Master to have ascertained from the records, could have applied the correct Scheme and if the appellant, being an institution, was not eligible to avail the Scheme and advised them properly. The request to this Court to direct the 3rd respondent to pay some reasonable amount for his lapse, inasmuch as such direction would go contrary to the Rules and payment of interest is prohibited for such Scheme in terms of Rule 17, cannot be accepted. A substantial amount had been kept with the 3rd Respondent till 03.01.1996 when the said amount was refunded without interest. In the light of the letter dated 01.12.1995 and in view of Rule 17 of the Rules, failure to pay interest cannot be construed as a case of deficiency in service in terms of Section 2(1)(g) of the Consumer Protection Act, 1986. Both the State and the National Commission have concluded that the 3rd Respondent was ignorant of any Notification and because of this**



**ignorance the appellant did not get any interest for the substantial amount. The factual finding arrived at by the State and the National Commission are concurred with and in view of the circumstances, the respondents cannot be fastened for deficiency in service in terms of law or contract. [Para 9] [53-F-H; 54-A-C]**

**1.4 The following suggestions are made to the Post Offices dealing with various accounts of deposits:**

> **(i) Whether it is metropolitan or rural area, persons dealing with public money or those who are in-charge of accepting deposits to be conversant with all the details relating to types of deposits, period, rate of interest, eligibility criteria etc. for availing benefits under different schemes.**
>
> **(ii) It is desirable to exhibit all these details in vernacular language in a conspicuous place to facilitate the persons who intend to invest/deposit money.**
>
> **(iii) That if the Central Govt. issues any notification/ instructions regarding change in the interest rate or any other aspect with regard to deposits, the decision taken shall be immediately passed on to all the authorities concerned by using latest technology methods i.e. by fax, e-mail or any other form of communication so that they are kept updated of the latest developments.**
>
> **(iv) If there is any change in different types of schemes, it must be brought to the notice of the sub-ordinate staff of the post offices dealing with deposits in order to ensure that correct procedures are followed and correct information is given to the public.**

**The said observations are made since in the case on hand because of the lack of knowledge on the part of the Post Master who accepted the deposit and the appellant, one of the ancient temples in Tamil Nadu lost a substantial amount towards interest. [Paras 10 and 11] [54-D-H; 55-A-C]**

**Case Law Reference:**

**(1998) 9 SCC 706 Held applicable. Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4995 of 2006.

From the Judgment & Order dated 31.05.2006 of the National Consumer Disputes Redressal Commission at New Delhi in First Appeal No. 411 of 1997.

S. Aravindh, Rakesh K. Sharma for the Appellant.

A.S. Chandhiok, ASG, Sonia Mathur, Bhagat Singh, Snigdha Sharma, V.K. Verma for the Respondents.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. This appeal is filed by the appellant-Temple through its Joint Commissioner against the final order dated 31.05.2006 passed by the National Consumer Disputes Redressal Commission (in short "the National Commission") at New Delhi in First Appeal No. 411 of 1997 whereby the Commission dismissed their appeal.

2. Brief facts:

(a) The appellant is a temple situated in the State of Tamil Nadu. It is one of the ancient temples of Lord Kartikeya and is considered prime among the six holiest shrines of the Lord. Every year, lakhs of devotees throng the temple which is situated on a hill to receive the blessings of the Lord. The temple is being administered by the Hindu Religious and Charitable



Endowments Department of the Government of Tamil Nadu. The devotees make offering in cash and kind to the deity. The cash offerings are collected and invested in various forms. The income derived from such investments is utilized for charitable purposes such as prasadams, hospitals, schools and orphanages.

(b) According to the appellant, it had deposited a huge sum of money totaling to Rs.1,40,64,300/- with the Post Master, Post Office, Palani from 05.05.1995 to 16.08.1995 for a period of five years under the 'Post Office Time Deposit Scheme' (in short 'the Scheme'). On 01.12.1995, the Temple received a letter from the Post Master, Post Office, Palani-3rd Respondent herein informing that the Scheme had been discontinued for investment by institutions from 01.04.1995, and therefore, all such accounts should be closed without interest. The amount deposited by the Temple was refunded only on 03.01.1996 without interest.

(c) Aggrieved by the decision of the Postal Authorities, the appellant, on 10.01.1996, sent a legal notice to the respondents calling upon them to pay a sum of Rs.9,13,951/- within a period of seven days, being the interest @ 12% p.a. on the sum of Rs.1,40,64,300/- from the dates of deposit till the dates of withdrawal. As nothing was forthcoming from the respondents, the appellant preferred a complaint before the State Consumer Disputes Redressal Commission (in short "the State Commission"). Vide order dated 08.08.1997, the State Commission was divided over its opinion in the ratio of 2:1. The majority opinion comprising of the Chairman and Member II dismissed the complaint filed by the appellant.

(d) Aggrieved by the dismissal of the complaint by the State Commission, the appellant preferred an appeal to the National Commission which was also dismissed on 31.05.2006. Challenging the said order, the appellant has preferred this appeal by way of special leave before this Court.

3. Heard Mr. S. Aravindh, learned counsel for the appellant and Mr. A.S. Chandhiok, learned Additional Solicitor General for the respondents.

4. Points for consideration in this appeal are whether there was any deficiency in service on the part of the Post Master, Post Office, Palani-3rd Respondent herein and whether the appellant-complainant is entitled to any relief by way of interest?

**Discussion**

5. We have already adverted to the factual details. It is the case of the respondents that the Central Government had issued a Notification being No. G & SR 118(E) 119(E) 120(E) as per which no Time Deposit shall be made or accepted on behalf of any institution with effect from 01.04.1995. It is not in dispute that the appellant-Temple had deposited a huge sum of money amounting to Rs.1,40,64,300/- with the Post Master from 05.05.1995 to 16.08.1995. The said deposit was for a period of five years under the Scheme. Though the 3rd Respondent had accepted the amount under the said Scheme and issued a receipt for the same, later it was found that the deposits made on and from 01.04.1995 were against the said Notification which amounted to contravention of the Post Office Savings Bank General Rules, 1981 (in short 'the Rules').

6. In exercise of the powers conferred by Section 15 of the Government Savings Banks Act, 1873, the Central Government framed the above mentioned Rules. The Rules are applicable to the following accounts in the Post Office Savings Bank, namely, a) Savings Account b) Cumulative Time Deposit Account c) Recurring Deposit Account d) Time Deposit Account and it came into force with effect from 01.04.1982. Among various Rules, we are concerned with Rules 16 & 17 which read as under:-

"16. **Accounts opened incorrectly.**—(1) Where an account is found to have been opened incorrectly under a



category other than the one applied for by the depositor, it shall be deemed to be an account of the category applied for if he was eligible to open such account on the date of his application and if he was not so eligible, the account may, if he so desires, be converted into an account of another category ab initio, if he was eligible to open an account of such category on the date of his application.

(2) In cases where the account cannot be so converted, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made in the accounts refunded to the depositor with interest at the rate applicable from time to time to a savings account of the type for which the depositor is eligible.

17. Accounts opened in contravention of rules.—Subject to the provisions of rule 16, where an account is found to have been opened in contravention of any relevant rule for the time being in force and applicable to the accounts kept in the Post Office Savings Bank, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made in the account refunded to the depositor without interest."

Since the deposits in the case on hand relate to Post Office Time Deposit Account, Rule 17 of the Rules is squarely applicable. The reading of Rule 17 makes it clear that if any Account is found to have been opened in contravention of any Rule, the relevant Head Savings Bank may, at any time, cause the account to be closed and the deposits made be refunded to the depositor without interest. Rule 16 speaks that where an account is opened incorrectly under a category other than the one applied for by the depositor, it shall be deemed to be an account of the category applied for if a person is eligible to open such account and if he is not so eligible, the account may be converted into an account of another category *ab initio*, if the person so desires and if he is found to be eligible. For any reason, where the account cannot be so converted, the account

is to be closed and the deposits made in the accounts be refunded to the depositor with interest at the rate applicable from time to time to a savings account of the type for which the depositor is eligible.

7. Before considering Rule 17, it is useful to refer the communication dated 01.12.1995 of the Post Master-3rd Respondent herein which reads as under:

"DEPARTMENT OF POSTS, INDIA

From

Post Master
Palani 624 601

To

The Joint Commissioner/
Executive Officer
A/M. Dhandayuthapani Swamy
Thirukoil, Palani

No. DPM/SB/Dlg. Dated at Palani 01.12.1995

Sub: Investment by Institution in the Post Office Time Deposits, K.V. Patras, NSC VIII Issue-reg.

Sir,

I am to inform you that with effect from 01.04.1995 investments by Institution in the P.O. T.D. V.P.+N.S.C. VIII issue is discontinued. As Devasthanam is also an Institution, I request you to close all the TD accounts immediately without interest and also if any kind of above said patras and certificates purchased by the Devasthanam after 01.04.1995.

The following TD accounts have been opened at Palani H.O. after 01.04.1995. Please close the accounts immediately.

1) 5 year TD 2010417 dt. 05.05.1995, (2) 2010418 dt. 20.05.1995, (3) 2010419 dt. 31.05.1995, (4) 2010421 dt.



14.06.1995, (5) 2010422 dt. 21.06.1995, (6) 2010423 dt. 03.07.1995, (7) 2010424 dt. 03.07.1995, (8) 2010425 dt. 11.07.1995 (9) 2010426 dt. 13.07.1995, (10) 2010428 dt. 29.07.1995, (11) 2010429 dt. 01.08.1995, (12) 2010430 dt. 07.08.1995, (13) 2010431 dt. 07.08.1985 and (14) 2010435 dt. 16.08.1995.

Yours faithfully
(Sd/-)...........
Post Master
Palani 624 601"

It is clear from the above communication that with effect from 01.04.1995 i.e. even prior to the deposits made by the appellant-Temple, investment by institutions under the Scheme was not permissible and in fact discontinued from that date. It is not in dispute that the appellant- Temple is also an institution administered and under the control of the Hindu Religious and Charitable Endowments Department of the State. Vide the above said communication, the Post Master, Palani informed the appellant to close all those accounts since the same was not permissible. The communication dated 01.12.1995 also shows that all such accounts should be closed and the amounts so deposited are to be refunded without interest. In our case, the deposit accounts have been caused to be closed and the amounts deposited have been returned to the depositors without interest. Though the appellant claimed interest and insisted for the same on the ground of deficiency in service on the part of the Post Master, Palani, in view of Rule 17, the respondents are justified in declining to pay interest for the deposited amount since the same was not permissible. In the light of Rule 17 of the Rules, as rightly concluded by the State and the National Commission, it cannot be held that there was deficiency in service on the part of the respondents, 3rd respondent in particular.

8. The State Commission while rejecting the claim of the appellant relied on a decision of this Court reported in

*Postmaster Dargamitta, H.P.O., Nellore vs. Raja Prameeelamma (Ms.)* (1998) 9 SCC 706. In that case, the complainant therein issued six National Savings Certificates for Rs. 10,000/- each on 28.04.1987 from the Post Office. According to the Notification issued by the Government of India, the rate of interest payable with effect from 01.04.1987 was 11 per cent. But due to inadvertence on the part of the clerical staff of the Post Office, the old rate of interest and the maturity value which was printed on the certificates could not be corrected. The question that arose in that case was whether the higher rate of interest printed in the Certificate shall be paid or only the rate of interest mentioned in the Notification is applicable. This Court held that even though the Certificates contained the terms of contract between the Government of India and the holders of the National Savings Certificate, the terms in the contract were contrary to the Notification and therefore the terms of contract being unlawful and void were not binding on the Government of India and as such the Government refusing to pay interest at the rate mentioned in the Certificate is not a case of deficiency in service either in terms of law or in terms of contract as defined under Section 2(1)(g) of the Consumer Protection Act, 1986. The above said decision is squarely applicable to the case on hand.

9. It is true that when the appellant deposited a huge amount with the 3rd Respondent from 05.05.1995 to 16.08.1995 under the Scheme for a period of five years, it was but proper on the part of the Post Master to have taken a note of the correct Scheme applicable to the deposit. It was also possible for the Post Master to have ascertained from the records, could have applied the correct Scheme and if the appellant, being an institution, was not eligible to avail the Scheme and advised them properly. Though Mr. S. Aravindh, learned counsel for the appellant requested this Court to direct the 3rd Respondent to pay some reasonable amount for his lapse, inasmuch as such direction would go contrary to the Rules and payment of interest is prohibited for such Scheme



in terms of Rule 17, we are not inclined to accept the same. We are conscious of the fact that a substantial amount had been kept with the 3rd Respondent till 03.01.1996 when the said amount was refunded without interest. In the light of the letter dated 01.12.1995 and in view of Rule 17 of the Rules, failure to pay interest cannot be construed as a case of deficiency in service in terms of Section 2(1)(g) of the Consumer Protection Act, 1986. Both the State and the National Commission have concluded that the 3rd Respondent was ignorant of any Notification and because of this ignorance the appellant did not get any interest for the substantial amount. We agree with the factual finding arrived at by the State and the National Commission and in view of the circumstances discussed above, the respondents cannot be fastened for deficiency in service in terms of law or contract and the present appeal is liable to be dismissed.

10. Before parting with this appeal, we intend to make the following suggestions to the Post Offices dealing with various accounts of deposits:

(i) Whether it is metropolitan or rural area, persons dealing with public money or those who are in-charge of accepting deposits to be conversant with all the details relating to types of deposits, period, rate of interest, eligibility criteria etc. for availing benefits under different schemes.

(ii) It is desirable to exhibit all these details in vernacular language in a conspicuous place to facilitate the persons who intend to invest/deposit money.

(iii) That if the Central Govt. issues any notification/ instructions regarding change in the interest rate or any other aspect with regard to deposits, the decision taken shall be immediately passed on to all the authorities concerned by using latest

technology methods i.e. by fax, e-mail or any other form of communication so that they are kept updated of the latest developments.

(iv) If there is any change in different types of schemes, it must be brought to the notice of the sub-ordinate staff of the post offices dealing with deposits in order to ensure that correct procedures are followed and correct information is given to the public.

11. We are constrained to make these observations since in the case on hand because of the lack of knowledge on the part of the Post Master who accepted the deposit and the appellant, one of the ancient temples in Tamil Nadu lost a substantial amount towards interest.

12. With the above observations, we dismiss the appeal with no order as to costs.

N.J. Appeal dimissed.



MOHD. ARIF @ ASHFAQ
*v.*
STATE OF NCT OF DELHI
(Criminal Appeal Nos. 98-99 of 2009)

AUGUST 10, 2011

**[V.S. SIRPURKAR AND T. S. THAKUR, JJ.]**

*CONSTITUTION OF INDIA, 1950:*

*Article 136 – Scope of – Held: Supreme Court ordinarily does not go into the appreciation of evidence, particularly, where there are concurrent findings of facts – However, the Court examined the oral and documentary evidence not only relating to the appellant, but also to the other accused persons – As a result, the Court is of the view that the courts below have fully considered the oral and documentary evidence for coming to the conclusions that they did.*

*PENAL CODE, 1860*

*ss. 121, 121-A, 120-B r/w s. 302, 186/353/120-B, 468/471 and 420/120-B – Conspiracy to wage war against and to overawe Government of India – Red Fort attack – Three soldiers killed by intruders – Circumstantial evidence – Appellant-accused, a Pakistani national and member of an international terrorist organization, apprehended on the basis of a cell phone number – On his disclosure statements, sophisticated weapons used in the attack, hand grenades, diary etc. recovered leading to police encounter of his associate and seizure of documents from the office of a 'hawala' dealer (absconding) – Some accused absconding and three killed in encounters – Conviction of appellant-accused and sentence of death awarded by trial court, confirmed by High Court – Other accused acquitted by High Court – HELD: The offence of conspiring to wage a war is proved to the hilt against the appellant, for which he has been*

*rightly held guilty of the offence punishable u/s. 121 and 121-A, IPC – The appellant is also rightly held guilty of the offence punishable u/s. 120-B r/w s. 302, IPC – The High Court rightly came to the conclusion that the appellant was responsible for the incident of shooting inside the Red Fort on the night of 22.12.2000, which resulted in the death of three soldiers of Army – The Court agrees with the verdict of the trial court as well as the High Court–Arms Act, 1959 – s. 25 – Explosive Substances Act, 1908 – s. 4 – Foreigners Act, 1946 – s. 4 – evidence – Circumstantial evidence—Sentence/sentencing.*

*ss. 121 and 121-A – 'Conspiracy to wage war against Government of India' – Explained – Held: Once the prosecution proves that there was a meeting of minds between two persons to commit a crime, there would be an emergence of conspiracy – The fact that barely within minutes of the attack, the BBC correspondents in Srinagar and Delhi were informed, proves that there was a definite plan and a conspiracy – It was undoubtedly an extremely well-planned attempt to overawe and to wage war against the Government of India – Some of the associates of the appellant were killed and others are absconding – Thus, the case of the prosecution that there was a conspiracy to attack the Red Fort and kill innocent persons, was not affected even if the other accused persons who were alleged to have facilitated and helped the appellant, were acquitted.*

*Sentence/Sentencing:*

*Rarest of rare case – Attack on Indian Army stationed in Red Fort – Three soldiers killed by intruders – HELD: High court concurred with the finding of the trial court that this was a rarest of the rare case – This was a unique case where Red Fort, a place of paramount importance for every Indian heart was attacked where three Indian soldiers lost their lives – It was a blatant, brazenfaced and audacious act aimed to over awe the Government of India – Therefore, this case becomes a rarest of rare case – This was nothing but an undeclared*



*war by some foreign mercenaries like the appellant and his other partners, in conspiracy, who either got killed or escaped – The Court is in complete agreement with the findings regarding the incriminating circumstances as recorded by the High Court – The case satisfies both the tests, namely, shocking the conscience of the community and crime of enormous proportion, as multiple murders were also committed – The sentence of death awarded by courts below is upheld – Penal Code, 1860 – s.121, 121-A, 120-B/302.*

*EVIDENCE:*

*Circumstantial evidence – Principles explained – Red Fort attack – HELD: Cartridge cases found inside the Red Fort and AK 56 rifles found outside, established that the attack was made by intruders with sophisticated weapons –Accused apprehended on the basis of a cell phone number – He being a Pakistani national, had got a ration card, a driving licence, opened bank accounts on fake addresses and identities, opened a computer centre, married an Indian citizen just 15 days before the attack – Before and after the attack he received calls from Pakistan and made calls to BBC correspondents in Delhi and Srinagar – A number of incriminating articles including a pistol recovered from his possession and hand grenades recovered at his instance – On his disclosure statement Police reached his associate who was then killed in an encounter – It is obvious that the appellant was a very important wheel in the whole machinery which was working against the sovereignty of this country, and was weaving his web of terrorist activities by taking recourse to falsehood one after the other including his residential address and also creating false documents – Prosecution was successful in establishing the circumstances against the appellant, individually, as well as, cumulatively – Penal Code, 1860 – ss. 121, 121-A, 120-B r/w s. 302 IPC.*

*INVESTIGATION:*

*Disclosure statement of accused and recoveries of*

*incriminating articles – 'Arresting' of accused and recording of his statement – Held: The accused being in custody of the investigating agency, he need not have been formally arrested – It is enough if he was in custody of the investigating agency, meaning thereby, his movements were under the control of the investigating agency – As regards the failure to record the information, it must be held that it is not always necessary – The essence of the proof of a discovery u/s. 27, Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody – Therefore, there is nothing wrong with the discovery even if it is assumed that the information was not "recorded" and it is held that immediately after the accused had been apprehended, he gave the information which was known to him alone and in pursuance of which a very material discovery was made – However, in the instant case, there is evidence that the accused was "arrested" and his disclosure statement was recorded – Evidence Act, 1872 – s.27.*

*Role of investigating agency –Held: The investigation in the instant case was both scientific and fair investigation – This was one of the most difficult cases to be investigated as there could have been no clue available to the investigating agency – The small thread which became available to the investigating agency was the chit found alongwith some Indian currency at the back of the Red Fort in a polythene packet – Compliments must be paid to the Investigating Officer as also to all others associated with the investigation for being objective and methodical in their approach – It has to be borne in mind that not a single incidence of ill-treatment to the appellant was reported or proved – Again, the timely recording of the D.D. Entries, scientific investigation using the computer, the depth of investigation and the ability of the investigating agency to reach the very basis of each aspect, lend complete credibility to the fairness of the investigation.*



*CRIMINAL TRIAL:*

*Role of trial court and High Court – Held: In the instant case, compliments must be paid to the trial court and the High Court – The trial held before the trial Judge was the epitome of fairness, where every opportunity was given to the accused persons and more particularly, to the appellant – Similarly, the High Court was also very fair in giving all the possible latitude and in giving patient hearing to the accused-appellant.*

**The appellant, a Pakistani national and a member of an international terrorist organization known as Lashkar-e-Toiba (LeT), alongwith others, was prosecuted for the attack on the Red Fort. The prosecution case was that in furtherance of a conspiracy to overawe India by terrorist activities in different parts of the country and to fulfil that object the accused-appellant and his fellow terrorists had planned an attack on Army stationed inside the Red Fort. In order to execute the plan, some intruders entered the Red Fort at about 9.00 p.m. on 22.12.2000 and started indiscriminate firing and gunned down one sentry and two other Army personnel and when the Quick Reaction Team returned the firing, the intruders escaped by scaling over the rear side boundary wall of the Red Fort. During investigation and search, the police found a polythene packet which had fallen down from the packet of one of the intruders while scaling down the rear wall of the Red Fort. The said packet contained some currency notes and a piece of paper (Ext. PW-183/3) on which a mobile no. 9811278510 was mentioned. This mobile number led to the arrest of the appellant and on his statement the police caught 10 more persons. The trial court convicted the appellant u/ss. 120-B, 121, 121-A, 186/353/120-B, 120-B read with s.302, ss. 468/471/474, 420/120-B IPC, s. 25 of Arms Act, s. 4 of Explosive Substances Act and s. 4 of Foreigners Act. He was, *inter alia,* awarded death sentence u/s 121 IPC for waging was against the Government of India. He was also awarded**

**death sentence u/s 120-B r/w s.302 IPC. The other accused convicted by trial court of various offences were acquitted by the High Court. However, the High Court confirmed the conviction and death sentence of the appellant.**

**Dismissing the appeal, the Court**

**HELD: 1. This Court ordinarily does not go into the appreciation of evidence, particularly, where there are concurrent findings of facts. This Court has very closely examined the judgments of both the courts below and found that there is a thorough discussion as regards the evidence, oral as well as documentary, and it was only after a deep consideration of such evidence that the trial court and the appellate court have come to the concurrent finding against the appellant. In order to see as to whether the acquittal of other accused persons can be linked to the verdict against the appellant, and inspite of the fact that there has been a concurrent verdict against the appellant, this Court examined the oral and documentary evidence not only relating to the appellant, but also to the other accused persons. As a result, this Court is of the view that the courts below have fully considered the oral and documentary evidence for coming to the conclusions that they did. In view of the concurrent findings, the scope to interfere on the basis of some insignificant contradictions or some microscopic deficiencies would be extremely limited. [Para 17] [95-D-H; 96-A]**

**2.1 From the clear evidence of PW-189, PW-126, PW-131, PW-134, PW-144 and PW-77, it is evident that some intruders had run away after firing inside the Red Fort and that they had gone towards the Ring Road. The evidence of all these witnesses is trustworthy. The related document is Ext. PW-77/A which lends full support to the version and suggests that there was an incident of**



**shooting in the Red Fort. The post mortem was conducted on the three bodies by PW-187. This witness has opined that all the deceased had bullet injuries by sophisticated fire arms and the shots were filed at them from a distant range. [para 18] [96-H; 97-A-D; 98-D-E]**

**2.2 A number of incriminating articles were found, the most important of the same being the empties of the bullets fired by the intruders and the arms seized. It is very significant that the prosecution has been able to connect the bullets with the arms seized by them. One of the two rifles was found near Vijay Ghat from the bushes while other (Ext. PW 62/1) was recovered at the instance of appellant on 26.12.2000. The prosecution has examined three ballistic experts, namely, PW-202, PW-206 and PW-211. Their reports were proved by PW-202 as Exhibits 202/A and 202/C. He duly proved and identified the cartridges which were test fired in the laboratory. It is clearly established that the cartridges cases found inside the Red Fort were fired from the two rifles which were found outside the Red Fort. This witness had also examined 11 empties of the self-loading rifles used by the army men while firing towards intruders, and had clearly opined that those empties could not have been loaded in AK-56 rifles examined by him. Thus, the prosecution has thoroughly proved the nexus between the cartridge cases which were found inside the Red Fort and the incident. This nexus is extremely important as while the guns were found outside the Red Fort the fire empties were found inside. This clearly suggests that the incident of firing took place inside the Red Fort while guns were abandoned by the intruders outside the Red Fort. Further, the recovery of bandoliers and hand grenades goes a long way to prove that the incident which took place inside the Red Fort was at the instance of the intruders. Further, there is the evidence of PW-206 who had examined the rifle found at Batla House during an**

**encounter in which the other terrorist was killed. That recovery is not seriously disputed. It is, therefore, held that the ghastly incident of shoot out did take place at the instance of some intruders inside the Red Fort, in which three persons lost their lives. [Para 18-21] [98-F; 99-B-E; 100-C-H; 101-C-D]**

**2.3 As regards the recovery of the polythene bag containing currency notes and a slip with a mobile number in the morning of 23.12.2000, this Court confirms the finding of the trial court and the High Court that the said polythene bag containing the currency notes and the slip on which the cell phone number was mentioned, was actually found on the spot abutting the backside wall of the Red Fort. This Court accepts the finding by the trial court and the High Court that this polythene bag must have slipped from a person who scaled down to the ground. [Para 22] [102-B-C; 105-F-H]**

**3.1 The investigation based on the mobile number i.e. 9811278510 written on the slip found in the polythene bag led to locate the computer centre run by the accused-appellant and the flat where he was apprehended in the night of 25.12.2000. One pistol 7.63 mouser, six live cartridges, a diary and a mobile phone bearing no. 9811278510 were recovered from his possession. He did not have any licence for this pistol. This is supported by the police record and the recovery witnesses (PW-148). After the accused-appellant was apprehended, he disclosed that his associate (A-21) was staying at his hide out at Batla House. This has come in the evidence of Inspector PW-229. There is absolutely no reason to disbelieve this evidence of apprehension of the accused by the police team which is also supported by documentary evidence. There is also no doubt that the apprehension of the accused was possible only because of the scientific investigation done by the inspector of Police**



**(PW-229). [Para 28,29,31,34 and 44] [108-E; 112-D-E; 113-A-B]**

**3.2 It is clear that telephone No.9811278510 was used on the relevant date on 22.12.2000 for claiming the responsibility of the attack in Red Fort. This situation almost clinches the issue. From the evidence of PW-150 who proved Ext. PW-150/B, and PW-198 Ext. PW-198 / B1 to B3, the prosecution has been successful in establishing that the cell phone No.9811278510 was used for making the calls to BBC correspondents in Srinagar and Delhi. In these calls, the caller who was handling that cell phone not only informed about the attack on the Red Fort but also owned the responsibility of LeT therein. The *inter se* connection between this cell phone and cell phone No.9811242154 is also clearly established by the witness PW-198 on the basis of IMEI number used in that cell phone. He had also established that these calls to the BBC were made from the vicinity of the Red Fort. [Para 36-37] [121-C-G]**

**3.3 This Court, therefore, accepts that cell phone No.9811278510 was used at a very crucial point of time i.e. between 9 to 9.30 p.m. at night on the day when the attack took place at or about the same time on Red Fort wherein three innocent persons were killed. This Court also confirms the finding by the trial court and the appellate court that it was this mobile number which was found with the appellant when he was arrested. The other corroborating evidence connecting the two mobile numbers namely, 9811278510 and 9811242154 and the IMEI Nos.44519944090240 and 449173405451240 and their interconnection with phone No.011 3355751 of BBC, Delhi, 2452918 (BBC, Srinagar), 2720223 of 'F' (sister of appellant's wife) and phone No.6315904 at computer centre is to be found in the evidence of PW-198, PW-229 and PW-230. The attempt of the investigating agency in analyzing the call details of these two numbers**

**succeeded in establishing the connection of these two numbers with the number of BBC correspondent at Srinagar, the number of BBC correspondent at Delhi, the number at 'F's residence and the number at the computer centre. But for this careful and meticulous analysis which was of very high standards, it would not have been possible to apprehend the appellant and to de-code the intricate and complicated maze of the conspiracy. [Para 37] [122-F-H; 123-A-E]**

**3.4 The circumstance which makes these mobile cell phones significant was the evidence of the Inspector of Police (PW-229) who asserted that the mobile No.9811278510 was constantly used on 14.11.2000 to make calls to Pakistan. (The appellant is admittedly a Pakistani national and was staying in India unauthorizedly). He has further asserted that calls from Pakistan were received on mobile number 9811278510 as also calls from this number were made to BBC correspondents in Delhi and Srinagar, when that mobile number was at different places heading to Red Fort on 22.12.2000. There is no reason to dis-believe this evidence which was collected so painstakingly. What is most significant in this evidence is that this very cell phone number was used to make the calls to and receive the calls from Pakistan. [Para 39-40] [123-H; 124-A-C; 125-A-H; 126-H]**

**3.5 The next significant circumstance is the evidence of PW-162 who was posted at Rajouri on 26.12.2000 and on that day a message was intercepted by BSF to the effect that a wanted militant in the shoot-out inside Red Fort case known as 'AA' was apprehended while other militant was killed. According to this witness this message was being passed by a militant called 'AS' of LeT, to a station in Khyber in Pakistan Occupied Kashmir. He proved the document as Ext. PW-162A. The other**



**witness on this point is Constable, BSF Head Quarters Srinagar (PW-175). [Para 41] [126-B-D]**

**3.6 All the voluminous evidence would not only corroborate the prosecution version to show the significant role played by the appellant in handling both the cell phone numbers. It is of no minor significance that on the apprehension of the appellant the news should reach Srinagar and from there to Pakistan Occupied Kashmir by way of wireless messages not only about the involvement of the appellant but also about 'AS' who was killed in the encounter as also 'AB' who was a proclaimed offender and was then killed in another encounter. [Para 41] [127-B-D]**

**4.1 There are some other significant circumstances relied on by the prosecution to show that the appellant, who admittedly was a Pakistani national and had unauthorizedly entered India, wanted to establish his identity in India and for that purpose, he got prepared a fake and forged ration card and on that basis, applied for and got a driving license and also opened bank accounts. This was established by the evidence of PWs 1,2,3,7,16,164,165,172, 174,20,31,44,36,56 and 113 and 163. The only purpose in doing this was to establish that he was living in Delhi legitimately as an Indian national. Thus, not only did the appellant got for himself a fake and forged ration card, but on this basis, also got prepared a fake learning license, in which also, he gave a false residential address. All this was obviously with an idea to screen himself and to carry on his nefarious activities in Indian cities. Therefore, it is held that the appellant used a forged ration card and got a driving license giving a false address. [Para 49-52] [135-E-F; 136-A-H; 137-E-H; 138-A-D]**

**4.2 The evidence of PW-21, establishes the connection of the appellant with Batala House, where the**

**encounter took place in which the appellant's companion (A-21) was killed. This is further corroborated by the evidence of PWs 232, 20, 31, 21. Needless to say that he used all these witnesses to his own benefit for carrying out his evil design in pursuance of the conspiracy. He got married to 'RYF' barely a fortnight prior to the incident at the Red Fort. [Para 54, 55 and 58] [139-G; 140-A-F; 145-G-H; 146-A]**

**5.1 The prosecution has also brought out the material about the calls made to a Hawala dealer (A-13). The investigating agency raided his house on 12.01.2001 on the information received from the appellant. Very significantly, the documents seized at the office of A-13, included a Visa of Islamic Republic of Pakistan and an identity card of NIIT etc. The seizure memo is proved by PW-83, who at the relevant time was working in the Directorate of Enforcement as the Chief Enforcement Officer and deposed that the appellant in his presence identified the photograph to be of the hawala dealer and accepted that he used to deliver hawala money. Therefore, this evidence is also extremely significant to support the role played by the appellant in the conspiracy. [Para 42] [127-E-H; 128-A-C]**

**5.2 The Hawala dealer (A-13) was found to be an Afghan national and according to the prosecution, he used to supply Hawala money to the appellant. According to the prosecution, the appellant used to deposit the money so received in his own account with HDFC Bank, opened on the basis of fake documents. He also used to deposit this money in two bank accounts of original accused No.3 and 4. According to the prosecution, this money was distributed to the other terrorists in Srinagar. It cannot be disputed that the appellant had connection with A-13 who remained absconding till date. This has been established by the evidence of PW-210, PW-79, PW-230, PW-6, PW-52, PW-**



**16, PW-1, PW-2, PW-3, PW-216 and the related documentary evidence. There is absolutely no explanation by the appellant either by way of cross-examination of the witnesses or by way of his statement u/s. 313 Cr.P.C. as to where all the amounts had come from and why did he deposit huge amounts of Rs.29,50,000/- in the three accounts. Further very sizeable amount is shown to have been paid to 'RYF' in her account in the State Bank of India. It would have to be held that the appellant was dealing with huge sums of money and he has no explanation therefor. This is certainly to be viewed as an incriminating circumstance against the appellant. High Court as well as the trial Court were right in drawing the inferences in respect of these deposits made by the accused. It is obvious that the appellant was a very important wheel in the whole machinery which was working against the sovereignty of this country, and was weaving his web of terrorist activities by taking recourse to falsehood one after the other including his residential address and also creating false documents. The acquittal of other accused would be of no consequence. [Para 60-65] [146-C-E; 152-G-H; 153-A-E, G]**

**6.1 It will be seen that immediately after the apprehension the appellant was not formally arrested, though he was in the custody of the investigating team. . PW-229 had undoubtedly stated that the accused was "arrested" and his disclosure statement was recorded. There is other evidence on record that his statement was recorded. It is indeed in that statement which is recorded that he disclosed about his involvement in the Red Fort shoot out, the role of his associate 'A-21' and about an AK-56 rifle. The witness went on to state further that the accused disclosed that his associate 'A-21 was staying in the hide out at Batla House. He also disclosed that he was having weapons and grenades and he also disclosed**

**that A-21 was a trained militant of LeT and member of suicide squad. Indeed, in pursuance of this information given, the investigating team did go to the mentioned address and an encounter did take place wherein A-21 was killed and large amount of ammunition and arms were found at that place. [Para 66] [156-B-G]**

**6.2 It is indeed true that normally for proving any such information and attributing the same to the accused, he must be in custody of the prosecution and, and such when he discloses or offers to disclose any information, his statement is recorded by the investigating agency for lending credibility to the factum of disclosure as also exactitude. However, in the instant case, it was indeed a very tense situation requiring extreme diligence on the part of the investigating agency and it could not afford to waste a single minute and was required to act immediately on the receipt of the information from the appellant. This was all the more necessary because the investigating agency were dealing with an extremely dangerous terrorist causing serious danger to the safety of the society. There is nothing wrong in the approach on the part of the investigating agency. What is significant is that the events which followed do show that it is only in pursuance of, and as a result of the information given by the accused that the investigating agency zeroed on the given address only to find a dreaded terrorist like A-21 holed up in that address with huge ammunition and the fire arms. In this view of the matter, the discovery evidence can not be rejected merely because, a formal statement was not recorded and further merely because a formal arrest was not made of the accused. [Para 67] [157-B-G]**

**6.3 Besides, the accused being in custody of the investigating agency, he need not have been formally arrested. It is enough if he was in custody of the investigating agency meaning thereby his movements were under the control of the investigating agency. A formal arrest is not necessary and the fact that the accused was in effective custody of the investigating agency is enough. It has been amply proved that the accused was apprehended, searched and taken into custody. In that search the investigating agency recovered a pistol from him along with live cartridges, which articles were taken in possession of the investigating agency. This itself signifies that immediately after he was apprehended, the accused was in effective custody of the investigating agency. [Para 68] [157-H; 158-A-B]**



**6.4 As regards the failure to record the information, it must be held that it is not always necessary. The essence of the proof of a discovery u/s. 27, Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody. How the prosecution proved it, is to be judged by the court and if the court finds the fact of such information having been given by the accused in custody to be credible and acceptable even in the absence of the recorded statement and in pursuance of that information some material discovery has been effected then the aspect of discovery will not suffer from any vice and can be acted upon. [para 69] [158-D-G]**

**6.5 In the instant case, immediately after the apprehension of the appellant, he spilled the information. In pursuance of that information the investigating agency acted with expediency and speed which in the circumstances then prevailing was extremely necessary nay compulsory. Ultimately, this timely and quick action yielded results and indeed a dreaded terrorist was found holed up in the address supplied by the appellant-**

**accused with sizeable ammunition and fire arms. Therefore, there is nothing wrong with the discovery even if it is assumed that the information was not "*recorded*" and it is held that immediately after the accused had been apprehended, he gave the information which was known to him alone and in pursuance of which a very material discovery was made. [Para 69] [158-G-H; 159-A-E]**

*Suresh Chandra Bahri v. State of Bihar* **1994 ( 1 ) Suppl. SCR 483 = 1995 Suppl (1) SCC 80;** *Vikram Singh & Ors v. State of Punjab* **2010 (2) SCR 22 = 2010 (3) SCC 56;** *State of U.P. v. Deoman Upadhyaya* **AIR 1960 SC 1125 – relied on**

**6.6 Section 27 of the Evidence Act is founded on the principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of the police officer, is tainted and, therefore, inadmissible; if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and, therefore, declared provable insofar as it distinctly relates to the fact thereby discovered. [Para 69] [161-C-F]**

*State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* **2005 (2) Suppl. SCR 79 = 2005 (11) SCC 600;** *Pulukuri Kottaya v. King Emperor* **AIR 1947 PC 67 – relied on**

**6.7 In the instant case, it is only because of the discovery made by the appellant that A-21 with the arms and ammunition was found at the address disclosed by the appellant. By the discovery made and recorded on the morning of 26.12.2000, the appellant had not only given the information about the whole plot, but in addition to that, he had also showen his readiness to point out the AK-56 rifle which was thrown behind the Red Fort immediately after the attack. In pursuance of that,**



**the appellant proceeded alongwith the investigating party and then from the spot that he had shown, AK-56 rifle was actually found. Even a bandolier was found containing hand grenades. In this regard, the evidence of Inspector PW-228 (Ext. PW 218, S.I. PW-218, S.I. PW-227, PW-125, PW 202 and SHO PW-234 is relevant, who all supported the discovery. This discovery was recorded by Ext PW-148/E. and was fully proved. [Para 69-70] [162-A-H]**

**6.8 The disclosure statement of the appellant led to recovery of the hand grenades brought from Pakistan and one AK-56 assault rifle. The seizure memo Ext. PW-168/B, the disclosure statement Ext. PW-168/D and the evidence of S.I. PW-218, S.I. PW-227 and Inspector PW-228 are relevant in this respect. There is nothing to disbelieve this discovery. The hand grenades were identified and their potency was proved by PW-202. Considering the peculiar nature of this case, the discovery of grenades at the instance of the appellant is accepted. Same thing can be stated about the earlier discovery dated 26.12.2000 of the AK-56 Assault Rifle, magazines, bandoleiries etc. Therefore, the formal arrest of the appellant and the recoveries effected thereafter or the seizure memos executed cannot be viewed with suspicion. [Para 47-48] [132-G-H; 134-E; 130-D]**

**6.9 As regards the discovery of the hand grenades on 1.1.2001 at the instance of the appellant, the defence did not even attempt to say that there was anything unnatural with this recovery. Thus, the discovery statements attributed to the appellant and the material discovered in pursuance thereof would fully show the truth that the appellant was involved in the whole affair. The discovery of hand grenades behind the computer centre was very significant. So also the discovery of the shop of A-13, the Hawala dealer, as also the documents discovered therefrom, show the involvement of the**

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**appellant in the whole affair. In this behalf, the findings of the High Court are fully endorsed. [para 71] [164-D-G]**

**6.10 As regards the plea that no public witnesses were associated, in fact, there is ample evidence on record to suggest that though the investigating agency made the effort, nobody came forward. This was all the more so, particularly, in case of the recovery of pistol from the appellant as also the discoveries vide Exhibit PW-148/E. Beside, if the general public refused to join the investigation to become *Panchas*, that cannot be viewed as a suspicious factum and on that basis, the investigative agency cannot be faulted. After all, what is to be seen is the genuineness and credibility of the discovery. The police officers, who were working day and night, had no reason to falsely implicate the appellant. Again, the Court cannot ignore the fact that the factum of discovery has been accepted by both the Courts below. [Para 48 and 71] [133-H; 134-A-H; 135-C-D; 164-D-G]**

*Suresh Chandra Bahri v. State of Bihar* **1994 ( 1 ) Suppl. SCR 483 = 1995 Suppl (1) SCC 80 – relied on**

**7.1 In addition to these circumstances, there is another circumstance that a message dated 26.12.2000 was intercepted by the BSF while Ext. PW 162/A and proved by Inspector PW-162 wherein there was a specific reference to the accused. Still another circumstance would be that the accused had no ostensible means of livelihood and yet he deposited Rs.29,50,000/- in three accounts, and also deposited some amounts in the account of 'RYF' and he had no explanation of these huge amounts, their source or their distribution. Lastly, the appellant gave a fanciful and a completely false explanation about his entering in India and his being a member of RAW and thereby, his having interacted with PW-20. [Para 73] [169-G-H; 170-A-B]**



**7.2 The detailed statement u/s. 313 CrPC which the accused gave at the end of the examination was a myth and remained totally unsubstantiated. The defence evidence of DW-1 has no legs to stand. DW-1 spoke about the marriage of her daughter 'RYF' to the appellant. Very strangely, she completely denied that she even knew that the appellant was a resident of Pakistan. Much importance, therefore, cannot be given to this defence witness. However, she admitted that moneys were paid into the account of 'RYF'. [Para 72] [165-A-D]**

**7.3 This Court is in complete agreement with the findings regarding the incriminating circumstances as recorded by the High Court. The High Court rightly came to the conclusion that the appellant was responsible for the incident of shooting inside the Red Fort on the night of 22.12.2000, which resulted in the death of three soldiers of Army. It has also been held by the High Court that this was a result of well planned conspiracy between the appellant and some other militants including deceased A-21, who was killed in an encounter with the police at Batla House. The High Court held that the associates, with whom the appellant had entered into conspiracy, had attacked the Army Camp inside the Red Fort, which suggests that there was a conspiracy to wage war against the Government of India, particularly, because in that attack, sophisticated arms like AK-47 and AK-56 rifles and hand grenades were used. [Para 74] [170-C-H; 171-A-C]**

**8.1 The law on the circumstantial evidence is, by now, settled. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself**

**completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. [Para 75 and 76] [170-C-E; 173-D-E]**

*Sharad Birdhichand Sarda Vs. State of Maharashtra* **1985 (1 ) SCR 88 = 1984 (4) SCC 116;** *Tanviben Pankaj Kumar Divetia Vs. State of Gujarat* **1997 (1) Suppl. SCR 96 = 1997 (7) SCC 156;** *State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru* **2005 (2) Suppl. SCR 79 = 2005 (11) SCC 600;** *Vikram Singh & Ors. Vs. State of Punjab* **2010 (2) SCR 22 =2010 (3) SCC 56,** *Aftab Ahmad Anasari Vs. State of Uttaranchal* **2010 (1) SCR 1027 = 2010 (2) SCC 583 – relied on**

**8.2 In the instant case, the prosecution was successful in establishing the circumstances against the appellant, individually, as well as, cumulatively. There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is guilty on the basis of the proved circumstances against him nor could there be any quantitative test made applicable. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proved circumstances. The instant case is such, as would pass all the tests so far devised by this Court in the realm of criminal jurisprudence. [Para 76] [173-G-H; 174-A-C]**

**9.1 It cannot be said that the appellant has suffered a prejudice on account of his being a Pakistani national. The investigation in the instant case was both scientific and fair investigation. This was one of the most difficult**



**cases to be investigated as there could have been no clue available to the investigating agency. The small thread which became available to the investigating agency was the chit found alongwith some Indian currency at the back of the Red Fort wall in a polythene packet. Compliments must be paid to the Investigating Officer PW-230 as also to all the other associated with the investigation for being objective and methodical in their approach. It has to be borne in mind that not a single incidence of ill-treatment to the appellant was reported or proved. Again, the timely recording of the D.D. Entries, scientific investigation using the computer, the depth of investigation and the ability of the investigating agency to reach the very basis of each aspect lend complete credibility to the fairness of the investigation. [Para 77] [174-D-H; 175-A-B]**

**9.2 Similar is the role played by the trial court and the High Court. It could not be distantly imagined that the courts below bore any prejudice. The trial held before the trial Judge was the epitome of fairness, where every opportunity was given to the accused persons and more particularly, to the appellant. Similarly, the High Court was also very fair in giving all the possible latitude, in giving patient hearing to the accused-appellant. The records of the trial and the appellate courts truly justify these inferences. [Para 77] [175-B-C]**

**10.1 So far as the plea that there could be no conviction for the conspiracy in the absence of conviction of any other accused for that purpose is concerned, there were 22 original accused persons, some of whom were acquitted and 8 accused persons, namely, A-12, A-13, A-14, A-15, A-16, A-17, A-18 and A-19, against whom the investigating agency had collected ample material and had filed chargesheet are absconding. Besides these absconding accused persons, 3 others, namely, A-20, A-21 and A-22 had died. The charge of**

**conspiracy was against all the accused persons. The conspiracy also included the dead accused A-21 who was found to be hiding and who was later killed in exchange of fire with the police. The whereabouts of A-21 were known only due to the discovery statement by the appellant, in which a very clear role was attributed to A-21, who was also a part of the team having entered the Red Fort and having taken part in the firing and killing of three soldiers. It has also come in the evidence that the other accused who was absconding, namely, A-20, was killed in exchange of fire with police in 2002 near Humayun's Tomb. It is to be remembered that the negative of the photograph of A-20 was seized at the time of arrest of the appellant, from his wallet. Indeed, the act of firing at the Army was not by a single person. Thus, the case of the prosecution that there was a conspiracy to attack the Red Fort and kill innocent persons, was not affected even if the other accused persons who were alleged to have facilitated and helped the appellant, were acquitted. [para 78] [175-D-H; 176-A-D]**

*Bimbadhar Pradhan Vs. The State of Orissa* **1956 SCR 206 = AIR 1956 SC 469***; Yashpal Mittal Vs. State of Punjab* **1978 ( 1 ) SCR 781 = 1977 (4) SCC 540;** *Ajay Agarwal Vs. Union of India & Ors.* **1993 (3) SCR 543 = 1993 (3) SCC 609;** *Nazir Khan & Ors. Vs. State of Delhi* **2003 (2) Suppl. SCR 884 = 2003 (8) SCC 461 – relied on**

*State of Himachal Pradesh Vs. Krishna Lal Pradhan* **1987 (2) SCC 17;** *State through Superintendent of Police, CBI/SIT Vs. Nalini & Ors.* **1999 (3) SCR 1 = 1999 (5) SCC 253***; Firozuddin Basheeruddin & Ors. Vs. State of Kerala* **2001 (7) SCC 596***; State (NCT of Delhi) Vs. Navjot Sandhu* **2005 (2) Suppl. SCR 79 = 2005 (11) SCC 600 – referred to**

**10.2 There was no argument addressed before this Court to the effect that there was no conspiracy. The only argument advanced was that the appellant alone could**



**not have been convicted for the conspiracy, since all the other accused were acquitted. Once the prosecution proves that there was a meeting of minds between two persons to commit a crime, there would be an emergence of conspiracy. The fact that barely within minutes of the attack, the BBC correspondents in Srinagar and Delhi were informed, proves that the attack was not a brainchild of a single person, but there was a definite plan and a conspiracy. It was undoubtedly an extremely well-planned attempt to overawe and to wage war against the Government of India. [Para 81] [187-E-H; 188-A-C]**

*Kehar Singh Vs. State (Delhi Admn.)* **1988 (2) Suppl. SCR 24 =AIR 1988 SC 1883 – relied on**

**10.3 The offence of conspiring to wage a war is proved to the hilt against the appellant, for which he has been rightly held guilty for the offence punishable u/s. 121 and 121-A, IPC. The appellant is also rightly held guilty for the offence punishable u/s. 120-B r/w s. 302, IPC. This Court agrees with the verdict of the trial court as well as the High Court. [Para 81] [188-D-G]**

**11.1 As regards the sentence, the High court concurred with the finding of the trial court that this was a rarest of the rare case. The High Court has observed that the counsel appearing for the appellant did not highlight any mitigating circumstance justifying the conversion of death sentence to life imprisonment. [Para 82] [189-B-D]**

**11.2 This was a unique case where Red Fort, a place of paramount importance for every Indian heart was attacked where three Indian soldiers lost their lives. This is a place with glorious history, a place of great honour for every Indian, a place with which every Indian is attached emotionally. An attack on a symbol that is so deeply entrenched in the national psyche was, therefore,**

**nothing but an attack on the very essence of the hard earned freedom and liberty so very dear to the people of this country. It was a blatant, brazenfaced and audacious act aimed to over awe the Government of India. This was not only an attack on Red Fort or the army stationed therein, this was an arrogant assault on the self respect of this great nation. Therefore, this case becomes a rarest of rare case. This was nothing but an undeclared war by some foreign mercenaries like the appellant and his other partners, in conspiracy who either got killed or escaped. In conspiring to bring about such kind of attack and then carrying out their nefarious activities in systematic manner to make an attack possible was nothing but an attempt to question the sovereignty of India. Therefore, this case becomes a rarest of rare case. [Para 83] [189-F-H; 191-B-H; 192-A-B]**

*State v. Navjot Singh Sandhu* **2005 (2) Suppl. SCR 79 = 2005 (11) SCC 600;** *State of Tamil Nadu v. Nalini* **1999 (3) SCR 1 = AIR 1999 SC 2640;** *Machhi Singh v. State of Punjab* **1983 (3) SCR 413 = 1983 (3) SCC 470 – relied on**

**11.3 In *Machhi Singh's* case, a principle was culled out that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. The other test includes the crime of enormous proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality are committed. Applying both the tests in the instant case, this Court is of the opinion that this is a case where the conscience of the community would get shocked and it would definitely expect the death penalty for the appellant. Besides, three soldiers who had nothing to do with the conspirators were killed. There is no reason to hold that**



**their murder was in any manner prompted by any provocation or action on their part. This would be an additional circumstance which would justify the death sentence. The defence did not attempt to bring any mitigating circumstance. Therefore, this Court has no doubts that death sentence was the only sentence in the peculiar circumstance of the case. The judgment of the trial court and the High Court convicting the accused and awarding him death sentence are confirmed. All the other sentences are also confirmed. [Para 84] [195-B-E; 194-F-H; 195-A-D]**

*Bachan Singh v. State of Punjab* **AIR 1980 SC 898 – relied on**

*Furman v. Georgia* **(1972) 33 L Ed 2d 346: 408 US 238 – referred to**

**Case Law Reference:**

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|---|---|---|
| 1994 (1) Suppl. SCR 483 | Relied on | Para 48 |
| 2010 (2) SCR 22 | Relied on | Para 69 |
| 2005 (2) Suppl. SCR 79 | Relied on | Para 69 |
| 2005 (11) SCC 600 | relied on | Para 69 |
| AIR 1947 PC 67 | relied on | Para 69 |
| 1985 (1) SCR 88 | relied on | para 75 |
| 1997 (1) Suppl. SCR 96 | relied on | para 75 |
| 2005 (2) Suppl. SCR 79 | relied on | para 75 |
| 2010 (2) SCR 22 | relied on | para 75 |
| 2010 (1) SCR 1027 | relied on | para 75 |
| 1956 SCR 206 | relied on | para 78 |

| | | |
|---|---|---|
| **1978 (1) SCR 781** | **relied on** | **para 78** |
| **1993 (3) SCR 543** | **relied on** | **para 78** |
| **2003 (2) Suppl. SCR 884** | **relied on** | **para 78** |
| **1987 (2) SCC 17** | **referred to** | **para 78** |
| **1999 (3) SCR 1** | **referred to** | **para 78** |
| **2001 (7) SCC 596** | **referred to** | **para 78** |
| **2005 (2) Suppl. SCR 79** | **referred to** | **para 79** |
| **1988 (2) Suppl. SCR 24** | **relied on** | **para 81** |
| **2005 (2) Suppl. SCR 79** | **relied on** | **para 83** |
| **1999 (3) SCR 1** | **relied on** | **para 84** |
| **1983 (3) SCR 413** | **relied on** | **para 84** |
| **AIR 1980 SC 898** | **relied on** | **para 84** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 98-99 of 2009.

From the Judgment & Order dated 13.09.2007 of the High Court of Delhi at New Delhi in Death Sentence Reference No. 2 of 2005, Criminal Appeal No. 927 of 2005.

Kamini Jaiswal, Abhimanue Shreshtha, Divyesh Pratap Singh for the Appellant.

Gopal Subramanium, SG, Mukul Gupta, Satyakam, Anubhav Kumar, Sadhna Sandhu, Som Prakash, Anchit Sharma, Rajat Katyal, Sanjeev Joshi, Divya Chaturvedi, D.S. Mahra, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

**V.S. SIRPURKAR, J.** 1. The appellant (admittedly a Pakistani national) challenges his concurrent conviction by the trial Court and the High Court as also the death sentence awarded to him, in this appeal.



2. On 22.12.2000 at about 9 p.m. in the evening some intruders started indiscriminate firing and gunned down three army Jawans belonging to 7th Rajputana Rifles. This battalion was placed in Red Fort for its protection considering the importance of Red Fort in the history of India. There was a Quick Reaction Team of this battalion which returned the firing towards the intruders. However, no intruder was killed and the intruders were successful in escaping by scaling over the rear side boundary wall of the Red Fort. This attack rocked the whole nation generally and the city of Delhi in particular as Red Fort is very significant in the history which was taken over by British Army way back in 1857 and was retrieved back to India on 15.8.1947. It is also significant to note that the Prime Minister addresses the nation from this very Red Fort on every 15th of August.

The three unfortunate soldiers who lost their lives in this attack were:-

(i) A civilian Sentry namely, Abdullah Thakur

(ii) Rifleman (Barber) Uma Shankar

(iii) Naik Ashok Kumar, who was injured and then succumbed to his injuries later on.

3. The Red Fort comes within the local jurisdiction of Police Station Kotwali. The Information was recorded by DD No.19A, Exhibit PW-15/B and Sub-Inspector (S.I.) Rajinder Singh (PW-137) rushed to the spot. SHO Roop Lal (PW-234) who was the Station House Officer of Kotwali police station also reached the spot and recorded the statement of one Capt. S.P. Patwardhan (PW-189) which was treated as the First Information Report. This First Information Report refers to two persons in dark clothing and armed with AK 56/47 rifles having entered the Red Fort from the direction of Saleem Garh Gate/Yamuna Bridge.

It is further stated that first they fired at the civilian Sentry Abdullah Thakur, secondly they came across rifleman (barber) Uma Shankar near Rajputana Rifles MT lines and fired at him due to which he died on the spot. It is further mentioned that lastly the intruders ran into the room in the unit lines close to the office complex and fired shots at Naik Ashok Kumar who was seriously injured. The FIR further mentions that thereafter they ran towards ASI Museum complex and fired in the direction of police guard room located inside the Museum. At this stage, the quick reaction team started firing at them. However, they escaped into the wooded area close to the ring road. The FIR also mentions that some fired/unfired ammunition was recovered from the spot.

4. The investigation started on this basis. During the examination of the spot, one live cartridge Exhibit PW-115/38 and number of cartridge cases (Exhibit PW-115/1-37) and (Exhibit PW-189/32-71), three magazines (Exhibit PW-189/1-3) of assault rifles, one of which had 28 live cartridges (Exhibit PW-189/4-31) were found and handed over to the police vide memo Exhibit PW-189/C and Exhibit PW-115/A. The empties of the cartridges fired by the Quick Reaction Team through the self loading rifles were deposited with ammunition store of 7 Rajputana rifles and were handed over to the police later on vide memo Exhibit PW-131/C.

5. On the next day, i.e. on 23.12.2000, in the morning at about 8.10 a.m., the BBC news channel flashed the news that Lashkar-e-Toiba had claimed the responsibility for the shooting incident in question which was entered in the daily diary. On the same morning one AK56 assault rifle (Exhibit PW-62/1) lying near Vijay Ghat on the back side of Lal Qila was found abandoned. There were seven cartridges in the magazine. They were taken into police possession vide memo Exhibit PW-62/F. On the same morning in early hours extensive search went on of the back side of the Red Fort. The police found a polythene bag containing some currency notes of different



denominations and a piece of paper, a chit (Exhibit PW-183/B) on which a mobile No.9811278510 was mentioned. According to the prosecution, the intruders had escaped from that very spot by scaling down the rear side boundary wall of Red Fort using the pipe and further a small platform for landing from below the pipe. According to the prosecution, while jumping from the platform, the said polythene bag with cash and the paper slip fell out of the pocket of one of the intruders. The currency notes and the paper slip were seized vide memo Exhibit PW-183/A. It was on the basis of this cell phone number that the investigation agency started tracing the calls and collecting the details from which it transpired that between 7:40 p.m. and 7:42 p.m. on the night of the incident, two calls were made from this mobile number to telephone No.0194452918 which was the number of one BBC correspondent in Sri Nagar, Altaf Hussain (PW-39). It was also found that three calls were made from same mobile number to telephone number 0113355751 which number was found to be that of BBC correspondent in Delhi, Ayanjit Singh (PW-41) between 9:25 p.m. and 9:33 p.m. The police found out that this mobile No.9811278510 was being used from two instruments whose IMEI number (identification number engraved on the mobile handset by the manufacturer) were obtained from mobile service provider ESSAR. These numbers were 445199440940240 and 449173405451240. The police could also find out that the person who had mobile connection card having No.9811278510 had another mobile cash card of ESSAR company with No.9811242154 and from this number large number of calls were found to have been made to telephone No.2720223 which was found to be the number of telephone installed at flat No.308A, DDA flats, Ghazipur, Delhi. This flat was registered in the name of one Farzana Farukhi. Similarly, number of calls were found to have been made from telephone No.2720223 to 9811242154. It was also found that number of calls were made from cell No. 9811242154 to telephone No.6315904 which was a landline number installed at House No.18-C, Gaffur Nagar, Okhala where a computer

centre in the name of 'Knowledge Plus' was being run. The further investigation revealed that this said computer centre was being run by one Mohd. Arif @ Ashfaq (appellant herein) who was residing at the flat mentioned as flat No.308A, DDA Flats, Ghazipur where landline No.2720223 was installed. The police, therefore, could connect the said flat No.308A at Ghazipur and the computer Centre i.e. Knowledge Plus at Okhala and could also connect Mohd. Arif @ Ashfaq with these two places. A surveillance was kept on these places for two days. During this period of surveillance, the computer centre had remained closed. On the basis of some secret information the premises at 308A, Ghazipur were raided on the night of 25-26.12.2000 and the appellant-accused Mohd. Arif @ Ashfaq was apprehended by the police while he was entering the flat. It was found during the investigation that Farzana Farukhi in whose name telephone No. 2720223 was registered was a divorcee sister-in-law of Mohd. Arif @ Ashfaq i.e. her sister was married to Mohd. Arif @ Ashfaq whose name was Rehmana Yusuf Farukhi. Mother of these two sisters, namely, Ms. Qamar Farukhi (DW-1), was also a resident of the same flat.

6. On his apprehension, Mohd. Arif @ Ashfaq (appellant) was cursorily searched by Inspector Ved Prakash (PW-173) during which one pistol (Exhibit PW-148/1) with six live rounds was found with him. They were sealed and taken into police custody. The appellant on his apprehension accepted his involvement in the incident inside the Lal Qila and gave further information to the policemen about the presence of his associate Abu Shamal @ Faizal as also the ammunitions at their hide out at House No.G-73 Batla House, Murari Road, Okhala, New Delhi.

7. He was immediately taken to that house by the raiding team which was headed by Inspector Mahesh Chandra Sharma (PW-229) and truly enough, in pursuance of the information given by him, the associate Abu Shamal was found to be there. The police party did not approach the flat immediately as the



house was found to be locked. However, at about 5.15 a.m. in the morning one person had gone inside the house and closed the door from inside. The police then asked him to open the door but instead of opening the door, he started firing from inside at the police party. The police party returned the firing with their fire arms and ultimately the person who was firing from inside died and was identified by appellant Mohd. Arif @ Ashfaq to be Abu Shamal @ Faisal. Substantial quantity of ammunition and arms was recovered from that flat being one AK-56 rifle (Exhibit PW-229/1), two hand grenades one of which was kept in Bandolier (Exhibit PW-229/5), two magazines (Exhibit PW-229/2-3) one of which had 30 live cartridges. Some material for cleaning arms kept in a pouch (Exhibit PW-229/6) and Khakhi Colour Uniform (Exhibit PW-229/8) were recovered and seized by the police vide seizure Memo (Exhibit PW-229/D & E). A separate case was registered under Sections 186, 353 and 307, IPC as also Sections 4 & 5 of the Explosive Substance Act and Sections 25, 27 of the Arms Act was registered at New Friends Colony in FIR No.630/2000. That case ended up in preparation of a closure report because the accused had already died in the encounter with the police. After the above encounter, the accused appellant was brought back to his flat where the search had already been conducted by policemen. During that search one Ration card which was ultimately found to be forged (Exhibit PW-164/A), one driving license in the name of Mohd. Arif @ Ashfaq (Exhibit PW-13/1), one cheque book of HDFC bank in the name of Mohd. Arif @ Ashfaq (appellant herein), one ATM card, one cheque book of the State Bank of India in the name of Rehmana Yusuf Farukhi, wife of accused appellant was found. The said rifle was also taken into custody. One pay-in slip of Standard Chartered bank (Exhibit PW-173/K) showing deposit of Rs.5 lakhs in the account of M/s. Nazir & Sons was found. The said firm belonged to other accused Nazir Ahmad Qasid. This amount was deposited by the appellant may be through Hawala from the high ups of the Lashkar-e-Toiba. Mohd. Arif @ Ashfaq (appellant herein) was then brought back

and there S.I. Harender Singh (PW-194) arrested Mohd. Arif @ Ashfaq (appellant herein). He searched him again when one Motorola mobile handset was recovered from his possession. The number of that instrument was found to be 9811278510. Its IMEI number which fixed the identification number of the hand set engraved on the instrument was 445199440940240. The cell phone was thereafter taken in possession.

8. In his interrogation by S.I. Harender Singh (PW-194), accused made a discovery statement which is recorded as Exhibit 148/E about one assault rifle which was thrown near Vijay Ghat behind the Red Fort after the incident by one of the associates (this was already recovered by the police) and one AK-56 rifle and some ammunition behind the rear wall of Red Fort by his another associate. In pursuance of that, he was taken to the backside of Red Fort and from there on his pointing out one AK-56 rifle (Exhibit PW-125/1), two magazines (Exhibit PW-125/2-3) having live cartridges, one bandolier and four hand grenades were recovered in the presence of the ballistic experts S.K. Chadha (PW-125) and N.B. Bardhan (PW-202). The same was taken to the police station. The ballistic experts after defusing the hand grenades took the whole material in their possession vide Exhibit memo PW- 218/C. Another discovery statement (Exhibit PW-168/A) was made on 01.01.2001 through which he got recovered three hand grenades from the place near Jamia Millia Islamia University duly hidden. This spot was on the back side of his computer centre 'Knowledge Plus'. They were seized vide seizure memo Exhibit PW-168/B. A separate FIR was also recorded by FIR No.3/2001.

9. The prosecution case, as it revealed on the basis of the investigation which followed, appears to be that the accused-appellant was a Pakistani national and eventually joined a terrorist organization called Lashker-e-Toiba. The accused-appellant took extensive training by using sophisticated arms like AK-56 rifles and hand grenades and



had illegally entered the Indian territory along with arms and ammunition in August, 1999 and camped himself at Srinagar in the company of other members of Lashker-e-Toiba who were similarly motivated by that Organization. The Organization had also decided to overawe India by their terrorist activities in different parts of India and to fulfill that object, the accused-appellant and his fellow terrorists had planned an attack on Army stationed inside Red Fort. According to the prosecution, the money required for this operation was collected by the accused-appellant through hawala channels, which was evident from the fact that during the investigation, he had led the police to one of the hawala dealers in Ballimaran area in Old Delhi. One Sher Zaman Afghani and Saherullah were the said hawala dealers, but they could not be apprehended. The police, however, recovered Rs.2 lakhs from the shop which was left open. From the information given by the accused-appellant, the police ultimately caught hold of 10 more persons, which included his Indian wife Rehmana Yusuf Farukhi. The other accused persons were Nazir Ahmad Qasid, his son Farooq Ahmad Qasid, Babbar Mohsin Baghwala, Matloob Alam, Sadakat Ali, Shahanshah Alam, Devender Singh, Rajeev Kumar Malhotra and Mool Chand Sharma. Excepting the accused-appellant, nobody is before us, as few of them were acquitted by the trial Court and others by the appellate Court. It is significant enough that there is no appeal against the acquittal by the High Court. There were number of other persons according to the prosecution who were the co-conspirator with the accused-appellant. However, they were not brought to book by the police. They were declared as proclaimed offenders. There is a separate charge-sheet filed against those proclaimed offenders also.

10. In order to establish an Indian identity for himself, the accused-appellant had married Rehmana Yusuf Farukhi who was also joined as an accused. According to the prosecution, she had full knowledge about the accused-appellant being a Pakistani national and his nefarious design of carrying out

terrorist activities. Significantly enough, she had married only 14 days prior to the shoot-out incident i.e. on 8.12.2000. She was of course, paid substantial amounts from time to time by the accused-appellant prior to her marrying him and this amount was deposited in her bank account No. 5817 with the State Bank of India. The prosecution alleged that the accused-appellant was in touch with Rehmana Yusuf Farukhi even prior to the marriage. One other accused, Sadakat Ali was arrested for having given on rent his property in Gaffur Nagar to the accused-appellant for running a computer centre in the name of 'Knowledge Plus'. Sadakat Ali is said to have been fully aware of the design of the accused-appellant and he had knowingly joined hands with the accused-appellant and had not informed the police that he had let out his premises to the accused-appellant. Huge money used to be received by the accused-appellant which he used to deposit in the accounts of accused Farooq Ahmed Qasid and Nazir Ahmad Qasid in Standard Chartered Grindlays Bank's branch at Srinagar and after withdrawing money so deposited, the same used to be distributed amongst their fellow terrorists for supporting the terrorist activities. According to the prosecution, huge amount of money was deposited by the accused-appellant in the two bank accounts of Nazir & Sons and Farooq Ahmed Qasid with Standard Chartered Grindlays Bank's branch at Connaught Place, New Delhi. The police was able to retrieve one deposit receipt showing deposit of five lakhs of rupees in November, 2000 in the account of Nazir & Sons. The said receipt was recovered from the flat of the accused-appellant after he was apprehended on the night of 25/26.12.2000.

11. Some other accused of Indian origin had also helped the accused-appellant, they being Devender Singh, Shahanshah Alam and Rajeev Kumar Malhotra. They got a forged learner's driving license No. 9091 (Exhibit PW-13/C) which was purported to have been issued by Delhi Transport Authority's office at Sarai Kale Khan, wherein a false residential address was shown as B-17, Jangpura. On that basis, the



accused-appellant also got a permanent driving license (Exhibit PW-13/1) in his name from Ghaziabad Transport Authority. The accused-appellant, with the cooperation of these three accused persons, had submitted a photocopy of a ration card, again with the forged residential address as 102, Kaila Bhatta, Ghaziabad. This very driving license was then used by the accused-appellant for opening a bank account with HDFC Bank in New Friends Colony, New Delhi, wherein he had shown his permanent address as 102, Kaila Bhatta, Ghaziabad and mailing address as 18, Gaffur Nagar, Okhla, New Delhi. Needless to mention that even these two were not his actual addresses. These were utilized by him for stashing the money that he received from the foreign countries. Accused Babar Mohsin provided shelter to the accused-appellant in his house in Delhi in February-March, 2000, so that the accused-appellant could prepare a base in Delhi for carrying out terrorist acts in Delhi. This Babar Mohsin had also accompanied the accused-appellant on his motorcycle to different parts of Delhi in order to show various places of importance to the accused-appellant, which could be targeted for a terrorist attack. The police was also able to retrieve a letter (Exhibit PW-10/C) addressed to Babar Mohsin, thanking him for the help extended by him to the accused-appellant during his visit to Delhi. This letter was written from Srinagar. This letter was seized by the police from the dickey of the motorcycle belonging to Babar Mohsin on 07.01.2001. One other accused Matloob Alam was having a ration shop in Okhla while accused Mool Chand Sharma was the area Inspector of Food & Supply Department. Both these accused persons had helped the accused-appellant in getting a ration card (Exhibit PW-164/A) which contained false information. Accused Matloob Alam was charged for distributing number of fake ration cards by taking bribe from the persons to whom the cards were issued. A separate FIR being FIR No. 65/2001 was registered against Matloob Alam at Police Station New Friends Colony, New Delhi. In fact, the ration card mentioned earlier was prepared by the accused Matloob Alam and the handwriting expert had

given a clear opinion that the said ration card was in the hands of Matloob Alam himself. The prosecution, therefore, proceeded against 11 accused persons, in all, who were charge-sheeted on the ground that they had all conspired together to launch an attack on the Army establishment inside the Red Fort so as to pressurize the Government of India to yield to the demand of the militants for vacating Kashmir

12. The police got examined all the arms and ammunition from the ballistic expert N.B. Bardhan (PW-202), Senior Scientific Officer-I, CFSL, New Delhi. Needless to mention that the said witness had found that the cartridges of the gun had actually been fired from AK-56 rifles which was got recovered by the accused-appellant from the backside of Red Fort and Vijay Ghat. The weapons were found by the witness to be in working order. The hand grenades recovered at the instance of the accused-appellant from Jamia Milia Islamia University were also examined and found to be live ones and these were defined as "explosive substance". The pistol and the cartridges recovered from the possession of the accused-appellant on his apprehension were also got examined by another ballistic expert Shri K.C. Varshney (PW-211), who vide his report Exhibit PW-211/A, found the said pistol to be in working order and the cartridges to be live ones and being capable of being fired from the said pistol. The police also found that the eleven empties of fired cartridges from Self Loading Rifles (SLRs) of the Army men were actually fired from SLRs made by Ordinance Factory at Kirki, India and that they could not be loaded in either of the two Assault Rifles recovered by the police.

13. This was, in short, a conspiracy and after obtaining the necessary sanctions, the police filed a charge-sheet against 11 accused persons. All the cases were committed to the Court of Sessions and though they were registered as separate Sessions cases, they were clubbed by the trial Court and the case arising out of FIR No. 688/2000 was treated as the main



case. We do not propose to load this judgment by quoting the charges framed against all the accused persons. Suffice it to say that they were charged for the offence punishable under Sections 121, 121A and 120-B IPC read with Section 302, IPC. The accused-appellant was individually charged for the offence punishable under Section 120-B, IPC on various counts as also for the offence punishable under Section 3 of the Arms Act read with Sections 25 and 27 of the Arms Act as also Sections 4 and 5 of the Explosive Substances Act. Lastly, the accused-appellant was also charged for the offence punishable under Section 14 of the Foreigners Act for illegally entering into India without valid documents.

14. The prosecution examined as many as 235 witnesses and exhibited large number of documents. Accused Rehmana Yusuf Farukhi alone adduced evidence in defence and examined her own mother and tried to show that they did not know the accused-appellant was a militant and that the money in the bank account of Rehmana Yusuf Farukhi was her own money and not given by the accused-appellant.

15. The accused-appellant was convicted for the offence punishable under Sections120-B, 121 and 121-A, IPC, Sections 186/353/120-B, IPC, Section 120-B, IPC read with Section 302, IPC, Sections 468/471/474, IPC and also under Section 420 read with Section 120-B, IPC. The accused-appellant was also held guilty for the offence punishable under Section 25 of the Arms Act, Section 4 of the Explosive Substances Act and Section 14 of the Foreigners Act. We are not concerned with the convictions of accused Nazir Ahmad Qasid, Farooq Ahmed Qasid, Rehmana Yusuf Farukhi, Babar Mohsin, Sadakat Ali and Matloob Alam. Barring the above accused, all the other accused persons were acquitted by the trial Court. The accused-appellant was awarded death sentence for his convictions under Section 121, IPC as also under Section 302 read with Section 120-B, IPC. He was awarded rigorous imprisonment for 10 years for his conviction

under Section 121-A, IPC. He was awarded sentence of life imprisonment for his conviction under Section 4 of the Explosive Substances Act, while on other counts, he was awarded rigorous imprisonment for 7 years for the conviction under Sections 468/471/474/420, IPC. He was awarded rigorous imprisonment for 3 years for his conviction under Section 25 of the Arms Act. He was awarded 2 years' rigorous imprisonment for his conviction under Section 353, IPC and 3 months' rigorous imprisonment for his conviction under Section 186, IPC. He was slapped with fines also with defaults stipulation. The sentences were, however, ordered to run concurrently. The other accused Rehmana Yusuf Farukhi, Babar Mohsin, Nazir Ahmad Qasid, Farooq Ahmed Qasid, Matloob Alam and Sadakat Ali were awarded various convictions; however, their appeal was allowed by the High Court. That leaves us only with the appeal filed by the present appellant. The High Court also confirmed the death sentence awarded by the trial Court to Mohd. Arif @ Ashfaq (accused-appellant). The State had also filed one appeal challenging the acquittal of accused Rehmana Yusuf Farukhi, Sadakat Ali and Babar Mohsin for the serious offence of hatching conspiracy with co-accused Mohd. Arif @ Ashfaq, Farooq Ahmed Qasid and Nazir Ahmad Qasid to wage war against the Government of India, so also an appeal was filed against the accused Farooq Ahmed Qasid and Nazir Ahmad Qasid for enhanced punishment of death penalty in place of the sentence of life imprisonment awarded to them by the trial Court. The State, however, did not file any appeal against the four acquitted accused persons. The High Court, after examination in details, confirmed the conviction and the sentence only of the present appellant, while all the other appeals filed by other accused persons were allowed and they were acquitted. The appeals filed by the State for enhancement, as also against the acquittal of other accused persons from the other charges, were dismissed by the High Court. That is how, we are left with the appeal of Mohd. Arif @ Ashfaq, the present appellant herein.



16. The first contention raised by Ms. Kamini Jaiswal, learned counsel appearing on behalf of the respondent was that no such incident of outsiders going into the Red Fort and shooting ever happened. The learned counsel further argued that the said shooting was as a result of the brawl between the Army men themselves. In order to buttress her argument, the learned counsel further said that even the police was not permitted to enter the Red Fort initially and though an enquiry was held regarding the incident, the outcome of such enquiry has never been declared. The learned counsel attacked the evidence of Capt. S.P. Patwardhan (PW-189) on the ground that the report made by him which was registered as FIR on 22.12.2000 was itself suspicious, as it was clearly hearsay. The learned counsel further relied on the evidence of Head Constable Virender Kumar (PW-15) who was a duty officer at Kotwali Police Station and claimed that he received the information at about 9.25 pm which he had recorded as DD No. 19A. It was pointed out that the said DD Entry was handed over to S.I. Rajinder Singh (PW-137) and Constable Jitender Singh (PW-54) was directed to accompany him. It was also pointed out that SHO Roop Lal (PW-234) was informed about the incident and he handed over to S.I. Rajinder Singh (PW-137) the report at 11.30 pm and it was on that basis that the FIR No. 688/2000 was registered at about 12.20 am on 23.12.2000. The learned counsel then relied upon the report in the newspaper Hindustan Times in which it was stated that the police intelligence was not ruling out the possibility of shoot out being insiders' job. The learned counsel also referred to the evidence of Constable Jitender Singh (PW-54), Naik Suresh Kumar (PW-122), Major Manish Nagpal (PW-126), Mahesh Chand (PW-128), Retd. Subedar D.N. Singh (PW-131), Hawaldar Dalbir Singh (PW-134) and S.I. Rajinder Singh (PW-137), as also the evidence of Major D.K. Singh (PW-144). It was tried to be argued that there were inter se contradictions in the evidence of all the witnesses and the whole story of some intruders going into the Red Fort and shooting was nothing but a myth. It was also suggested by the learned counsel that there

was serious dispute in the versions regarding the ammunition used by the intruders and ammunition used by the Army personnel. Fault was found with the timing of registration of FIR No. 688/2000. The learned counsel also stated that the prosecution had not brought on record any register which is maintained for recording the entry of any vehicle in the Red Fort. The learned counsel further suggested a contradiction in the evidence of Hawaldar Dalbir Singh (PW-134) and the statement of Retd. Subedar D.N. Singh (PW-131) regarding as to who took the rifle from Hawaldar Dalbir Singh (PW-134), whether it was Major D.K. Singh (PW-144) or Major Manish Nagpal (PW-126). About the timings of various police officers reaching including that of SHO Roop Lal (PW-234), the learned counsel pointed out that there were some deficiencies.

17. Before we appreciate these features of the evidence and the contentions raised by the learned counsel for the defence, we must first clarify that this Court ordinarily does not go into the appreciation of evidence, particularly, where there are concurrent findings of facts. We have very closely examined both the judgments below and found that there is a thorough discussion as regards the evidence, oral as well as documentary, and it was only after a deep consideration of such evidence that the trial and the appellate Courts have come to the concurrent finding against the appellant. In order to see as to whether the acquittal of other accused persons can be linked to the verdict against the appellant, we have examined even the other evidence which did not necessarily relate to the criminal activities committed by the appellant. Inspite of the fact that there has been a concurrent verdict against this appellant, still we have examined the oral and documentary evidence not only relating to the appellant, but also to the other accused persons. As a result, we have come to the conclusion that the trial and the appellate Courts have fully considered the oral and documentary evidence for coming to the conclusions that they did. In view of the concurrent findings, the scope to interfere on the basis of some insignificant contradictions or some



microscopic deficiencies would be extremely limited. All the same, this being a death sentence matter, we ourselves have examined the evidence.

18. From the clear evidence of Capt. S.P. Patwardhan (PW-189), Major Manish Nagpal (PW-126), Retd. Subedar D.N. Singh (PW-131), Hawaldar Dalbir Singh (PW-134) and Major D.K. Singh (PW-144), we are of the clear opinion that what took place on the said night on 22.12.2000 could not be just set aside as an internal brawl between the Army men themselves. The suggestion is absolutely wild. We find from the evidence that none of these witnesses who have been named above and who were the direct witnesses to the firing incident have been given this suggestion in their cross-examination that it was merely a brawl between the Army men. That apart, there are some circumstances which completely belie the theory of internal brawl. It would have to be remembered that a civilian Sentry Abdullah Thakur was the first to lose his life. There is nothing to suggest that the said Sentry Abdullah Thakur or the second casualty Rifleman (Barber) Uma Shankar, as also Naik Ashok Kumar had developed any enmity with anybody in the battalion. Further, if this was a brawl between the Army men, there was no reason why Abdullah Thakur was shot at and killed. We also do not find any reason to suspect the version of Major Manish Nagpal (PW-126) who himself claimed to have fired six rounds in the direction of Ring Road after taking a self loading rifle from Hawaldar Dalbir Singh (PW-134). In fact, there is no contradiction in his version and the version of Hawaldar Dalbir Singh (PW-134). The version of Major Manish Nagpal (PW-126) is in fact corroborated by the evidence of Major D.K. Singh (PW-144) as also the evidence of Retd. Subedar D.N. Singh (PW-131). Even Major D.K. Singh (PW-144) had fired alongwith Major Manish Nagpal (PW-126) and they had fired, in all, 11 rounds, the empties of which were given by these two officers to Retd. Subedar D.N. Singh (PW-131). Ultimately, these empties were produced before the civil police officers and were taken into possession vide Exhibit PW-131/A. This

version is also corroborated by Hawaldar Dalbir Singh (PW-134). We have carefully seen the evidence of all these witnesses mentioned above and found it trustworthy. It must be mentioned that at 9.23 pm, a call was made to the Police Control Room (PCR) by Major Manish Nagpal (PW-126) suggesting that some persons had run away after firing inside the Red Fort and that they had gone towards the Ring Road. This was proved by the lady Constable Harvir Kaur, PCR (PW-77) and the concerned document is Exhibit PW-77/A which lends full support to the version and suggests that there was an incident of shooting in the Red Fort. DD Entry No. 19A dated 22.12.2000 made at Police Station Kotwali supports this version of lady Constable Harvir Kaur (PW-77), which suggests that she had flashed a wireless message about some persons having fled towards the Ring Road after resorting to firing inside the Red Fort. The evidence of Head Constable Virender Kumar (PW-15) is also there to prove the report in this regard vide Exhibit PW-15/B. It must be remembered that Police Control Room had received the calls of similar nature at 9.47 pm and two calls at 9.50 pm vide Exhibits PW-42/A, PW-95/A and PW-43/A, which support the version of the prosecution about the incident. The evidence of Constable Indu Bala, PCR (PW-43) about having received a telephone call from one Karan Mohan, the evidence of Col. A. Mohan (PW-51) that he was informed by the Commanding Officer, 7th Rajputana, Delhi that some civilians had entered Red Fort and the evidence of Constable Harvir Kaur, PCR (PW-77) that she received information from Major Manish Nagpal (PW-126) from telephone No. 3278234 about some persons having fled, as also the evidence of Head Constable Harbans, PCR (PW-95) that he had received a telephone call from Col. Mohan (PW-51) by telephone No. 5693227 stating that his Jawan posted at Red Fort was attacked, supports the version that there was incident of shoot out and it could not be merely dismissed as an internal brawl. This is apart from the evidence of other police witnesses like SHO Roop Lal (PW-234) who had reached the spot almost immediately after receiving the wireless message and who confirmed the presence of S.I.



Rajinder Singh (PW-137) and Capt. S.P. Patwardhan (PW-189) on the spot. The senior officers of the police had also reached the spot and their evidence only confirms the dastardly incident of shoot out. There is enormous documentary evidence in shape of DD Entry No. 9A (Exhibit PW-156/C), DD Entry No. 73 B, Exhibit PW-152/B, Exhibit PW-152/F and DD No. 22A, which confirms that such incident had happened. There is other piece of voluminous documentary evidence about seizure of blood sample (Exhibit PW-123/B), seizure from the spots (Exhibit PW-122/B), seizure of blood stained clothes (Exhibit PW-114/A), Exhibit PW-123/A, Exhibit PW-122/A, seizure of magazine, live cartridges and empties (Exhibit PW-189/C), Exhibit PW-115/A to 37 (37 empty cartridges), Exhibit PW-115/38 (1 live cartridge), seizure of rope and cap (Exhibit PW-183/D), seizure of various articles from Red Fort (Exhibit PW-196/A) and Exhibits PW-230/A & 230/B etc. to suggest that the incident as, suggested by prosecution, did take place. It is also to be seen that the post mortem was conducted on the three bodies by Shri K. L. Sharma (PW-187). This witness has opined that all the deceased had bullet injuries by sophisticated fire arms and the shots were filed at them from a distant range. It is significant that the doctor was not cross-examined to the effect that the injury could have been caused by any weapon which was available with the Army and not with the AK 56 rifles. We are, therefore, not at all impressed by the argument that such incident was nothing but a white wash given by Army to hide the incident of internal brawl. We must reject the whole argument as too ambitious. We, therefore, hold that the incident of shoot out did take place in which three persons lost their lives.

19. Ms. Jaiswal then argued that though the premises were thoroughly searched as claimed by Sub. Ashok Kumar (PW-115) he did not find a fired bullet. She relied on the evidence of Hawaldar Dalbir Singh (PW-134) who also claimed that the premises were being searched all through the night. Similarly, she referred to the evidence of S.I. Rajinder Singh

(PW-137), Maj. D.K. Singh (PW-144), Capt. S.P. Patwardhan (PW-189), and S.I. Naresh Kumar (PW-217) and Inspector Hawa Singh (PW-228). According to her, all these witnesses had suggested that the search was going on practically all through the night and that Capt. Patwardhan (PW-189) had also ordered the search outside. The argument is clearly incorrect. Merely because all these witnesses have admitted that there was search going on for the whole night, it does not mean that the incident did not take place. We have already pointed out that number of incriminating articles were found, the most important of the same being the empties of the bullets fired by the intruders. It is very significant that the prosecution has been able to connect the bullets with the arms seized by them.

20. One of the two rifles was found near Vijay Ghat from the bushes while other has been recovered at the instance of appellant on 26th December, 2000. The prosecution has examined three witnesses who were the ballistic experts. They were N.B. Bardhan (PW-202), A.Dey (PW-206), K.C. Varshney (PW-211). N.B. Bardhan (PW-202) has specifically stated that both the rifles were used in the sense that they were fired. A. Dey (PW-206) had the occasion to inspect the rifle recovered from Batla House as Exhibit PW-206/B. The ballistic experts report was proved by N.B. Bardhan (PW-202) as Exhibit 202/A. He clearly opined that the empties found inside the Red Fort had been fired from the rifles (Exhibit PW-125/1) and (Exhibit PW-62/1). He clearly deposed that he examined 39 sealed parcels sent by SHO, Police Station Kotwali. Out of these parcels, according to the witness, parcel No.34 was containing AK 56 assault rifle so also parcel No.36 in same parcel, sub-parcel No.20 contained another assault rifle. He further confirmed in para (iii) of his opinion that these were 7.62 mm assault rifles and the cartridges contained in bearing mark C-1 in parcel No.3 which were marked as C-49, C-52,C-56,C-58, C-64, C-71 contained in parcel No.19 as also 21 7.62 mm assault rifle cartridge cases marked as C-72,C-74,C-75 to C-



80,C-82 to C-84 and C-86, C-89,C-91, C-94 to C-96, C-98, C-102, C-106 to C-108 contained in parcel No.19A had been fired from 7.62 mm AK assault rifle marked as W/1 which was recovered from back side of Lal Quila on the disclosure statement made by the appellant. He further opined in para (iv) of his opinion that the cartridge cases marked as C-2 contained in parcel No.4, thirty four fired 7.62 mm assault rifle cartridge cases marked as C-32 to C-48, C-50, C-51, C-53 to C-55, C-57, C-59 to C-63 and C-65 to C-70 contained in parcel No.19, as also sixteen 7.62 mm assault rifle cartridge cases marked as C-73, C-77, C-81, C-85, C-87, C-88, C-90, C-92, C-93, C-97, C-99, C-100, C-101, C-103 to C-105 contained in parcel no.19A were fired from 7.62 mm assault rifle AK-56 marked as W/2 rifle recovered from Vijay Ghat. The report of the ballistic experts was proved as Exhibit PW-202/C. He duly proved and identified the cartridges which were test fired in the laboratory. He also proved and identified the rifles examined by him and the magazines along with the other live cartridges found in the same. There was hardly any cross-examination worth the name of this witness and, therefore, it is clearly established that the cartridges cases found inside the Red Fort were fired from the two rifles which were found outside the Red Fort. This witness had also examined 11 empties of the self-loading rifles used by the army men firing towards intruders and had clearly opined that those empties could not have been loaded in AK-56 rifles examined by him. We must note that one of these rifles i.e. Exhibit PW-62/1 was recovered on the discovery made by the appellant. We shall come to the merits of that discovery in the latter part of our judgment. However, at this stage, it is sufficient to note that the prosecution had thoroughly proved the nexus between the cartridge cases which were found inside the Red Fort and the incident. This nexus is extremely important as while the guns were found outside the Red Fort the fire empties were found inside. This clearly suggests that the incident of firing took place inside the Red Fort while guns were abandoned by the intruders outside the Red Fort. This witness also examined the contents of parcel

No.34, namely, one rifle two magazines, live cartridge, knife and a Bandolier. This was again an assault rifle of 7.62 mm which we have already considered earlier. However, along with the same, as per the discovery memorandum a bandolier (Exhibit PW-202/3) was also found. The contents of the Bandolier were in parcel No.35. It contained four hand grenades and four detonators they being Exhibit PW-50/1 to 4 and Exhibit PW-50/5 to 8. Very significantly four detonators had a slip affixed with the help of a tag and it was written in Urdu Khabardar. Grenade firing ke liye tyrar he. Safety pin sirf hamle kye waqt nikale.(beware grenade is ready for firing. Pin should be taken out only when it is to be thrown). The existence of these bandoliers and the grenades and their recovery goes a long way to prove that the theory propounded by the defence that the incident never took place inside the Red Fort at the instance of the intruders and it was an internal affair of the Army men inside has to be rejected. In order to complete the narration, we must also refer to the evidence of Shri A. Dey who had examined the rifle found at Batla House during the encounter in which one Abu Shamal was killed. That recovery is not seriously disputed by Ms. Jaiswal.

21. We have the evidence of Subedar Ashok Kumar (PW-115) about the recovery of 37 empties cartridges and one live cartridge from the Red Fort so also the evidence of Hawaldar Ramesh Kakre (PW-116) about the empty cartridges being found near sentry post where Abudullah Thakur was killed. One live cartridge also was recovered from there. He further deposed about the two empty cartridges found near M.T. Park where Uma Shankar was killed. He deposed that these empties were found near training store while seven empties were found near museum and the same was handed over to Subedar Ashok Kumar (PW-115). Similar is the evidence of S.P. Patwardhan (PW-189) about the place from where all this spent ammunition was recovered. SHO Roop Lal (PW-234) and Naik Suresh Kumar (PW-122) deposed about the places wherefrom the cartridge cases and the magazines were found



from inside the Red Fort. All this supports the prosecution theory that the ghastly incident of firing did take place at the instance of some outsiders inside the Red Fort.

22. This takes us to another contention of Ms. Jaiswal that in fact nothing was found behind the Red Fort on the night of 23.12.2000. The learned Solicitor General, Shri Subramanium placed a very heavy reliance on the recoveries made in the same night or early morning of next day i.e. 23.12.2000. The recoveries of that day are extremely important. Ms. Jaiswal invited our attention in this behalf to the evidence of S.I. Sanjay Kumar (PW-183) who claimed that in the morning of 23.12.2000 during the search of the backside of the wall of the Red Fort abutting to the ring road he found some currency worth Rs.1415/- and a slip contained in the polythene bag. It was a short slip on which a mobile number was written being 9811278510. According to witness S.I. Sanjay Kumar (PW-183), SHO Roop Lal (PW-234) was called at the place and it was SHO Roop Lal (PW-234) who pasted the telephone number slip on a separate paper. There was currency and both these articles were seized by the police. This polythene bag was a transparent bag. Besides the evidence of PW-183, SI Sanjay Kumar, we have the evidence of S.I. Naresh Kumar (PW-217) and SHO Roop Lal (PW-234). The amount was separately kept vide Exhibit 183/A while the slip was identified as Exhibit PW-183/C. We have seen the photographs of the polythene bag and the currency as also the slip which were also proved. Ms. Jaiswal attacked this recovery and the seizure thereof vehemently. According to her this was a figment of imagination by the investigating agency and there was no question of any such recovery much less in the wee hours of 23.12.2000 at about 5-6 a.m. She pointed out that the two witnesses S.I. Sanjay Kumar (PW-183) and S.I. Naresh Kumar (PW-217) were clearly lying. We have examined the evidence of all the three witnesses particularly in this behalf and we find the evidence to be thoroughly reliable. Ms. Jaiswal could not bring to our notice any material in the cross examination of these

witnesses so as to render the evidence uncreditworthy. Some efforts were also made by relying on the evidence of S.K.Chadha (PW-125) that though he was a member of the team, he reached the spot from where the recovery was made at 10 a.m. on 23.12.2000. We fail to follow the significance of this admission. It is not as if all the officers must remain at one and the same place if they are the members of a particular investigation team. It may be that S. K. Chadha might have reached the spot at 10 O'clock but that does not mean recovery team consisting of other members did not effect recovery of the polythene bag containing currency and the slip. Ms. Jaiswal also urged that the premises were being searched thoroughly with the help of dog squad and the search light and that it was not possible that the search team would miss to notice the polythene bag and the currency and the slip lying in it. The argument is only mentioned for being rejected. What the investigating team would be looking for are not the polythene bag and the small paper but the weapons and the men who handled those weapons. A small transparent polythene bag could have easily been missed earlier or may not have attracted the attention of the investigating agency. We do not find anything to suspect the claim that the recovery was made at about 5-6 a.m. We must note that this was the longest night when the sun rise would also be late. Under such circumstances, in that dark night if the investigating team, after the microscopic search, took a few ours in recovering the small apparently insignificant polythene bag, it is not unnatural. They could not be expected to find polythene bag instantaneously or immediately. Much time must have been taken in first searching inside the Red Fort. Therefore, if the polythene bag was found at about 5-6 a.m. as per the claim of the prosecution agency, and not earlier, there is nothing uncreditworthy in the claim. We are, therefore, convinced that the polythene bag and the slip mentioning the cell phone number were actually found at the spot. Ms. Jaiswal tried to find some chinks in the armour by suggesting that S.I. Sanjay Kumar's statement was contrary to the statement of S.I. Naresh Kumar (PW-217). We do not find any discrepancy



between the two statements. Ms. Jaiswal also referred to the evidence of Inspector Mohan Chand Sharma (PW-229) who stated that recovery was made by him at about 9 a.m. in the morning. What the witness meant was that it was he who came in the possession of the items at 9 a.m. There is nothing very significant in that assertion. The evidence of SHO Roop Lal (PW-234) was also referred to who claimed that after the polythene bag was produced before him which contained currency and paper slip, he sealed currency in the same polythene with the help of cloth and sealed under parcel given Exhibit No.24. There is nothing to dis-believe this claim after all SHO Roop Lal (PW-234) was the senior most investigating officer and there is nothing insignificant if S.I. Sanjay Kumar (PW-183) finding the polythene bag handed over the same to SHO Roop Lal (PW-234). A specific step has been taken by S.I. Sanjay Kumar (PW-183) by getting the said bag photographed. We have seen the photographs also. It is true that no photograph was taken of the polythene bag containing currency note and the slip mentioning the telephone number. They appear to be in separate photographs and it is quite understandable as immediately after the finding of the polythene bag it must have been handled by S.I. Sanjay Kumar (PW-183). It is only after finding the slip and the telephone number mentioned thereon that by way of abundant caution the photographs were taken. Anxiety was to show the slip and the fact that there was a telephone number written on the slip. Ms. Jaiswal then argued that Hawa Singh (PW-228) had stated that he was told about the slip only in the evening though he joined the investigation at 10.30 a.m. We do not find anything substantial in this argument. Ms. Jaiswal further argued that there is contradiction in S.I. Sanjay Kumar (PW-183) and Inspector Mohan Chand Sharma's (PW-229) statement as to who had recovered the currency and slip and that there was material contradiction in the evidence of S.I. Sanjay Kumar (PW-183), S.K. Chadha (PW-125) and Inspector Mohan Chand Sharma (PW-229). Further, she tried to say that there was contradiction in the statement of S.I. Sanjay Kumar, SHO Roop

Lal (PW-234) and S.I. Naresh Kumar (PW-217) on the question as to whether currency and slip was taken inside the Red Fort to be handed over to SHO Roop Lal (PW-234) or whether he was called on the spot of recovery. She also raised objections about the photographs that they were not taken in 'as is where is position'. We have already applied our mind to this aspect and we are of the clear opinion that the objections raised by the defence are absolutely insignificant. What is material is the polythene bag being found. The police could not have created this polythene bag containing currency and slip with a number mentioned on it. There was no question of any false evidence being created at that point of time which was hardly a few hours after the shootout. It is true that the photographs of the polythene bag are not and could be on 'as is where is basis'. We have already given the reason thereof. We have no doubts in our mind and we confirm the finding of the trial Court and the appellate Court that the said polythene bag containing the currency notes and the slip on which the cell phone number was mentioned, was actually found on the spot which spot was abutting the backside wall of the Red Fort. It has to be borne in mind that a major incident of shootout had occurred wherein three lives were lost. The attack was on the Red Fort which has emotional and historical importance in the Indian minds. Large investigation team was busy investigating the whole affair and, therefore, the police could not have produced out of the thin air a small polythene bag containing currency and the slip. The spot where it was found is well described and was on the escape route of the intruders. That wall from inside the Red Fort has hardly any height though it is of about 15 to 20 feet from the ground on the other side. We have seen the proved photograph which suggests that from that spot one can easily land on the extended pipe and from that pipe to the small platform and from there to the ground. The polythene bag was found near this spot. Therefore, we accept the finding by the trial Court and the appellate Court that this polythene bag must have slipped from a person who scaled down to the ground. At the beginning of the debate it was made out as if the said



wall was insurmountable and that nobody could have jumped from the height of about 50-60 feet. Further on the close look at the evidence, the photographs the hollowness of the claim of the defence was writ large.

23. There is one more significant circumstance to suggest that the polythene bag must have been found where it was claimed to have been found by the investigating agency i.e. the finding of AK-56 rifle from a nearby spot in the bushes. We will consider the merits of that discovery which was at the instance of the appellant in the latter part of our judgment. Suffice it to say at this stage that the polythene bag was found in the reasonable proximity of the spot from where AK-56 rifle was recovered.

24. Barely within 4-5 hours of the finding out the chit and the currency notes, the investigating agency found one AK-56 rifle with seven live cartridges from a place near Vijay Ghat in the Ring Road behind the Red Fort. A DD entry to that effect vide Exhibit PW-81/A was made. There is evidence in the shape of Exhibit PW 78A proved by PW-78 Head Constable Narender Singh which is a Police Control Room Form. The prosecution also examined Head Constable Upender Singh (PW-89). The evidence of Head Constable Satbir Singh (PW-81) proves the information having been given to the PCR. There was a sketch of recovery Naksha Mauka Baramadgi, seizure of rifle, magazine and the live cartridges from Vijay Ghat is evidenced in Exhibit PW-62/B and also Exhibit 84/XIV. While dealing with the evidence of the ballistic expert we have already shown the connection between the empty cartridges and this rifle. This rifle was marked as W/1 in the ballistic experts report and was identified as Exhibit PW-125/1. There is nothing to belie this discovery which is well supported by the evidence of Head Constable Narender Singh (PW-78), Head Constable Satbir Singh (PW-81) and Head Constable Upender Singh (PW-89). In fact Head Constable Upender Singh was the one who had found the said rifle. Other relevant witness who

corroborated this version is Constable Ranbir Singh (PW-35) who had made the DD entry and had received the message from police Control Room. The other witnesses are SI Ram Chander (PW-62) who presided over the recovery and SHO Roop Lal (PW-234) who was also present at the time of recovery and saw the rifle. The other witnesses, namely, SI Sanjay Kumar (PW-183) and SI Naresh Kumar (PW-217) have provided the corroborating evidence to this recovery. The whole recovery is proved by the prosecution.

25. However, even before that the investigating agency started investigation about the cell number which was found written in the slip which was found in the morning at about 5-6 a.m. this cell number was to provide a ray of light to the investigating agency which had no clue whatsoever till then about the perpetrators of the crime. Ultimately, the investigating agency on the basis of that number being 9811278510 not only unearthed the conspiracy but also reached the main players including the present appellant.

26. The investigation suggests that the said mobile number slip was assigned to Inspector Mohan Chand Sharma (PW-229). This was a mobile number on the basis of the cash card. At the relevant point of time, the cash card implied a SIM card, a SIM card loaded with prepaid value and such SIM card were readily available in the open market. There was no necessity of registering with the service provide for obtaining a mobile connection through cash card. All that was required was activation by the service provider without which the cash card or the SIM card as the case may be could not be used.

27. It has come in the evidence that the active mobile phone has two components i.e. the mobile instrument and the SIM card. Every mobile instrument has a unique identification number, namely, Instrument Manufactured Equipment Identity, for short, IMEI number. Such SIM card could be provided by the service providers either with cash card or post paid card to the subscriber and once this SIM card is activated the



number is generated which is commonly known as mobile number. The mobile service is operated through a main server computer called mobile switching centre which handles and records each and every movement of an active mobile phone like day and time of the call, duration of the call, calling and the called number, location of the subscriber during active call and the unique IMEI number of the instrument used by the subscriber during an active call. This mobile switching centre manages all this through various sub-systems or sub-stations and finally with the help of telephone towers. These towers are actually Base Trans-receiver Stations also known as BTS. Such BTS covers a set of cells each of them identified by a unique cell ID. A mobile continuously selects a cell and exchanges data and signaling traffic with the corresponding BTC. Therefore, through a cell ID the location of the active mobile instrument can be approximated.

28. As per the evidence of Inspector Mohan Chand Sharma (PW-229) he collected the call details of the said mobile number which was received in a computer installed in his office at Lodhi Road. He found that mobile phone number 9811278510 was constantly used from Zakir Nagar and at that time the IMEI number of the cell phone instrument used was 445199440940240. It was found that the said number was also used for making calls to Pakistan. However, from 11.12.2000, the IMEI number of the mobile phone No.9811278510 was changed to IMEI No.449173405451240. It transpired from the evidence that this IMEI number that the mobile phone number 9811278510 with the changed IMEI number had also made calls to landlines which were discovered to be belonging to BBC, Srinagar and BBC, Delhi. These calls were made almost immediately after the incident of shootout. This number was also used for making calls to Pakistan and pager number at Srinagar 01949696 and 0116315904. The latter number was found to be in the name of Mohd. Danish Khan at 18C, Gaffur Nagar i.e. the computer centre run by the accused appellant. It was also found that from this number calls were made to

0113969561 which was found to have been installed at the shop of one Sher Zaman who was allegedly an absconding accused and the Hawala operator. The analysis of call details of 9811278510 suggested that the said mobile number was used in two mobile instruments having the aforementioned IMEI numbers. This was done in case of cell number 9811278510 with IMEI number 445199440940240 only between 26.10.200 to 14.11.2000 and recovered instrument having IMEI No.4491731405451240 between 11.12.2000 to 23.12.2000. While scanning earlier IMEI No.445199440940240, it was found that one other mobile number 9811242154 was found to have been used in the said instrument. This instrument used mobile number 9811242154 between 22.7.2000 to 8.11.2000. From this, Shri Subramanium, learned Solicitor General urged that there were two mobile numbers, namely, 9811278510 and 9811242154 which were used and the two IMEI numbers namely 445199440940240 and 449173405451240. A pattern showed the use of the third number which was 0116315904, the number of computer centre. Shri Subramanium learned Solicitor General submitted the following data for our perusal:-

**"011-6315904- Computer Center**

**Found connected to Mobile No.9811278510:-**

(1) 14.12.2000 at 125435 hrs

**Found connected to Mobile No.9811242154:-**

(1) 31.10.2000 at 211943 hrs

(2) 08.11.2000 at 082418 hrs

(3) 10.11.2000 at 144727 hrs

(4) 19.11.2000 at 163328 hrs

**Found connected to Mobile No.9811242154 :-**

(1) 09.09.2000 at 113619 hrs



(2) 08.09.2000 at 113753 hrs

(3) 02.10.2000 at 103130 hrs."

Learned Solicitor General provided the data regarding the telephone connection made by above number with the telephone connection of one Attruddin who was a proclaimed offender in Kashmir.

29. It is also apparent, as argued by the learned Solicitor General that number 9811242154 was constantly in touch with two numbers, namely, 0116315904 which was installed at 18C Gaffur Nagar computer centre and 011 2720223 installed in the name of Farzana, sister of Rehmana, the wife of accused at 308A, Janta Flats, Ghazipur. This number 9811242154 had thus a definite connection with mobile No.9811278510 and the two instruments bearing IMEI numbers mentioned earlier with each other. Therefore, these two points, namely, the computer centre and the flat at 308A, Janta Flat, Ghazipur were kept under observation. Relying on the evidence of Inspector Mohan Chand Sharma (PW-229), learned Solicitor General argued that calls made from No.9811242154 were between Zakir Nagar and Ghazipur. It was found that the location of the phone used to be at Ghazipur when the calls were made to that number from Zakir Nagar and the location of phone used to be at Zakir nagar when the calls were made from Ghazipur. Significantly enough, the 'Knowledge Plus' computer centre remained closed for two days after the incident at Red Fort. The investigating agency came to know about the ownership of the 'Knowledge Plus' computer center and it was established that the accused Mohd. Arif @ Ashfaq who was a resident of Ghazipur, owned this centre. All this evidence by Inspector Mohan Chand Sharma (PW-229) went unchallenged. The other witness who had produced the whole record was Rajiv Pandit (PW-98) who proved the call record and the report to the queries made to him by the investigating officer. Exhibit PW-98/A is the information in respect of the mobile number 9811278510 which was active from 26.10.2000 to 23.12.2000.

While Exhibit PW-198/D is the information stating that IMEI number 449173405451240 was used by mobile number 9811278510 and that IMEI number 445199440940240 was used by both mobile numbers, namely, 9811278510 and 9811242154. There is hardly any cross-examination of this witness Rajiv Pandit (PW-198) to dis-believe his version. All this goes to suggest the definite connection between two IMEI numbers and the two mobile numbers named above. It is needless to mention that this analysis painstakingly made by Inspector Mohan Chand Sharma (PW-229) led the investigating team to zero on the accused appellant in the night of 25.12.2000.

30. It has come in the evidence of SI Omwati (PW-68) that she was working as duty officer at police station special cell on 25.12.2000 and on that day at about 9.05 a.m. Inspector Mohan Chand Sharma (PW-229) had recorded his departure in connection with the case No.688 of 2000 along with some other staff. It has also come in the evidence that on 25.12.2000 at about 9.45 p.m. a DD entry was made at the police station special cell Ashok Vihar that Inspector Mohan Chand Sharma (PW-229) informed on telephone that a suspect by name of Ashfaq Ahmed was about to come at the house number 308A, DDA flats, Ghazipur and made a request to send some officers. There is another entry bearing a DD No.10 to the effect that Inspector Ved Prakash (PW-173) along with R.S. Bhasin (PW-168), SI Zile Singh (PW-148) , SI Upender Singh (PW-89), SI Manoj Dixit, WSI Jayshree and S.I. Omwati (PW-68), Constable Mahipal Singh and Head Constable Rameshwar (PW-166) having left the police special cell Ashok Vihar in pursuance of the message sent by Mohan Chand Sharma (PW-229). This has been proved in the evidence of Inspector Ved Prakash (PW-173). It has also come in the evidence of Mohan Chand Sharma (PW-229) that he along with his team was at Ghazipur on 25.12.2000 while SI Daya Sagar was deputed at the knowledge plus computer centre along with the staff. He was informed at about 9.40 p.m. on his mobile phone



that Mohd. Arif @ Ashfaq was seen at Batla House and may have left for Ghazipur. He also informed ACP Rajbir about it. ACP Rajbir Singh, therefore, fixed 11 p.m. as the time for meeting him at the red light where he reached along with his staff. This has been corroborated by S.I. Omwati (PW-68) who speaks about DD entry No.10 recorded at special cell at about 10.15 to the effect that certain special officers had left under the supervision of ACP Rajbir Singh. As per the evidence of Inspector Mohan Chand Sharma (PW-229) that a raid was conducted by them at 11.15 p.m. at flat No.308A, Ghazipur and at that time three ladies were present. There it was decided that Ved Prakash would go inside the flat and the remaining staff would keep a watch from outside. This has been corroborated by Inspector Ved Prakash (PW-173). It was at about 12.45 a.m. that Mohd. Arif @ Ashfaq (appellant herein) came to the flat of Ghazipur and knocked at the gate where he was overpowered by the staff present. At that time one pistol 7.63 mouser and six live cartridges were recovered from his possession. He did not have any licence for this pistol. A memo of the seizure is Exhibit PW-148/B proved by sub-Inspector ZIle Singh (PW-148). The entry in the Malkhana register is 32/XI. Inspctor Ved Prakash prepared a rukka which is Exhibit (PW-173/A) and a DD entry bearing number 9A was made at 2.35 a.m. on 26.12.2000 at police station Kalyan Puri. A separate FIR number 419/2000 under Section 25, Arms Act was also registered at police station Kalyan Puri, Delhi. The FIR is to be found vide Exhibit PW-136B. The time of occurrence shown in the first FIR is 12.45 a.m. on 26.12.2000. This pistol was identified by all the recovery witnesses and experts in the Court while its capability of being fired has been proved by Shri K.C. Varshney (PW-211) the FSL expert. The pistol is Exhibit PW-148/1. At the time of its recovery, the pistol had five cartridges in the magazines and one cartridge in the chamber of the pistol. All this has been deposed by SI Zile Singh (PW-148). It was this witness Zile Singh (PW-148) who identified appellant in the Court as also proved the recovery of the pistol from his possession. It was at this time after his apprehension that the

accused disclosed that his associate Abu Shamal @ Faizal was staying at his hide out at G-73, First Floor, Batla House, Okhala. This has come in the evidence of Inspector Mohan Chand Sharma (PW-229). We have absolutely no reason to dis-believe this evidence of apprehension of the accused by the police team which is also supported by documentary evidence. We have also no doubt that the apprehension of the accused was possible only because of the scientific investigation done by PW-229, Inspector MC Sharma.

31. We now consider the argument of the appellant that on the basis of the recovery of the piece of paper having Mobile phone No. 9811278510, the police did not actually reach the appellant as was their claim. It was argued by Ms. Jaiswal, learned counsel appearing on behalf of the appellant that Inspector S.K. Sand (PW-230) himself had claimed in his Examination-in-Chief that he had deputed someone to contact the mobile phone company ESSAR for the call details of the said mobile number on 13.2.2001 and obtained the same Vide Exhibit PW-198/B-1 to 3. On this basis, the learned counsel claimed that the details of the phone conversation on this number as also on other mobile number 9811242154 could not have been known nor could their connection with telephone number 2720223 at the house of the appellant in Ghazipur or telephone number 6315904 at the Computer Centre at Gaffur Nagar be established. In this behalf, it was claimed that this evidence is directly counter to the evidence of Inspector Mohan Chand Sharma (PW-229) who claimed the knowledge about interconnection between 23rd to 25th December, 2001. The learned Solicitor General, however, argued that the evidence of Inspector Mohan Chand Sharma (PW-229) could not be faulted as he claimed to have immediately collected all the call details of the said two mobile phone numbers from the computer installed in their office at Lodhi Road. It was on the basis of the information received in computer regarding mobile No. 9811278510 that he established its connection with mobile No. 9811242154 on the basis of IMEI number. The claim of



Inspector Mohan Chand Sharma (PW-229) that he had collected the information from his computer earlier to 25.12.2010 was not controverted nor do we find any cross-examination to that effect. It is true that Inspector S.K. Sand (PW-230), the Investigating Officer, had sought the information on 13.2.2001, but that does not mean that Inspector Mohan Chand Sharma (PW-229) did not have the information earlier. There was no other way otherwise to apprehend the appellant. It may be that the Investigating Officer decided to obtain the details in writing seeking official information from the original company and that is why his seeking that information on 13.2.2001 does not affect the prosecution case. In our view, the contention raised by the learned Solicitor General is correct and has to be accepted. It is to be noted that the defence has not refuted the claim of the prosecution that telephone No. 2720223 which was in the name of appellant's Sister-in-law Farzana Farukhi, was installed at Flat No. 308-A, Ghazipur, where he was residing alongwith his wife Rehmana Yusuf Farukhi and his mother-in-law Qamar Farukhi (examined as DW-1). It is also not the claim of the defence that telephone No. 6315904 was not installed at the computer centre 'Knowledge Plus' which the appellant was running alongwith other person Faizal Mohd. Khan (PW056). We, therefore, reject the argument of Ms. Jaiswal, learned counsel that on the basis of the chit, the investigating agency could not and did not reach the appellant on the night of 25.12.2000.

32. The other argument raised by Ms. Jaiswal is that in fact there was no evidence to show that the appellant in fact did have any mobile phone with him when he was apprehended. Secondly, it was argued that it was not proved that the appellant ever owned a mobile phone at all. The learned counsel pointed out that when the appellant was apprehended, though he was searched, all that the raiding party recovered was a pistol and that there is no mention of the recovery of Motorola mobile phone bearing number 9811278510. The learned counsel was at pains to point out that it was during his second search after

about six hours that the mobile phone was shown to have been recovered. This, according to the learned counsel, is nothing but a concoction. Ms. Jaiswal also pointed out that there was a substantial delay in formally arresting the appellant and also recovering other articles from his person.

33. We shall consider the second contention first. In this behalf, the learned Solicitor General relied on the evidence of Faizal Mohd. Khan (PW-56), who was also a tenant in the house of Nain Singh (PW-20). It has come in his evidence that the appellant was also residing as a tenant for some time before this incident took place. He has also pointed out that one Adam Malik (PW-31) used to reside in the house of Nain Singh (PW-20) and it was he who had brought the appellant with him in May, 2000 and got him one room in that house. As per the evidence of Faizal Mohd. Khan (PW-56), it was Azam Malik (PW-31) who had introduced him to the appellant. He was the one alongwith whom the appellant had then opened a computer centre by the name of 'Knowledge Plus' at 18-C, Gaffur Nagar and for opening that centre, he had invested Rs.70,000/- while the appellant had invested 1,70,000/- for purchasing computer from one Khalid Bhai. This part of the evidence is also admitted by the appellant in his statement under Section 313 Cr.P.C. He, however, claimed in that statement that he had paid lesser amount. Faizal Mohd. Khan (PW-56) needed a telephone for their computer centre but since they did not have ration card, he (PW-56) spoke to his cousin Danish Mohd. Khan and requested him to get one telephone installed at their computer centre with the help of his identity card and that is how Danish Mohd. Khan had got installed a telephone in his own name at the 'Knowledge Plus' computer centre. The learned Solicitor General pointed out that this evidence has remained unchallenged. It is further argued that the evidence of Faizal Mohd. Khan (PW-56) establishes that the appellant had a mobile phone also. It is significant that admittedly, this witness was a partner of the appellant in the computer centre. The claim of this witness that the appellant



had a mobile phone, was not even challenged during his examination. From this the learned Solicitor General argued and, in our opinion, rightly, that the appellant used to have a mobile phone with him. The learned Solicitor General further pointed out that this piece of evidence is then corroborated by the evidence of Aamir Irfan Mansoori (PW-37), who was also a tenant with the appellant in the house of Nain Singh (PW-20). He had also deposed that the appellant used to have a mobile phone. The Solicitor General pointed out that there was no challenge to the evidence of Aamir Irfan Mansoori (PW-37), particularly, about his assertion that the appellant did have a mobile phone. From this, the learned Solicitor General argued that it is an established position that in the past, the appellant used to have a mobile phone. Similar is the evidence of Rashid Ali (PW-232), who was also a resident in the house of Nain Singh (PW-20). It is significant to note that this witness claimed that on 8.12.2000, he was taken by the appellant for an Iftar party in the evening. However, there the appellant got married to Rehmana on 8.12.2000 in the evening. This shows the proximity of the witness. He further deposed that the appellant had a mobile phone. Even this witness was not cross-examined regarding the availability of the mobile phone with the appellant. We have no reason to disbelieve the above three witnesses and, therefore, we hold that it was established by the prosecution that the appellant used to have a mobile phone.

34. Once this position is clear, then it has to be seen as to why the mobile phone was not taken in possession by the raiding party when they actually apprehended the appellant and whether at that time he had the mobile phone at all. The learned Solicitor General argued that the raiding party had gone to Flat No. 308-A, Ghazipur to nab a suspected terrorist. This was on the basis of the information gathered by Inspector Mohan Chand Sharma (PW-229). The learned Solicitor General argued that the raiding party had to ensure that once they nabbed the terrorist, he should be disarmed first. This was necessary for the safety of the public at large and, therefore,

when the raiding party found and nabbed the appellant, they first removed his fire arm and started digging further information about any other terrorist who was the partner of the appellant and, therefore, when the appellant disclosed about the other hide-out at G-73, Muradi Road, Batla House, in order to avoid any further loss of life and harm to the general public and also for preventing the said suspect from fleeing, the raiding party took the appellant to the Batla House almost immediately. The learned Solicitor General, therefore, argued that considering the seriousness of the situation and further considering the element of very little time at the disposal of the raiding party, the appellant was immediately taken to Batla House, where a full fledged encounter took place resulting in death of Abu Shamal, another terrorist as also in recovery of lethal weapons like an AK-47 rifle and hand grenades. The learned Solicitor General explained the so-called delay caused in recovery of the mobile phone from the appellant. He also argued that the expediency of the matter required stopping these terrorists from inflicting further harm to the innocent society and, therefore, investigating agency had to move with the break-neck speed which they actually did instead of wasting their time in writing the Panchnamas of discovery and recovery etc. The learned Solicitor General further argued that the very fact that there was an encounter in Batla House, the location of which was known only to the appellant, establishes the necessity for quick reaction on the part of the investigating agency. In our opinion, this explanation is quite satisfactory to reject the argument raised by learned defence counsel. We have, therefore, no hesitation to hold that after the appellant was apprehended on the night of 25.12.2000, the investigating agency recovered not only the pistol, but a mobile phone bearing number 9811278510 which was with the appellant.

35. Ms. Jaiswal also argued that the investigating agency had seized only the mobile instrument bearing No.9811278510 but not the SIM card and that was an extremely suspicious circumstance. It is to be noted in this behalf that the instrument



was seized in the morning of 26.12.2000. The analysis of the telephone calls shows that the above mentioned number did not work after 16.50 hours on 23.12.2000. Thus this number was inactive on 24th and 25th December. Ms. Jaiswal argued that the phone might have been sold or at least would have changed hands and did not directly connect the appellant with the call made to the BBC correspondent immediately after the attack. In this behalf, learned Solicitor General relied on the evidence of Rajiv Pandit (PW-198). He pointed out that the record regarding the SIM No 0006680375 did not exist. Learned Solicitor General further argued that the letter dated 20.2.2001 of the police Exhibit PW-114/XV clearly showed that the said SIM was activated and an application in that behalf also made before the Court to un-seal the case property so as to examine whether the SIM card number was correctly noted in the seizure memo Exhibit PW-59/XIV or not. It has to be seen that the number of cash card and the one found on the SIM vide Exhibit PW-62/XIV were the same. The learned Solicitor General, therefore, argued that the SIM card found in the telephone was not activated and, therefore, there was no record available. However, according to the Solicitor General, it has been proved that the instrument number 4491713405451240 was on the cell phone recovered from the appellant. In that behalf, reliance was placed on the evidence of S.I. Harender Singh (PW-194), SI Zile Singh (PW-148) and Inspector Mohan Chand Sharma (PW-229). From this, according to the learned Solicitor General, the prosecution had established that but for the mobile number which was collected on the basis of the chit, it was not possible to apprehend the appellant at all. He further argued that the very same instrument which has been recovered from the appellant was used for calling BBC correspondent immediately after the attack and it was also argued that the location of the instrument at that time was in the vicinity of Red Fort. There is considerable force in the submission made by the learned Solicitor General. The depositions of the prosecution witnesses mentioned above, in our opinion, leave no doubt whatsoever in our minds that mobile

number 9811278510 was used in the instrument having IMEI No.449173405451240 immediately after the attack.

36. This takes us to the telephonic conversation in which the two aforementioned cell phones with two IMEI numbers were used which create a complete link between the appellant and the crime. In this behalf the first witness is Altaf Hussain (PW-39) who was the BBC correspondent based in Srinagar and who claimed that sometimes the militant organizations used to give him information claiming responsibility of any terrorist acts. On 22.12.2000 he had received a call on his land line No.2452918. He deposed that the caller told him that the incident inside the Red Fort had been carried out by them and claimed in vernacular 'do daane daal diye hain'. The caller also claimed himself to be belonging to Lashkar e Toiba. When he asked as to what it meant by Do daane daal diye hain, he was told by the caller that it was a Fidayeen attack and that they had attacked Army personnel. On this, the witness told the caller to contact Delhi BBC office and also gave the telephone number of BBC, Delhi to him. The wife of this witness Ms. Naznin Bandey (PW-40) also deposed that Mr. Altaf Hussain was her husband and the aforementioned telephone number 2452918 was in her name and the same was being used by her husband also. This call was made almost immediately after the attack which took place at about 9.25 p.m. His further evidence is that one Ayanjit Singh (PW-41) was a BBC correspondent in Delhi. Ayanjit Singh (PW-41) was having a telephone number 011 3355751 on which he received a telephone call between 9-9:30 p.m. and someone claiming to be belonging to Lashkar-e-Toiba told him that they had attacked the Red Fort. When the witness asked as to from where he was speaking, the witness was told by the caller that he was calling from inside the Red Fort. He also told that they had killed two persons. The caller refused to identify himself. This call remained for 2-3 minutes. Shri Satish Jacob (PW-150) corroborated this version of Ayanjit Singh (PW-41) to the effect that on 22.12.2000 about 9 p.m. Ayanjit Singh who was a Desk



Editor in the Delhi office had received relevant call and had informed his colleagues also. He also confirmed that Altaf Hussain (PW-39) was the BBC correspondent in Srinagar. These call records were searched by the investigating agency and were duly proved by the prosecution. It has already come in the earlier part of the judgment that it was on 13.2.2001 that request for supply of information regarding mobile number 9811278510 was made vide letter Exhibit PW-230/K. By another letter Exhibit PW-230/N dated 27.1.2001, General Manager, MTNL was requested to give details of the subscribers of the telephone No. 011 3355751 which was the number of BBC Delhi, telephone No. 2720223 belonging to Farzana Faruqui and installed at Ghazipur at the residence of appellant and telephone No.6315904 belonging to Danish Mohd. Khan which was fixed at computer centre. The prosecution proved that letter and the records through the witnesses. It has come in the evidence that on 14.2.2001, the call details of 9811278510 were furnished along with cell ID list by way of letter Exhibit PW-198/E and those call details were also duly proved vide Exhibit PW-198/B1-3. A further letter dated 20.2.2001 was proved by the prosecution to have been written to the General Manager, ESSAR cell phone for the information in respect of the aforesaid mobile instrument bearing IMEI No.445199440940240 and 44917340545120. In this letter, it was specifically asked as to against which mobile number the speed card No.0006680375 was activated. Rajiv Pandit (PW-198) deposed that the details were already furnished on 14.2.2001 in respect of 9811278510 while the speed card details of the No.0006680375 were not available in the records. The relevant documents are Exhibit PW-198/E in respect of cell No.9811242154. The evidence of Rajiv Pandit went almost unchallenged. His assertion that he, as a General Manager (Administration), of ESSAR Cell Phones had provided the relevant information of call details to Inspector Surender Sand in respect of mobile No.9811278510, has gone unchallenged. From his evidence, it stands proved that calls were made to BBC correspondent from cell No.9811278510

on 22.12.2000 at 9.27 p.m. and two calls were made to BBC, Delhi No.3355751 at 9.50 p.m. He also established that when the call was made, the location of caller, as per mobile details, was at Kashmere Gate whereas from the second call, the location was Chandni Chowk. This evidence is also corroborated by the evidence of Mohan Chand Sharma (PW-229) who located the two IMEI numbers mentioned above and he also confirmed that as per the information collected by him two calls were made to BBC offices one in Srinagar and one in Delhi. There is absolutely nothing to dis-believe this version and, therefore, it is clear that telephone No.9811278510 was used on the relevant date on 22.12.2000 for claiming the responsibility of the attack in Red Fort. When call was made the IMEI number was 449173405451240. This situation almost clinches the issue.

37. The corroboration to the fact that a message was received by BBC Delhi telephonically regarding the attack on Red Fort on 22.12.2000 at about 9 O' Clock at night is to be found in the evidence of Satish Jacob (PW-150) who proved Exhibit PW-150/B. There is no cross examination of the witness on this aspect. The prosecution, therefore, is successful in establishing that the cell phone No.9811278510 was used for making the calls to Srinagar, BBC correspondent as also to the BBC correspondent in Delhi. In these calls, the caller who was handling that cell phone not only informed about the attack on the Red Fort but also owned the responsibility of Lashkar-e-Toiba therein. These call details have been proved by Rajiv Pandit (PW-198) whose evidence we have already referred to earlier, vide Exhibit PW 198/B1 to B3. The inter se connection in between this cell phone and cell phone No.9811242154 is also clearly established by the witness Rajiv Pandit (PW-198) on the basis of IMEI number used in that cell phone. He had also established that these calls to the BBC were made from the vicinity of the Red Fort. While the call to Srinagar was made from Chandni Chowk, the second call was made from behind the Red Fort. It has already come in the earlier discussion that



the information received from the analysis of the cell phone records particularly of cell No. 9811242154 along with its IMEI number came very handy to the investigating team for further establishing the connection in between the landline telephones which were at the computer centre owned by the appellant at Ghazipur which number was in the name of his sister-in-law Farzana Farukhi and where the appellant lived with his wife Rehmana Farukhi. Ms. Jaiswal took us thoroughly through the cross examination of this witness and pointed out that on the basis of Exhibit PW-198/DA, there were some contradictory entries in Exhibit PW-198/DA and the other data proved by the witness. We are not impressed by this argument firstly because there is nothing to show that this is an authenticated document and though Ms. Jaiswal claimed that this document was supplied to the accused by the prosecution, there is nothing to support such a claim. We, have, therefore, no hesitation in rejecting Exhibit PW-198/DA. Ms. Jaiswal then pointed out that in Exhibit PW-198/E, there were certain discrepancies. The witness had actually explained those discrepancies by asserting "if the computer has reversed at some point, it may be due to technical fault". It is quite understandable that there could be some technical problems in the computer. We have gone through the whole cross examination very carefully but we do not find any reason to reject Exhibit PW-198/E. In our opinion, the insignificant irregularities brought in the cross examination would not call for rejection of the document and the evidence. We, therefore, accept that cell phone No.9811278510 was used at a very crucial point of time i.e. between 9 to 9.30 p.m. at night on the day when the attack took place at or about the same time on Red Fort wherein three innocent persons were killed. We also confirm the finding by the trial Court and the appellate Court that it was this mobile number which was found with the appellant when he was arrested. We have already held that the theory that this mobile number belonged to the prosecution and it was planted on the appellant is not only farfetched but totally un-believable. We have also explained the delay in recovery of this mobile number

from the accused on the basis of its IMEI number. The other corroborating evidence connecting the two mobile numbers namely, 9811278510 and 9811242154 and the IMEI Nos.44519944090240 and 449173405451240 and their interconnection with phone No.011 3355751 of BBC, Delhi, 2452918 (BBC, Srinagar), 2720223 of Farzana Farukhi and phone No.6315904 at computer centre is to be found in the evidence of Rajiv Pandit (PW-198), Inspector Mohan Chand Sharma (PW-229) and Inspector S.K.Sand (PW-230). The attempt of the investigating agency in analyzing the call details of these two numbers succeeded in establishing the connection of these two numbers with the number of BBC correspondent at Srinagar, the number of BBC correspondent at Delhi, the number at Farzana Farukhi's residence and the number at the computer centre in the name of Danish Mohd. Khan. But for this careful and meticulous analysis which was of very high standards, it would not have been possible to apprehend the appellant and to de-code the intricate and complicated maze of the conspiracy. The timing of the calls made from this number to BBC Srinagar bearing number 0194452918 and BBC, Delhi bearing No.011 3355751 are significant. It will be seen that the calls made to Srinagar were at 7.41 p.m., 7.42 p.m. and 9.27 p.m. while the calls made to BBC, Delhi were at 9.25 p.m., 9.33 p.m. and again 9.33-45p.m. Again, while the calls to Srinagar were made from the front side of the Red Fort, the other calls were made from the back side of the Red Fort which establishes the presence of this mobile phone in close proximity to Red Fort when the calls were made. That is a very significant aspect.

38. All this evidence would leave no option for us except to accept the prosecution's contention that this cell phone No.9811278510 and the other phone No. 9811242154 as also the two IMEI numbers were extremely significant aspects.

39. The next circumstance which makes these mobile cell phones significant was the evidence of PW-229, Inspector



Mohan Chand Sharma when he asserted that this mobile No.9811278510 was constantly used on 14.11.2000 from Zakir Nagar area. The witness claimed this on the basis of the cell ID. It is to be seen that when the said mobile was used its IMEI No. was 445199440940240 and the witness further asserted that during this period phone calls from this number were made to Pakistan. The witness explains that on 11.12.2000, the IMEI number was changed to 449173405451240 and a telephone call was made from this number to 0116315904 which is the landline number of computer centre run by the appellant. The making of the calls to Pakistan is extremely significant. This witness also explained in his evidence as to how on the basis of the cell ID and the call record of the two mobile cell phones, namely, 9811278510 and 9811242154 they zeroed on the location of the accused. This witness has explained that the earlier mentioned IMEI number 445199440940240 was also used in the second mobile number 9811242154. In his examination in chief, this witness has explained that the calls were received and made from and to this number 9811242154 from Zakir Nagar and Ghazipur. He also asserted in his conclusion that the cell ID of mobile number 9811242154 was at Zakir Nagar when the calls were made to Ghazipur and the cell ID was at Ghazipur when the calls were received on Zakir Nagar. This he said on the basis of the computer installed in their office. The witness also explained that the call details of the telephone number 9811242154 was collected from the official computer and he also proved the document Exhibit PW-229 A which data pertained to the period 22.7.2000 to 19.11.2000. He also connected the two telephones by saying that the calls were made on 8.9.2000 at about 11.37.53 hours to pager No.1949696 from both these mobile cell phones. He then asserted about the user of cell phone number 9811278510 on the day when the attack took place. He also established the connection of landline No.2720223 at Ghazipur which stood in the name of Farzana Farukhi and another number 6315904 which was a landline number at Knowledge Plus Computer Centre run by the appellant. It was on the basis of the caller ID

that the investigating team zeroed on these two points. We do not see any reason to dis-believe this witness. The calls to Pakistan from the concerned numbers is a very significant circumstance particularly because the appellant is admittedly a Pakistani national and was staying in India unauthorizedly.

40. The witness also asserted on the basis of Exhibit PW-198/B1 to B3 that there were calls made on 20.12.2000 to 22.12.2000 in which calling number could not be recorded as the calls were made from Pakistan to India. He explained it that during those days clipping facility was not available in India with Pakistan. He explained clipping facility to be Calling Line Identification facility. He has further asserted that these calls from Pakistan were received on mobile number 9811278510 when that mobile number was at Jamia Nagar, New Friends Colony, Kashmere Gate and Chandni Chowk and he further asserted that on 22.12.2000 when the calls were received on 14.32 i.e. at 2.32 p.m. the position of the mobile was at Darya Ganj. He also further explained that when the call was made from this number 9811278510 on 22.12.2000 at 7.41 p.m. the location of this number could be inside the Red Fort. Similarly he asserted about the calls having been made from this number at 8.24 p.m. when this telephone was at Kashmere Gate i.e. towards the back of Red Fort. He also asserted about the calls having been made from this number to BBC, Delhi when the location of cell phone was behind the back of Red Fort. Similarly, he spoke about the call having been made to BBC, Srinagar on its landline number from the same position when the cell phone caller was behind the back of the Red Fort. He also further asserted that on the same day i.e. on 22.12.2000 the calls were received on this cell phone number when this cell phone number was at Jamia Nagar and that the cell phone remained in the same position at Jamia Nagar constantly. There is no reason for us to dis-believe this evidence which was collected so painstakingly. What is most significant in this evidence is that this very cell phone number



was used to make the calls to and receive the calls from Pakistan.

41. The next significant circumstance is the evidence of Inspector J.S.Chauhan of BSF (PW-162). He was posted at Rajouri on 26.12.2000 and on that day a message was intercepted by BSF to the effect that a wanted militant in the shoot-out inside Red Fort case known as Ashfaq Ahmed was apprehended while other militant Abu Shamal was killed. According to this witness this message was being passed by LeT by a militant called Abu Sakar to a station in Khyber in Pakistan Occupied Kashmir. He proved the handwriting of one B.S. Virk DIG (West) and proved the document as Exhibit PW-162A. The other witness on this point is Constable Suresh Kumar, BSF Head Quarters Srinagar (PW-175). He was the one who intercepted the message on his wireless set to the effect that Delhi police had killed one militant Shamal Bhai and one more militant, namely, Abu Hamad Hazarvi whose real name was Ashfaq was apprehended. The message also suggested that militant Bilal Babar was successful in running away and was hiding in Delhi in his hide out. He asserted that he passed this message to the senior officers. In his cross examination, it has come that it was not a coded message and the same was being conveyed in Urdu. A very funny suggestion has been given to this witness that it was a coded message meaning thereby the factum of message was admitted. In his cross examination at the instance of the appellant the witness asserted that the message was being passed from Srinagar though he was unable to locate the exact point of the wireless set from which it was being sent. There is hardly any cross examination. Significantly, there is a reference to one Abu Bilal in the said intercepted message. Very significantly, it has come in the evidence of Inspector Pratap Singh (PW-86) and the evidence of S.K.Sand (PW-230) that when the appellant was apprehended and his wallet was checked, a negative was recovered from the wallet which was said to be of Abu Bilal. In fact Inspector S.K. Sand (PW-230) got this negative developed

into a photograph. He then asserted that the said Abu Shamal who was involved in the Red Fort shoot out case had died and an FIR No.9/2002 police station Special Cell was registered in this behalf. The said Abu Bilal was a proclaimed offender in FIR No.688 of 2000 Police Station Kotwali, Delhi and as per the evidence of Mohan Chand Sharma he was subsequently killed in an encounter. All this voluminous evidence would not only corroborate the prosecution version to show the significant role played by the appellant in handling both the cell phone numbers mentioned above. It is of no minor significance that on the apprehension of the appellant the news should reach Srinagar and from there to Pakistan Occupied Kashmir by way of wireless messages not only about the involvement of the appellant but also about Abu Shamal who was killed in the encounter as also Abu Bilal who was a proclaimed offender and was then killed in another encounter.

42. There is also some material brought by the prosecution about the calls from these numbers to one Sher Zaman who is said to be a Hawala dealer. The investigating agency raided the house of Sher Zaman on 12.01.2001. This was on account of the information received by the investigating agency from the appellant. In that raid, a sum of Rs.1,11,100/- was found at the said house and certain other documents like diaries were also found which were seized under the seizure memo. Mohd. Idrish (PW-74) who was the President of Dila Ram Afgani Market, Ballimaran Delhi has proved the seizure. The fact that the calls were made from cell phone 9811278510 were made by Mohd. Arif @ Ashfaq, the appellant, to the telephone No.3969561 was established by Kashi Nath (PW-46) who was representative of MTNL. He proved that this number was installed by him in premises No.5123, Sharif Manjil and that was the office of Sher Zaman. This evidence was also corroborated by Om Prakash (PW-46). Very significantly, the documents seized at Sher Zaman's office included a Visa of Islamic Republic of Pakistan and an identity card of NIIT etc. The seizure memo is proved by R.K. Ajwani (PW-83). He was,



at the relevant time, working in the Directorate of Enforcement as the Chief Enforcement Officer and deposed that the appellant in his presence identified the photograph to be of Sher Zaman @ Shabbir and accepted that he used to deliver hawala money. The visa slip of Islamic Republic of Pakistan was proved and marked as Exhibit PW-83/P1 and NIIT card No.1235-00304 with a photograph of Sher Zaman was proved and marked as Exhibit PW-83/P2. There were some other documents proved by this witness. The cross examination of this witness is also lackluster. Therefore, this evidence is also extremely significant to support the role played by the appellant in the conspiracy.

43. Even at the cost of repetition, we may mention that immediately after the appellant was apprehended with a pistol and the live rounds he spilled the beans and gave information about his other associate Abu Shamal on the basis of which information the investigating team reached G-73, Batla House at about 3.15 a.m. This is deposed to by Inspector Mohan Chand Sharma. The house was locked. The investigating team lay there and waited and at about 5.10 a.m. a man resembling the description given by the appellant entered the house. The house was knocked at and the police disclosed their identity but the same was not opened and therefore, it had to be opened by the use of force. As per the evidence of Inspector Mohan Chand Sharma (PW-229) the firing started from inside and the same was returned eventually leading to the death of Abu Shamal @ Faisal. It is very significant to note that from this house, one AK-56 rifle, two magazines, 32 live and 67 fired cartridges were recovered. Two live hand grenades, bullet proof jackets and khakhi uniform were also recovered. It is significant that there is virtually no cross examination on this aspect. The evidence of Inspector Mohan Chand Sharma (PW-229) suggests that immediately after his apprehension, the appellant had owned up the involvement in the Red Fort attack incident and that he showed his residence to recover the arms and ammunitions and also disclosed about his associate. There is

absolutely no cross examination about the incident at G-73, Batla House, Muradi Road, Okhla which place the police party was led by and discovered by the appellant. There is nothing to challenge the finding of the weapons & ammunition which were recovered at the instance of and as a result of information given by the appellant. All this has gone unchallenged in cross examination of Inspector Mohan Chand Sharma (PW-229). All this is supported by documentary evidence like DD entry bearing No.20 at Police Station New Friends Colony which mentioned about the firing going in Gali N.8, Batla House. Ram Singh, ASI (PW-92) proved this entry. Similarly, the receipt of information is entered as DD entry No. 28A at the same police station on 26.12.2000 at 6.40 a.m. Lastly, on the same day there is another entry DD No.22A at the same police station on the basis of information by Inspector Mohan Chand Sharma and FIR No.630 of 2000 was also registered. The other significant witnesses are Constable Ranbir Singh (PW-177) and ASI Ran Singh (PW-92). We need not go into the contents of these entries excepting to suggest that the information given by the appellant about Abu Shamal is reflected therein. This brings us to a very important discovery statement made by the appellant as also to the seizure in pursuance of the said discovery statement.

44. The appellant was formally arrested after he was brought back at about 6.45 a.m. by S.I. Harender Singh (PW-194). It is at this time that the mobile phone No.9811278510 was recovered from his possession. The seizure has been proved by Zile Singh (PW-148) which is Exhibit PW-148/ D. This witness proved that after his formal arrest by S.I. Harender Singh in the search of appellant, Rs.1000 in cash and the mobile phone of Motorola make was recovered. He then made a disclosure statement vide Exhibit PW-148 E. This recovery of mobile phone was also corroborated by Inspector Mohan Chand Sharma (PW-229). It had IMEI number 449173405451240 on which calls were made from mobile phone 9811278510 and as per the call details this was the



instrument used for mobile number 9811278510. We have already explained in the earlier part of the judgment that this evidence could not be rejected on the mere plea that the mobile number was not found or was not immediately taken in possession by the investigating agency though they apprehended him on the night of 25.12.2000. We have also pointed out as to how it would have been disastrous to waste time in writing the Panchnama instead of immediately acting on the information given by the appellant. We, therefore, see nothing unnatural or unusual in the recovery of the mobile phone 9811278510. After all, the subsequent results which followed discovery statement by the appellant i.e. the knowledge about G-73, Batla House and the encounter of Abu Shamal and the finding of his fire weapon and the ammunition etc. do justify the quick action on the part of the investigating agency. We, therefore, cannot view with suspicion the formal arrest of the appellant and the recoveries effected thereafter or the seizure memos executed.

45. After his arrest in the evening of 25.12.2000, the appellant firstly disclosed about Abu Shamal @ Faizal. After the encounter of Abu Shamal @ Faizal, when his formal arrest was made, he made disclosures vide Exhibit PW-148/E. There is no cross-examination of S.I. Zile Singh (PW-148) about the factum of the appellant having made a disclosure. S.I. Harender Singh (PW-194) is another witness to speak about the Exhibit PW-148/E. It has been baldly suggested to S.I. Harender Singh (PW-194) that the appellant was tortured. The discovery statement which was made by the appellant is to the following effect:-

> "Abu Shaimal had thrown his AK-47 rifle, magazine and hand grenade into the shrubs near nullah behind the wall of Red Fort. Abu Shad had thrown his AK-47 rifle into the shrubs grown at Vijay Ghat. I can point out the places and get recovered the weapons."

Another witness examined on this issue was S.I. Satyajit

Sarin (PW-218). He asserted in his examination-in-chief that the investigation team reached the Red Fort alongwith Mohd. Arif @ Ashfaq and the team was joined by Inspector Hawa Singh (PW-228). They requested two/three passersby to join the investigation, but they refused to join and, therefore, without wasting any further time, they reached the spot and there they found AK-56 Assault Rifle, two magazines tied to each other and a bandoleer of military green colour containing four hand grenades in four different packets. The site plan was prepared by Inspector Hawa Singh (PW-228) and the recovery of the arms and ammunition was made and the same were taken to P.S. Kotwali. The hand grenades were later on got defused. The chance finger prints were tried to be taken and photographs were taken.

46. The witness also gave a complete description of the four detonators and a slip attached to the hand grenades. A complete description of the shells was given by this witness. He also identified the said rifles, magazines, knife and detonators, as also four hand grenades and the bandoleer in Court. The other witness to support this discovery and the recoveries pursuant thereto is S.I. Amardeep Sehgal (PW-227). He also gave a complete story as deposed by the earlier witness. This evidence was further corroborated by the evidence of N.B. Bardhan, Sr. Scientific Officer in CFSL (PW-202), who was present at the time of recovery of hand grenades being a ballistic expert. Another witness is S.K. Chadha (PW-125). We have already discussed earlier the evidence of N.B. Bardhan about the nature of the rifles, one found at Batla House and the other recovered at the instance of the appellant from the Red Fort wall. He has also spoken about the nature of the hand grenades. This discovery was attacked vehemently by Ms. Kamini Jaiswal, learned counsel appearing on behalf of the appellant, in all the aspects. The learned counsel described this recovery as a farce and also asserted that this discovery could not be said to be a discovery at all in view of the fact that in all probability, the placement of the rifles, bandoleer etc. must have



known to the police for the simple reason that the whole area was almost combed by number of police personnel for the whole night and even thereafter i.e. in the night of 22.12.2000 and the morning of 23.12.2000. We have seen the recovery Panchnama proved by the witnesses at Exhibit PW-227/A. It has to be borne in mind that both the rifles and the ammunition have not only been identified by the witnesses but it has also been proved by the prosecution as to how they were used and the fact that they were used actively in the sense that they were fired also. We have already discussed the evidence of the Ballistic experts, which went on to corroborate the version by the prosecution. The learned counsel pointed out that this weapon was found near to the slip which was recovered on the night of 22.12.2000 itself. She also pointed out that weapon could not be said to be hidden. They were just lying in the bush and, therefore, it is just impossible to infer that they were not seen by the police. In short, the learned counsel suggested that this is a fake discovery and the police already knew about the AK-56 Assault Rifle, magazines and a bandoleer etc. She pointed out that one other witness, namely, Abhinender Jain (PW-28) was a part of the team in recovering the weapons allegedly at the instance of the appellant and he did not speak about the disclosure made by the appellant on 26.12.2000. We shall revert back to this discovery in particular and the law relating to Section 27, Evidence Act a little later.

47. Another discovery at the instance of the appellant was on 01.01.2001 vide Disclosure Statement (Exhibit 28/A). However, there is one more important discovery at the instance of the appellant, which is proved at Exhibit 168/A. It was made on 01.01.2001 and has been proved by R.S. Bhasin (PW-168) and S.I. Satyajit Sarin (PW-218). In this discovery, the appellant disclosed that out of the hand grenades which he had brought from Pakistan, three were hidden in the bushes inside boundary wall of Jamia Milia Islamia University, which spot is just behind the computer centre run by the appellant. Accordingly, this discovery statement was recorded by R.S. Bhasin (PW-168)

and he organized a raiding team consisting of Inspector Hawa Singh (PW-228), Inspector Mohan Chand Sharma (PW-229) and five others, who were not examined by the prosecution. The team went to New Friends Colony at 2.25 pm and appraised SHO Gurmeet Singh (PW-213), who alongwith two others (not examined), joined the investigation. After taking the permission from Dr. Farukh and Dr. Mehtab, one Raghubir Singh (PW-209) was asked by the authorities to join the investigation. One Devender Kumar (PW-208) also joined the raiding party. Thereafter, at the instance of the appellant, three hand grenades were recovered kept concealed. A seizure memo was also executed vide Exhibit PW-168/B and a Rukka was also prepared, on the basis of which a new case was sought to be registered at P.S. New Friends Colony. One more disclosure statement was made vide Exhibit PW-168/D, where the appellant disclosed and agreed to recover more hand grenades and AK-56 rifle which was recovered from Safa Qudal, Sri Nagar. This version was supported by S.I. Satyajit Sarin (PW-218) as also S.I. Amardeep Sehgal (PW-227) and Inspector Hawa Singh (PW-228). There is nothing to disbelieve this discovery of hand grenades which hand grenades were ultimately identified and their potency was proved by N.B. Bardhan (PW-202). A feeble contention was raised by Ms. Jaiswal, learned counsel that this discovery of the hand grenades should not be believed because it is belated. She pointed out that the appellant was in the police custody right from the night of 25.12.2000 and the discovery statement was made and recorded on 1.1.2001. Insofar as the discovery of grenades is concerned, we must say that nothing much was argued. The significance of the grenades having been hidden right behind the computer centre near the compound wall of Jamia Milia Islamia University cannot be ignored. The appellant has no explanation as to why the three hand grenades were hidden right behind the computer centre.

48. The learned Solicitor General very forcefully argued with reference to various documents which supported this discovery



and pointed out that immediately after the recovery of these hand grenades, they were seized properly and this recovery was supported by the independent evidence of Devender Jain (PW-208) and Raghubir Singh (PW-209). He also pointed out that there is nothing in the cross-examination of these two individual witnesses to dispute or doubt the recovery of the hand grenades at the instance of the appellant. It is to be noted that police could not have produced the foreign made hand grenades to be planted either at the Red Fort or at Jamia Milia Islamia University behind the computer centre. Insofar as the discovery of hand grenades at Jamia Milia Islamia University is concerned, we have no doubts about its genuineness and we accept the same. Merely because the appellant was in custody for 4-5 days and decided to disclose the information only on 01.01.2001, would not be a reason by itself to doubt the same or to have any suspicion on the same. In the case of this nature and magnitude and also considering the nature of the appellant who was a Pakistani national and was allegedly sent to do terrorist acts in India and as such a tough terrorist, was not expected to give easily the information unless he was thoroughly interrogated. Considering the peculiar nature of this case, we accept the discovery of grenades at the instance of the appellant. Same thing can be stated about the earlier discovery dated 26.12.2000 of the AK-56 Assault Rifle, magazines, bandoleer etc. The very fact that these weapons were proved to have been used would corroborate the discovery. If the general public refused to join the investigation to become Panchas, that cannot be viewed as a suspicious factum and on that basis, the investigative agency cannot be faulted. After all, what is to be seen is the genuineness and credibility of the discovery. The police officers, who were working day and night, had no reason to falsely implicate the appellant. They could not have produced AK-56 Rifles and the grenades of foreign make from thin air to plant it against the appellant. It has been held in Suresh Chandra Bahri v. State of Bihar [1995 Suppl (1) SCC 80] that even if the discovery statement is not recorded in writing but there is definite

evidence to the effect of making such a discovery statement by the concerned investigating officer, it can still be held to be a good discovery. The question is of the credibility of the evidence of the police officer before whom the discovery statements were made. If the evidence is found to be genuine and creditworthy, there is nothing wrong in accepting such a discovery statement. We do not see any reason to accept the argument that the police must have already known about the weapon. Considering the fact that this attack was on a dark night in the winters and the guns were thrown in the thick bushes then existing behind the Red Fort wall, it is quite possible that they were missed by the investigating agency. At any rate, the recovery of these guns from the spot near which the whole horrible drama took place and the appellant having knowledge about the same and further the proved use of these weapons and their fire-power, would persuade us to accept this discovery. Again, we cannot ignore the fact that the factum of discovery has been accepted by both the Courts below.

49. There are some other significant circumstances relied on by the prosecution to show that the appellant, who admittedly was a Pakistani national and had unauthorizedly entered India, wanted to establish his identity in India and for that purpose, he got prepared a fake and forged ration card and on that basis, applied for a driving license and also opened bank accounts. The only purpose in doing this was to establish that he was living in Delhi legitimately as an Indian national.

50. On his arrest on 25.12.2000, a ration card was recovered and seized from the very house at 308A, DDA flats, Ghazipur, Delhi. This card bore the number 258754. This was in the name of Ashfaq Ahmed, S/o Akram Khanat, R/o F-12/12, Batla House, Okhla, New Delhi. S.R. Raghav, retired Food and Supply Officer, Delhi (PW-7) entered the witness box to suggest that this card was not issued by his department i.e. Circle 6, Okhla. Other witness is Ms. Anju Goel, UDC (PW-164), who deposed that the appellant's ration card did not bear



her signature. She also pointed out that the signature appearing in Exhibit PW-164/A (ration card) was not her signature. There is no effective cross-examination of both these witnesses. Dharamvir Sharma, FSO, Circle 3, Bijwasan, Delhi (PW-165) also referred to the aforementioned ration card proved by Ms. Anju Goel (PW-164) and asserted that the signature and the handwriting on the said card was not that of Ms. Anju Goel. Manohar Lal, UDC, Department of Education (PW-172) deposed that the appellant's ration card was not issued from Circle 6 of the Ration office. Kushal Kumar (PW-174) deposed that he had made entry of ration card of the appellant in his register at his fair price shop. Ms. Sunita, LDC, Food & Supply Office, Circle 7 (PW-191) gave specimen of two rubber stamps and they did not tally with the rubber stamps on the ration card of the appellant. There is absolutely no cross-examination. There is a report proved by Yashpal Singh, Supply Inspector, Department of Food and Supply, Ghaziabad (PW-2), being Exhibit PW-2/A, to the effect that no ration card in the name of Mohd. Arif @ Ashfaq (appellant) was ever issued by their office. Thus, it is obvious that the appellant got prepared a fake ration card, where name of his wife was mentioned as Bano and residence as 102, Kela Bhatta, Ghaziabad, where he had never resided. This ration card, significantly enough, was recovered from his house at 308A, DDA flats, Ghazipur, Delhi. Yashpal Singh (PW-2) and Rajbir Singh, Area Rationing Officer, Food and Civil Supply Department, Ghaziabad (PW-3) proved that the ration card was in the name of Azad Khalid (PW-1) and there was no ration card in the name of Ashfaq Ahmed S/o Akram Khanat. Azad Khalid Siddique, Correspondent, Sahara TV (PW-1) himself stepped into the witness box and deposed that there was one ration card in his name and other in his father's name, which were issued at the address of 102, Kela Bhatti, Ghaziabad, which address was falsely given by the appellant because the appellant had never stayed at the said address. Thus, it is obvious that the ration card was fake and fabricated. The factual information on the ration card also does not tally at all.

51. The investigating agency, on 3.1.2001, seized certain important documents, they being a learner's license issued by Shaikh Sarai Authority bearing Exhibit No. PW-13/C, Form No. 2 of Ashfaq Ahmed for renewal of learner's license bearing Exhibit No. PW-13/D and a photocopy of the ration card of Ashfaq Ahmed bearing Exhibit No. PW-13/E. The seizure memo is Exhibit PW-13/B. These documents have been proved by S.I. Rajinder Singh (PW-137). This was in order to do the verification of the driving license of the appellant. The witness suggests that he enquired from Ms. Mamta Sharma (PW-16), ARTO, who confirmed that the same was a genuine driving license having been issued by her office and hence, proceeded to seize the supporting documents. It is obvious that the said driving license was sought for on the basis of the ration card in the name of the appellant, which was obviously fake, as we have already shown above for the simple reason that the address given on this driving license was not the genuine address of the appellant, whereas it was in fact the address of Azad Khalid Siddique (PW-1) who had nothing to do with the appellant. In this driving license also, the address given by the appellant was B-17, Jangpura, Bhogal and it was issued by Sarai Kale Khan Authority. He obviously did not reside on this address which is clear from the evidence of Narayan Singh (PW-6). Thus, not only did the appellant got himself a fake and forged ration card, but on this basis, also got prepared a fake learning license, in which also, he gave a false residential address. All this was obviously with an idea to screen himself and to carry on his nefarious activities in the Indian cities. Nothing much has come in the cross-examinations of these witnesses. We have, therefore, no hesitation to hold that the appellant used a forged ration card and got a driving license giving a false address.

52. The appellant, in order to legitimize his residence in Delhi, started a computer centre at House No.18C, Gaffur Nagar, Okhla. Danish Mohd. Khan (PW-44), Mohd. Khalid (PW-36), Faizal Mohd. Khan (PW-56), Shahvez Akhtar (PW-113)



and Shahnawaz Ahmad (PW-163) are the witnesses on this aspect. Danish Mohd. Khan (PW-44) deposed that his cousin Faizal had opened a cyber cafe with the appellant and this was told to him in September, 2000. Previously both of them used to reside in the house of Nain Singh (PW-20). Since Faizal did not have an identity proof, he borrowed the identity card of this person and since the card was in his name, the phone connection in this computer centre was also in his name. He, undoubtedly, resiled from his statement before the police that he applied for a telephone connection in his name. However, there is no cross-examination of this witness about what was told to him by Faizal. In his cross-examination at the instance of the Public Prosecutor, he admitted that Faizal had asked him to help him in getting telephone connection. He also admitted that Faizal had told him that for getting an internet connection, a telephone was required. The telephone number of the computer centre was 6315904 which was in the name of this witness.

53. The other witness in this behalf is Faizal Mohd. Khan (PW-56) himself who deposed that he was residing in the house of one Nain Singh (PW-20) at Okhla Village on a monthly rent of Rs.1,000/- and that he had a personal computer on which he used to practice. He further deposed that one Adam Malik (PW-31) also used to reside in the said house and it was he who brought the appellant with him in May, 2000. It was this Adam Malik (PW-31) who introduced him to the appellant and told him that the appellant is a resident of Jammu. He wanted to open a computer centre but was not having enough money and it was Adam Malik (PW-31) who informed the appellant that the witness wanted to open a computer centre and offered financial help. He managed Rs.70,000/- and the appellant put Rs.1,70,000/- and that is how the computer centre was opened. The witness stated that the twosome i.e. himself and the appellant employed one Shahvez Akhtar (PW-113) and Shahnawaz Ahmad (PW-163) as faculty members on the condition that they would get salary only when the computer

centre starts earning profit. He then deposed that he used the ration card of Danish Mohd. Khan (PW-44) and a telephone connection was obtained in the name of Danish Mohd. Khan (PW-44) and was installed at the computer centre 'Knowledge Plus'. We have already referred to his assertion that the appellant had a mobile phone. In his cross-examination, nothing much has come about the contribution given by the appellant of Rs.1,70,000/-. He also asserted that it was the appellant who managed to take the premises of computer centre on lease. Shahvez Akhtar (PW-113) and Shahnawaz Ahmad (PW-163) have supported this. Adam Malik (PW-31) also confirmed that he was the one who arranged for the accommodation of the appellant in the house of Nain Singh (PW-20). To him, the appellant had told that he was a Kashmiri and doing the business of selling shawls. Nain Singh (PW-20) also supported the theory of the appellant contacting him through his earlier tenant Adam Malik (PW-31). To the same effect is the evidence of Aamir Irfan (PW-37) and Rashid Ali (PW-232). All this clearly goes on to show that the appellant was all the time making false representation, firstly, on his doing business of selling shawls, secondly, on carefully entering as a tenant in the house of Nain Singh (PW-20), thirdly, on defrauding Danish Mohd. Khan (PW-44) for opening a computer centre for which he contributed Rs.1,70,000/- and lastly, successfully getting a telephone installed at the computer centre. All this was nothing but a deliberate effort to find a firm foot hold on the Indian soil to carry out his nefarious design.

54. We have also gone through the evidence of Gian Chand Goel (PW-21), which establishes the connection of the appellant with House No.G-73 Batala House, Murari Road, Okhala, New Delhi, where the encounter took place in which the appellant's companion Abu Shamal was killed. In his evidence, Gian Chand Goel (PW-21) specifically stated that he did not know anything about the appellant and that he had rented the house to Rashid Ali (PW-232) on 6.12.2000 i.e. barely 16 days earlier to the incident at a monthly rent of



Rs.1,500/-. He also deposed that on 7.12.2000, two other boys were brought by him and all the three started residing on the first floor of his house. He deposed that Rashid Ali (PW-232) who was a student of Jamia Milia Islamia University and the appellant were the tenants of Nain Singh (PW-20) and later on, they shifted into his house as tenants. He also referred to the encounter dated 26.12.2000, wherein Abu Shamal was killed, though he did not know the name of Abu Shamal.

55. Rashid Ali (PW-232) had a significant role to play in this whole affair. He asserted that he was a tenant of Nain Singh (PW-20) in 1998 while studying in Jamia Milia Islamia University in B.A. IInd Year. He was friendly with one Hamid Mansoori and Adam Malik (PW-31). He came to know the appellant who was residing in the house of Nain Singh (PW-20) as a tenant. He also confirmed that the appellant was having a mobile phone with him. On 8.12.2000, the appellant took him to Roza Iftar Party at Laxmi Nagar. Instead of the Iftar Party, the appellant got married to a lady on that day. Significantly enough, the appellant had already gone as a tenant to Gian Chand Goel (PW-21), however, it seems that still he was making out as if he was residing in PW-20 Nain Singh's house and in an important function like his marriage, he took Rashid Ali (PW-232) telling him that they were going for an Iftar Party in the month of Ramzan. All this suggests that the appellant was very particular about his own personal details and made various false representations to all those in whose contact he came. Needless to say that he used all these witnesses to his own benefit for carrying out his evil design in pursuance of the conspiracy.

56. This brings us to the evidence of Nain Singh (PW-20) and the fantastic theory that the defence gave about the role played by this witness. The said witness was examined to show that House No. 97-A, Okhla Village was in the name of his mother and while he stayed on the ground floor, his mother had rented out the first floor and the second floor. He asserted that

Adam Malik (PW-31) was the tenant on the second floor and he had brought the appellant to his mother and his mother had rented out the room to him at the rent of Rs.1,200/- per month. He also asserted that he asked Adam Malik (PW-31) to get the house vacated, whereupon, the appellant vacated the house after about one and a half months. He was cross-examined in detail. It was brought out in his cross-examination that he did not have any documentary evidence regarding the appellant remaining in that house as a tenant. It was suggested to him that he was working as an Intelligence man in the Cabinet Secretariat. He was made to admit that he could not disclose the present official address or the places where he moved out of Delhi. He was made to say "I cannot say whether I am not disclosing these addresses as my identity in the public would be disclosed". He also refused to show his identity card in the open Court while it was shown to the Court. He was made to say "I cannot disclose whether I am working for RAW". He then clarified that no fund was at his disposal for going out of Delhi, but he was paid for the Railway warrant or air ticket. Strangely enough, a suggestion was given to the witness to the effect that the appellant never took the aforesaid house from his mother on rent or that he was introduced by any of the other tenants of that house. All through in his cross-examination, it was tried to be suggested that the appellant never stayed in his house as a tenant. That is all the cross-examination of this witness. In his statement under Section 313 Cr.P.C., the appellant suggested that he used to work for X-Branch, RAW (Research & Analysis Wing) since 1997 and he had come to Kathmandu in June, 2000 to give some documents to one Sanjeev Gupta on a Pakistan Passport bearing No. 634417. He spoke that there was a party named Paktoonmili Party and RAW was supporting that party since last 30-35 years. He stated that one Sagir Khan was a member of that party and he was arrested by the police of Pakistan alongwith his younger brother and he received this news in Kathmandu and spoke to Sanjeev Gupta in this regard. He further claimed that his cousin had also advised him not to return to Pakistan for the time being and that Sanjeev Gupta



advised him to go to India and he accompanied him upto Rauxol and from there, he (the appellant) came to India by train. He claimed that the address of Nain Singh (PW-20) was given to him by Sanjeev Gupta as also his telephone number being 6834454. He then claimed that Nain Singh (PW-20) gave a room in his house for his stay and advised him not to tell his name and address to anyone and to describe himself as a resident of Jammu. He claimed that Nain Singh (PW-20) used to do business of money lending and the appellant used to help him in maintaining his accounts. He then claimed that Nain Singh (PW-20) helped him to open the computer centre. Thereafter, Nain Singh (PW-20) got some money through Sanjeev Gupta from Nepal. The amount was Rs.7 lakhs. However, Nain Singh (PW-20) did not disclose about receiving of that huge amount and whenever he was questioned about any amount, Nain Singh (PW-20) used to avoid such questions. He then claimed to have contacted his family members who asked him to speak to Sanjeev Gupta and after he spoke to Sanjeev Gupta, he came to know about Rs.6,50,000/- having been sent to Nain Singh (PW-20) by him. The appellant then claimed that Nain Singh (PW-20) got his account opened in HDFC Bank and also got a cheque book which was shown to him. It was at his instance that the appellant was asked to sit at the computer centre and his cheque book of the HDFC bank used to remain with Nain Singh (PW-20). According to the appellant, Nain Singh (PW-20) got only one cheque signed by him and whenever he needed money, he used to take it from Nain Singh (PW-20) in the sum of Rs.500/- to Rs.1,000/-. He then claimed that one Chaman Lal in Chandni Chowk and one Sardar Ji in Karol Bagh were also engaged in the business of money lending and the appellant used to collect money from them on behalf of Nain Singh (PW-20). He then went on to suggest that on the birthday party of his son, Nain Singh (PW-20) got him introduced to Inspector R.S. Bhasin (PW-168) and Inspector Ved Prakash (PW-173). However, he persisted in demanding money from Nain Singh (PW-20) on which Nain Singh (PW-20) used to get annoyed and because of that, he

got the appellant involved falsely in this case. He claimed that on 25.12.2000, Nain Singh (PW-20) called him from his computer centre to his house on the plea that Inspector R.S. Bhasin (PW-168) and Inspector Ved Prakash (PW-173) had to take some information from him and he accordingly came to the said house. Thereafter, these two persons who were in plain clothes and had come to the house of the appellant in a white maruti zen car took him to a flat in Lodhi Colony, where both the Inspectors alongwith one Sikh Officer interrogated the appellant about his entire background and thereafter he was dropped to his house by the same persons. Nain Singh (PW-20) was not present at that time, but his wife informed him about the telephonic call received from his in-laws at Ghazipur regarding dinner in the evening. Thereafter, he took a bus and reached the house of his in-laws and asked them whether they had made a call which they denied to have made. He claimed to have finished his dinner by 10.00 pm when the police party raided the house. The appellant stated that the police party threatened him that if he spoke much, he will be shot dead and his signatures were obtained on a blank paper. Then he was tortured and was constantly kept in the custody of Inspector R.S. Bhasin (PW-168), S.I. Murugan and Constable Jai Parkash. He then admitted to have put his signatures on the blank paper under the fear of torture to himself and his sister-in-law, mother-in-law and brother-in-law. He further said that he did not know any other accused excepting his wife Rehmana Yusuf Farukhi. He claimed that he was implicated in this case only because he is a Pakistani national.

57. All this would go to suggest that Nain Singh (PW-20) had a very vital part to play in his (appellant) being brought to India and being established there. Very strangely, all this long story runs completely counter to the cross-examination of Nain Singh (PW-20), as has already been pointed out. In his cross-examination, the whole effort on the part of the defence was to show that the appellant was never a tenant of Nain Singh (PW-20) and had never stayed at his place, whereas his defence



was completely contrary to this theory wherein the appellant has claimed that he was intimately connected with Nain Singh (PW-20), inasmuch as, he used to look after his accounts and used to assist him for recovery of the amounts loaned by Nain Singh (PW-20) to various other people. The learned counsel did not even distantly suggest to PW-20 Nain Singh the long story stated by the appellant in his statement under Section 313 Cr.P.C. There is not even a hint about the role played by Sanjeev Gupta in Nepal or the amounts allegedly sent by Sanjeev Gupta to Nain Singh (PW-20) and Nain Singh (PW-20) having refused to part with the amount in favour of the appellant. There is nothing suggested to Nain Singh (PW-20) that the appellant was working for the X-Branch, RAW, much less since 1997, while he was in Pakistan. The learned defence counsel Ms. Jaiswal very vociferously argued that Nain Singh (PW-20) was actually working for an organization "RAW". She also pointed out that a clear cut suggestion was given about his RAW activities and his being a member of RAW, in his cross-examination. She also pointed out that there was some contradiction in the statement of Nain Singh (PW-20) and Adam Malik (PW-31) about letting out the house to the appellant. Much was made of the fact that Nain Singh (PW-20) refused to disclose his identity and shown the identity card only to the Court. From all this, the learned counsel tried to argue that Nain Singh (PW-20) was a RAW agent and was also involved in business of money lending. She also pointed out that though Nain Singh (PW-20) claimed that the accused had vacated the house, the evidence disclosed that the appellant stayed at Nain Singh's house till December. She also pointed to the contradictory statement made by Gian Chand Goel (PW-21). According to the learned counsel, while earlier the witness said that the house was let out to Rashid Ali (PW-232) on 6.12.2000 and the appellant used to meet him, later on in the same para, he said that the appellant and Rashid Ali (PW-232) both, were his tenants. Then the said witness claimed in his further cross-examination that the appellant was his only tenant. From all this, the learned counsel urged that there was a very

deep possibility of Nain Singh (PW-20) being a RAW agent and as such having given shelter to the appellant and that the appellant stayed throughout in Nain Singh's house only. Very significantly, this claim of the learned defence counsel goes completely counter to the cross-examination where the only suggestion given is that the appellant was never a tenant of Nain Singh (PW-20) and never stayed at his house.

58. The learned counsel also invited our attention to the evidence of Aamir Irfan (PW-37), Yunus Khan (PW-4) as also Ved Prakash (PW-173). We have considered all these contentions but we fail to follow the interesting defence raised by the appellant in his statement under Section 313 Cr.P.C. and complete contradictory stand taken while cross-examining Nain Singh (PW-20). We also find nothing in the long story woven by the appellant in his statement under Section 313 Cr.P.C. about his activities as a RAW agent and about his being sent to Nain Singh (PW-20) by Sanjeev Gupta from Nepal. We do find that there was reluctance on the part of Nain Singh (PW-20) to show his identity card which he only showed to the Court, but that does not, in any manner, help the defence case. Even if it is accepted that Nain Singh (PW-20) was working for RAW, it does not give credence to the defence theory that it was Nain Singh (PW-20) who brought the appellant in India, arranged for his stay, took his services, arranged for his computer centre and then ultimately, falsely got him implicated. In the absence of any such suggestion having been made to Nain Singh (PW-20), the tall claims made by the defence cannot be accepted. We have considered the evidence of all these witnesses, namely, Nain Singh (PW-20), Adam Malik (PW-31), Aamir Irfan (PW-37), Yunus Khan (PW-4) and Ved Prakash (PW-173), but the same do not persuade us to accept the defence theory. It is obvious that the appellant was staying with Nain Singh (PW-20) for some time and then used to interact with the other tenants like Rashid Ali (PW-232) and Adam Malik (PW-31) and at that time, he claimed to be belonging to Jammu and claimed to be in the business of selling shawls. It is during that period



alone that he got married to Rehmana Yusuf Farukhi barely a fortnight prior to the incident at the Red Fort. We, therefore, reject the argument of Ms. Kamini Jaiswal on this aspect.

59. This takes us to the various bank transactions which throw much light. Prosecution had claimed that when the diary was recovered on the arrest of the appellant, the investigating agency found one telephone number belonging to Sher Zaman @ Shabbir who was found to be an Afghan national and according to the prosecution, he used to supply Hawala money to the appellant. According to the prosecution, the appellant used to deposit the money so received in his own account with HDFC Bank, opened on the basis of fake documents. He also used to deposit this money in two bank accounts of Nazir Ahmad Qasid (original accused No. 3) and Farooq Ahmed Qasid (original accused No. 4). According to the prosecution, this money which the appellant used to deposit in the account of Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) was distributed to the other terrorists in Srinagar. Ms. Jaiswal, learned counsel appearing on behalf of the appellant, claimed that the prosecution had not been able to prove the link in between Sher Zaman @ Shabbir and the appellant. According to her, the claim of the prosecution that Rs.29,50,000/- was deposited in the accounts of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) was also not established. The learned counsel argued that the prosecution was able to barely prove deposit of Rs.5 lakhs, in the account of appellant but had failed to prove that the appellant had deposited Rs. 29,50,000/- in other accounts. According to the learned counsel, even this claim of the prosecution that was based on the evidence of handwriting expert, was not properly proved. The learned counsel also pointed out that while Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) were acquitted, the others including Sher Zaman @ Shabbir (A-13), Zahur Ahmad Qasid (A-17), Bilal Ahmad Kawa (A-18) or Athruddin @ Athar Ali (A-19) were never brought to the trial as they were shown to be absconding. At this juncture, we cannot

ignore the evidence of Kashi Nath (PW-46), an employee of MTNL (PW-46), who deposed that telephone number 3969561 was installed by him in premises No. 5123 which was the office of Sher Zaman @ Shabbir (A-13). Very significantly, this number was also found in the call details of the appellant having Mobile No. 9811278510. This version of Kashi Nath (PW-46) was corroborated by Om Prakash (PW-47). Again Idrish (PW-74) deposed that the cash of Rs.1,01,000/- was recovered from the shop/office of Sher Zaman @ Shabbir (A-13), which shop/ office was raided pursuant to the statement of the appellant.

60. First, the fact that Sher Zaman @ Shabbir (A-13), Zahur Ahmad Qasid (A-17) and Bilal Ahmad Kawa (A-18) being absconding, does not and cannot in any manner establish the defence case to the effect that these persons were never concerned with Hawala money through the appellant or otherwise. As regards the Sher Zaman @ Shabbir (A-13), the investigating agency could not have reached the shop of Sher Zaman @ Shabbir (A-13) unless the claim of the investigating agency that they found his number in the diary is true. The fact of the matter is that the investigating agency did reach his shop as mentioned in the earlier part of this judgment. Therefore, it cannot be disputed that the appellant had some connection with Sher Zaman @ Shabbir (A-13) who was then established to be an Afghan national and who remained absconding till date. The learned counsel for the defence also argued that Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) have been acquitted by the High Court and that there is no appeal by the State against their acquittal. That may be true, but that would be a separate subject. At least prima facie, that does not help the appellant at all. We will go through the reasons for acquittal, after we have considered the evidence regarding the bank transactions. We will consider this evidence now in details.

61. It has come in the evidence that the appellant opened an account on 13.9.2000 with HDFC Bank, New Friends Colony, New Delhi, where his address was given as 102, Kaila



Bhatta, Ghaziabad. The other address was given as 18, Gaffur Nagar, Okhla, New Delhi. The document on the basis of which this account was opened was the driving license of the appellant. The first thing that comes to our mind is that both these addresses were false. While the appellant had never stayed at 102, Kaila Bhatta, Ghaziabad, his address 18, Gaffur Nagar, Okhla, New Delhi was totally incorrect. It has come by way of evidence of Sushil Malhotra (PW-210) that on the cash memo of the fees, the appellant wrote his address as 18, Gaffur Nagar, Okhla, New Delhi. In fact, the appellant had never resided on this address, the date of the cash memo being 28.3.2000. The prosecution had also examined Iqbal Hassan (PW-79) who had confirmed that no such person has ever lived in this house, particularly, on the relevant dates. Insofar as his learning license is concerned, the appellant has given his address as B-17, Jangpura. On that basis, he got his learning license from Sarai Kale Khan Authority. He has never stayed in this address either. It has also come in the evidence of Inspector S.K. Sand (PW-230) that learner's license bearing address B-17, Jangpura was fake and he further asserted that the area of Jangpura never falls under the authority of RTO, Sarai Kale Khan. There is a report of the Motor licensing authority vide Exhibit PW-230/C that the learner's license was fake. All this was confirmed by Narayan Singh (PW-6), UDC, Sarai Kale Khan Authority and Ajit Singh Bajaj (PW-52). Insofar as driving license is concerned, there is evidence of Hazarul Hasan, RTO Office, Ghaziabad that this driving license was issued from Ghaziabad in favour of the appellant through Ms. Mamta Sharma (PW-16), ARTO vide Exhibit PW-13/A which is a copy of the driving license and Exhibit PW-22/C which is also a copy of the driving license. Significantly enough, for this, the address was shown to be 102, Kaila Bhatta, Ghaziabad. This was for reason that unless the appellant had shown himself a resident of Ghaziabad, he could not have got the driving license issued through Ghaziabad authority. Therefore, his address found on the driving license as 102, Kaila Bhatta, Ghaziabad was itself a false address. This address was on the

basis of the ration card which was a fake ration card in the name of appellant's wife Bano, who was allegedly residing at 102, Kaila Bhatta, Ghaziabad. All this was proved to be false by Azad Khalid (PW-1), Yashpal Singh, Supply Inspector, Department of Food and Supply, Ghaziabad (PW-2) and Rajbir Singh, Area Rationing Officer, Food and Civil Supply Department, Ghaziabad (PW-3). There is another ration card which he got prepared in which his wife's name was shown as Mrs. Bano alongwith children. The address of this ration card was shown to be F-12/12, Batla House, Okhla, New Delhi, where he never resided. Therefore, on the basis of his driving license, when he got his HDFC Bank account opened, it is obvious that he had given false information, much less regarding his residential address which was also mentioned on his driving license and which was not true.

62. The prosecution proved 9 cash deposit slips of Grindlays Bank, the total amount being Rs.29,50,000/-. According to the prosecution, these were in appellant's handwriting while depositors' name has been mentioned as Aslam, Salim Khan, R.K. Traders and Rashid. We have already discussed about the fake residential address given by the appellant while opening the account with HDFC Bank. The details of this account were proved by Sanjeev Srivastava (PW-22). He proved Exhibits PW-22/B, C and F. Exhibit PW-22/F is a copy of the account statement of Rehmana, the wife of the accused which suggests that from 15.9.2000 onwards upto 14.12.2000, on various dates, amounts like Rs.10,000/-, Rs.40,000/-, Rs.50,000/-, Rs.1,50,000/-, Rs.2,00,000/- etc. were deposited in cash. The total amount deposited was Rs.5,53,500/-. There is absolutely no explanation by the appellant about the source from which these amounts came. Corroborating evidence to the evidence of Sanjeev Srivastava (PW-22) is in the shape of Rishi Nanda (PW-23) and Inspector Ved Prakash (PW-173). Ved Prakash (PW-173) had found the ration card in the name of the appellant, his driving license, cheque book of HDFC Bank in his name, Passport of



Rehmana (wife of the appellant), a cheque book of State Bank of India, a digital diary and a personal diary and some other documents. From these, Ved Prakash (PW-173) found that there were three accounts, namely, in Standard Chartered Bank, Connaught Place, New Delhi in the names of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) which had account numbers 32263962, 28552609 and 32181669 respectively. He also detected account number 0891000024322 in HDFC Bank which was opened with the help of the driving license. Another witness S.I. Harender Singh (PW-194) had prepared the memo of house search. P.R. Sharma (PW-9), who was from State Bank of India, deposed that account no. 5817 was belonging to Rehmana Yusuf Farukhi in which amounts of Rs.50,000/-, Rs.1,50,000/-, Rs.52,500/- and Rs.30,000/- were deposited. He proved the relevant deposit slips also. Another witness O.P. Singh (PW-64) corroborated the evidence of P.R. Sharma (PW-9). The most important link with the HDFC account as also with the deposit slips of Standard Chartered Grindlays Bank came to light. Dr. M.A. Ali (PW-216), SSO, CFSL, CBI, New Delhi, on the basis of his report, deposed that the account opening form of HDFC Bank of the appellant, 9 deposit slips of Standard Chartered Grindlays Bank as also deposit slips of the State Bank of India account of Rehmana Yusuf Farukhi bore the handwriting of the appellant. This clinches the issue about the account opened in HDFC Bank. It is to be noted that there were three accounts in Standard Chartered Grindlays Bank in the name of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) which had account numbers 32263962, 28552609 and 32181669 respectively. The investigating agency collected the documents from Standard Chartered Grindlays Bank including 9 cash deposit receipts as also documents regarding the account numbers 32263962, 28552609 and 32181669. 9 cash deposit slips are purportedly in the name of Aslam, Salim Khan, R.K. Traders and Rashid and all these have been proved to be in the handwriting of the appellant. We have already discussed about the account of HDFC Bank which was opened

on the basis of the driving license having a false address. We have also referred to the bank documents in respect of Rehmana Yusuf Farukhi and the amounts having been deposited in her account and also the pay-in (deposit) slips in respect of her accounts. It must be noted that at least one document out of these being questioned document No. 30B has been proved to be in the handwriting of the appellant which has been proved by the expert evidence of Dr. M.A. Ali (PW-216). We have already referred to the evidence of Ved Prakash (PW-173) and S.I. Harender Singh (PW-194) about the amounts belonging to the appellant and about the amounts paid by the appellant to the tune of Rs.29,50,000/- in the accounts of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18), account numbers of which have already been mentioned above and the fact that 9 deposit slips were in the handwriting of the appellant. It has come in the evidence of Subhash Gupta (PW-27) that he had handed over photocopy of the account opening forms of the three accounts mentioned above, in which Rs.29,50,000/- were deposited by the appellant, to Inspector Ved Prakash (PW-173). We then have the evidence of B.A. Vani, Branch Manager, Standard Chartered Grindlays Bank, Srinagar, who claimed that three bank accounts mentioned above were opened during his tenure and in his branch belonging to M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18). He pointed out that the amounts which were deposited in these accounts (by the appellant) were further distributed by 40 original cheques by various persons. He referred to 3 cheques of Farooq Ahmed Qasid (A-4), 29 cheques of M/s. Nazir & Sons and 8 cheques of Bilal Ahmad Kawa (A-18). There is evidence of Kazi Shams, SHO, Sadar, Srinagar (PW-99) who had recovered the cheque book of M/s. Nazir & Sons at the instance of Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4). We also have the evidence of Mohd. Riaz Ahmed, PA to DM, Badgam, J&K. He deposed that there was a detention order passed against Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4). In the detention order, it was stated that both these



accused persons were connected with a foreign mercenary named Abbu Bilal and they agreed to receive the fund from 'LeT' outfit in separate account opened at ANZ Grindlays Bank, Srinagar and had also received the first installment of Rs.3 lakhs in the account of Bilal Ahmad Kawa (A-18), which money was withdrawn by him. The evidence of Hawa Singh (PW-228) is to the effect that he had received 40 cheques of the above mentioned accounts, which evidence was corroborated by S.I. Amardeep Sehgal (PW-227) and S.I. Himmat Ram (PW-45). It was Inspector Pratap Singh (PW-86) who had found the account numbers of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) from the diary seized from the appellant. Further, the evidence of Sanjeev Srivastava, Manager, HDFC Bank (PW-22) went on to establish that it was the appellant who had opened the bank account in the New Friends Colony Branch of the HDFC Bank on the basis of his driving license, in which an amount of Rs.6 lakhs was deposited. This evidence was corroborated by Rishi Nanda (PW-23). P.R. Sharma (PW-9), Manager-SBI, Ghazipur spoke about the amounts received in the bank account of Rehmana Yusuf Farukhi. This evidence was corroborated by O.P. Singh, Manager-SBI, Ghazipur (PW-64). It has already been mentioned that as per the evidence of Dr. M.A. Ali (PW-216), the account opening form of HDFC Bank, New Friends Colony Branch and 9 deposit slips of Standard Chartered Grindlays Bank, Connaught Place, New Delhi as also the deposit slip of State Bank of India account of Rehmana Yusuf Farukhi bore the handwriting of the appellant. The report is Exhibit PW-216/A at page Nos. 1-11.

63. The argument of Ms. Jaiswal, learned counsel appearing on behalf of the appellant, that Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) have already been acquitted, is of no consequence. We may point out that there is absolutely no explanation by the appellant either by way of cross-examination of the witnesses or by way of his statement under Section 313 Cr.P.C. as to where all these amounts had

come from and why did he deposit huge amounts in the three accounts mentioned above. Rs.29,50,000/- is not an ordinary sum. Also, there is no evidence that in his account in HDFC Bank, the appellant has Rs.6 lakhs. Further very sizeable amount is shown to have been paid to Rehmana Yusuf Farukhi in her account in the State Bank of India. How did the appellant receive all these amounts and from where, are questions that remain unanswered in the absence of any explanation and more particularly because the appellant had no ostensible means of livelihood. It would have to be held that the appellant was dealing with huge sums of money and he has no explanation therefor. This is certainly to be viewed as an incriminating circumstance against the appellant. The silence on this issue is only telling of his nefarious design. It is obvious that the appellant was a very important wheel in the whole machinery which was working against the sovereignty of this country. All this was supported with the fact that 9 deposit slips, the bank forms for opening the accounts, the slip through which amount was deposited in the account of Rehmana Yusuf Farukhi, were all proved to be in the handwriting of the appellant. We have absolutely no reason to reject the evidence of handwriting expert. All this suggests that the appellant was weaving his web of terrorist activities by taking recourse to falsehood one after the other including his residential address and also creating false documents.

64. Ms. Jaiswal, learned defence counsel argued that merely on the basis of the evidence of the hand writing expert, no definite conclusion could be drawn that it was the appellant who deposited all this money into the three accounts of Nazir Sons, Bilal Ahmad Kawa and Faruk Ahmad Qasid. She also urged that accused Nos. 3 and 4 were acquitted by the Court. We have already clarified earlier that the acquittal of Qasid would be of no consequence for the simple reason that they may have been given the benefit of doubt regarding their knowledge about the said amounts being deposited in their accounts or for that matter their dispatch for the terrorist



activities. Some more evidence would have been necessary for that purpose. It is undoubtedly true that there should have been an appeal against their acquittal. However, that does not absolve the appellant completely since he had to explain as to where he was receiving money from for putting in the accounts of Qasid. This circumstance of the appellant in failing to explain the huge amount and its source would be of immense importance and would go a long way to show that the accused was receiving huge amounts from undisclosed sources.

65. A very lame explanation has been given about the amounts in the account of Rehmana. It was suggested that the monies were gifts from relatives on account of her marriage. Her mother DW-1 also tried to suggest the same. The explanation is absolutely false for the simple reason that there is no proof about such a plea. Everything about this marriage is suspicious. It is only on 8.12.2000 that the accused claims to have got married to Rehmana. It was under mysterious circumstances and in a secret manner that the accused got married to Rehmana. Dr. M.A. Ali (DW-216) has been examined by the prosecution as the hand writing expert who examined two pay-in-slips, namely, Exhibits PW-173/F and PW-173/G. The other documents which were given for examination were Q 29, Q30, Q30B, Q 30C, Q 31 and Q32 which are Exhibit PW 9/C to F. Out of these, some of the documents were seized from the bank vide seizure memo Exhibit PW 9/A. Document Nos.Mark Q 30 and 30 A and Mark 30B have been proved to be particularly filled in the hand writing of Mohd. Arif @ Ashfaq and partly in hand writing of Rehmana. This suggests the amount of Rs.15,000/- has been deposited in the account of Rehmana on 21.11.2000. Similarly, document marked Q-6, Q-6A and Q-6B were also proved to be in the hand writing of the appellant and partly in hand writing of Rehmana. Accused has no explanation to offer. There can be no dispute that the accused had been depositing huge amount into the account of Rehmana. Considering the dates on which the deposits were made, the argument of the learned counsel

that she received small amounts by way of gifts for her marriage which had never taken place till then, has to fall to ground. Again, accused Rehmana was acquitted as the prosecution was not able to prove that she had been a party to the conspiracy or knew about the conspiracy. That however, cannot absolve the appellant. The reluctance on the part of the prosecution to file appeal against her acquittal can also not help the accused. It is strange that a person who is not even an Indian National and is a citizen of Pakistan got into touch with this lady and got married to her on 8.12.2000 and before that he should be depositing huge amounts into the accounts of Rehmana. This becomes all the more strange that Rehmana had no reasonable explanation for receiving these amounts. We, therefore, view this circumstance as an incriminating circumstance. We entirely agree with the High Court as well as the trial Court for the inferences drawn in respect of these deposits made by the accused.

66. Ms. Jaiswal then severely criticized the finding of the Courts below accepting the disclosures made by the appellant and the discoveries made pursuant thereto. The main discovery which the learned counsel assailed was the statement in pursuance of which the whereabouts of Abu Shamal were made known to the investigating agency. The learned counsel urged that no disclosure statement was recorded immediately after the apprehension of the accused. She, therefore, urged that it could not have been held by the Courts below that the information regarding the Batla house and Abu Shamal being a terrorist in hiding on that address proceeded from the appellant or that he had the knowledge thereof. The learned counsel basically rests her contention on the fact that before accepting the fact that the accused gave some information in pursuance of which some discoveries were made, the investigating agency must record a statement and in the absence of such a statement, discovery cannot be attributed to the accused. Our attention was drawn to the evidence of PW-229 who deposed that a statement was recorded immediately



on the apprehension of the appellant. The date mentioned on Exhibit PW 148 E is 26.12.2000. According to the learned counsel if the accused was apprehended on the early night of 25.12.2000 then the date on Exhibit PW 148 E could not have been 26.12.2000. The counsel further says that therefore the Batla house encounter was prior to recording of the disclosure statement of the accused. The contention is not correct. It will be seen that immediately after the apprehension the appellant was not formally arrested, though he was in the custody of the investigating team. The learned counsel pointed out that the witness's statement was that the accused was "arrested" and his disclosure statement was recorded. PW-229 had undoubtedly stated so. There is other evidence on record that his statement was recorded. It is indeed in that statement which is recorded that he disclosed about his involvement in the Red Fort shoot out, the role of Abu Shamal and about an AK-56 rifle. The witness went on to state further that the accused disclosed that his associate Abu Shamal was staying in the hide out at house No. G-73, first floor, Batla House, Okhla. He also disclosed that he was having weapons and grenades and he also disclosed that Abu Shamal is a trained militant of LeT and member of suicide squad. Indeed, had this information not been disclosed immediately after his apprehension, there was no question of the investigating agency coming to know about the whereabouts of Abu Shamal. Indeed, in pursuance of this information given the investigating team did go to the aforementioned address and an encounter did take place wherein Abu Shamal was killed and large amount of ammunition and arms were found at that place. The learned counsel urged that in the absence of any "recorded statement" immediately after his apprehension, such discovery should not be attributed to the appellant. For the sake of argument, we will assume that no statement was recorded prior to Batla House incident. The learned counsel secondly urged that if admittedly the accused appellant was formally arrested on the next day i.e. on 26th, then it would be axiomatic that he was not in the

custody of the police and, therefore, all that evidence should be rendered as inadmissible.

67. It is indeed true that for normally proving any such information and attributing the same to the accused the said accused must be in the custody of the prosecution and then when he discloses or offers to disclose any information, his statement is recorded by the investigating agency for lending credibility to the factum of disclosure as also exactitude. In pursuance of such information, the investigating agency proceeds and obtains the material facts and thereafter executes a Panchnama to that effect. We have already referred to this question in the earlier part of our judgment that it was indeed a very tense situation requiring extreme diligence on the part of the investigating agency whereby the investigating agency could not afford to waste a single minute and was required to act immediately on the receipt of the information from the appellant. This was all the more necessary because the investigating agency were dealing with an extremely dangerous terrorist causing serious danger to the safety of the society. We do not see anything wrong in this approach on the part of the investigating agency. The only question is whether the investigating agency discovered something in pursuance of the information given by the accused. The events which followed do show that it is only in pursuance of, and as a result of the information given by the accused that the investigating agency zeroed on the given address only to find a dreaded terrorist like Abu Shamal holed up in that address with huge ammunition and the fire arms. If that was so, then the question is as to whether we can reject this discovery evidence merely because, as per the claim of defence, a formal statement was not recorded and further merely because a formal arrest was not made of the accused.

68. Firstly speaking about the formal arrest for the accused being in custody of the investigating agency he need not have been formally arrested. It is enough if he was in custody of the



investigating agency meaning thereby his movements were under the control of the investigating agency. A formal arrest is not necessary and the fact that the accused was in effective custody of the investigating agency is enough. It has been amply proved that the accused was apprehended, searched and taken into custody. In that search the investigating agency recovered a pistol from him along with live cartridges, which articles were taken in possession of the investigating agency. This itself signifies that immediately after he was apprehended, the accused was in effective custody of the investigating agency.

69. Now coming to the second argument of failure to record the information, it must be held that it is not always necessary. What is really important is the credibility of the evidence of the investigating agency about getting information/ statement regarding the information from the accused. If the evidence of the investigating officer is found to be credible then even in the absence of a recorded statement, the evidence can be accepted and it could be held that it was the accused who provided the information on the basis of which a subsequent discovery was made. The question is that of credibility and not the formality of recording the statement. The essence of the proof of a discovery under Section 27, Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody. How the prosecution proved it, is to be judged by the Court but if the Court finds the fact of such information having been given by the accused in custody is credible and acceptable even in the absence of the recorded statement and in pursuance of that information some material discovery has been effected then the aspect of discovery will not suffer from any vice and can be acted upon. Immediately after the apprehension of the appellant he spilled the information. In pursuance of that information the investigating agency acted with expediency and speed which in the circumstances then prevailing was extremely necessary nay compulsory. Any investigating agency in such sensational

matter was expected not to waste its time in writing down the Panchnama and memorandum. Instead they had to be on a damage control mode. They had a duty to safeguard the interests of the society also. Therefore, if the investigating agency acted immediately without wasting its time in writing memoranda of the information given by the accused, no fault could be found. Ultimately, this timely and quick action yielded results and indeed a dreaded terrorist was found holed up in the address supplied by the appellant-accused with sizeable ammunition and fire arms. We do not, therefore, find any thing wrong with the discovery even if it is assumed that the information was not "recorded" and hold that immediately after his apprehension, the accused did give the information which was known to him alone in pursuance of which a very material discovery was made. The learned Solicitor General relied on a reported decision in *Suresh Chandra Bahri v. State of Bihar* [Cited supra]. In that case, no discovery statement was recorded by the investigating officer PW -59 Rajeshwar Singh of the information supplied by the accused to him. Further, no public witness was examined by the prosecution to support the theory that such an information was given by the accused to him in pursuance of which some material discovery was made. This Court, however, in spite of these two alleged defects, accepted the evidence of discovery against the accused on the basis of the evidence of Rajeshwar Singh PW-59. The Court mentions:

> "It is true that no disclosure statement of Gurbachan Singh who is said to have given information about the dumping of the dead body under the hillock of Khad gaddha dumping gfdound was recorded but there is positive statement of Rajeshwar Singh, PW 59, Station House Officer of Chutia Police Station who deposed that during the course of investigation Gurbachan Singh Led hhim to Khad Gaddha hillock along with an Inspector Rangnath Singh and on pointing out the place by Gurbachan Singh he got that place unearthed by labourers where a piece



> of blanket, pieces of saree and rassi were found which were seized as per seizure memo Ext.5. He further deposed that he had taken two witnesses along with him to the place where these articles were found. Rajeshwar Singh PW 59 was cross-examined with regard to the identity of the witness Nand Kishore who is said to be present at the time of recovery and seizure of the articles as well as with regard to the identity of the articles seized vide paragraphs 18, 21 and 22 of his deposition but it may be pointed out that no cross-examination was directed with regard to the disclosure statement made by the appellant Gurbachan Singh or on the point that he led the police party and others to the hillock where on hi pointing out, the place as unearthed where the aforesaid articles were found and seized. It is true that no public witness was examined by the prosecution in this behalf but the evidence of Rajeshwar Singh PW59 does not suffer from any doubt or infirmity with regard to the seizure of these articles at the instance of the appellant Gurbachan Singh which on TI Parade were found to be the articles used in wrapping the dead body of Urshia."

The court then stated in paragraph 71 that the *two essential requirements of application of Section 27 of Evidence Act are that (1) the person giving information was accused of any offence; and (2) he must also be in police custody.* The Court then went on to hold that the provisions of Section 27 of the Evidence Act are based on the view that if the fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. This is precisely what has happened in the present case. Indeed, the appellant was accused of an

offence and he was also in the police custody. We have already explained the ramifications of the term "being in custody". This judgment was then followed in *Vikram Singh & Ors v. State of Punjab* [2010 (3) SCC 56] when again the Court reiterated that there was no need of a formal arrest for the applicability of Section 27. The Court therein took the stock of the case law on the subject and quoted from the decision of *State of U.P. v. Deoman Upadhyaya* [AIR 1960 SC 1125] regarding the principles involved in Sections 24 to 30, Evidence Act and more particularly Sections 25, 26 and 27 of the Evidence Act. The Court ultimately held in case of *Deoman Upadhyay* (cited supra) that the expression 'accused of any offence' in Section 27 as in Section 25 is also descriptive of the person concerned i.e. against a person who is accused of an offence. Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of the police officer, is tainted and, therefore, inadmissible if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and, therefore, declared provable insofar as it distinctly relates to the fact thereby discovered. The Court also pointed out the distinction between Sections 27 and 26, Evidence Act in para 40 of the judgment of *Vikaram Singh* (cited supra). The Court came to the conclusion that the principle that Section 27 would be provable only after the formal arrest under Section 46 (1) of the Code could not be accepted. It may be mentioned here that even in the decision in *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* [2005 (11) SCC 600] relying on the celebrated decision of *Pulukuri Kottaya v. King Emperor* [AIR 1947 PC 67], the Court held "we are of the view that *Pulukuri Kottaya* (cited supra) case *is an authority for the proposition that 'discovery of fact' cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or*



*the mental awareness of the informant as to its existence at a particular place".* This is precisely what has happened in this case. It is only because of the discovery made by the appellant that Abu Shamal with the arms and ammunition was found at the address disclosed by the appellant.

70. Ms. Kamini Jaiswal, learned counsel appearing for the appellant also severely attacked the discovery made and recorded on the morning of 26.12.2000. By that discovery, the appellant had given the information about the whole plot, with which we are not concerned, but in addition to that, he had showed his readiness to point out the AK-56 rifle which was thrown immediately after the attack, behind the Red Fort. In pursuance of that, the appellant proceeded alongwith the investigating party and then from the spot that he had shown, AK-56 rifle was actually found. Even a bandolier was found containing hand grenades. The learned counsel argued that this was a farcical discovery and could not be attributed to the appellant, as in fact, immediately after the attack on 22.12.2000, the police party had covered the whole area not only during the darkness of the night on 22.12.2000, but also in the following morning. She pointed out that sniffer dogs were also used at that time for searching the suspected terrorists either hiding out or leaving any trace. From this, the learned counsel argued that it is impossible that the investigating agency could not have seen the said rifle and it was impossible that such an important article like AK-56 rifle and bandolier would go unnoticed by the investigating agency. She, therefore pointed out that this was nothing but a poor attempt on the part of the investigating agency to plant the rifle and to attribute the knowledge of that rifle falsely to the appellant. In the earlier part of the judgment, we have already discussed the evidence regarding this discovery where we have referred to the evidence of Inspector Hawa Singh (PW-228), S.I. Satyajit Sarin (PW-218) and SHO Roop Lal (PW-234), who all supported the discovery. This discovery was recorded vide Exhibit PW-148/E. S.I. Satyajit Sarin (PW-218) corroborated the evidence of Inspector

Hawa Singh (PW-228) and prepared a seizure memo (Exhibit PW-218). S.I. Amardeep Sehgal (PW-227) also corroborated the version given by Inspector Hawa Singh (PW-228) and S.I. Satyajit Sarin (PW-218). Two other witnesses, namely, S.K. Chadha (PW-125) and N.B. Bardhan (PW-202) were also present who inspected the AK-56 rifle found at the instance of the appellant. The learned counsel pointed out that if the sniffer dogs were taken there for searching, it would be impossible that the investigating agency would not find the AK-56 rifle which was lying quite near to the spot from where the chit and the currency notes were picked up by the investigating agency. In the first place, there is definite evidence on record that the sniffer dogs were not taken to the spot from where the polythene packet containing chit and currency notes was recovered. Inspector Hawa Singh (PW-228) is the witness who specifically spoke about the dog squad not having been taken to that spot. We are not impressed by this argument that the investigating agency had already seen the said rifle but had chosen to plant it against the appellant. Even the evidence of SHO Roop Lal (PW-234) is to the effect that dog squad was not taken to the back of the Red Fort. SHO Roop Lal (PW-234) also stated that the Sunday Bazar was also not allowed to be held on 22.12.2000. We have no reason to discard this evidence. That apart, we do not see any reason why the investigating agency would plant the aforementioned AK-56 rifle, bandolier and hand grenades therein, without any rhyme or reason. True, they were interested in the investigation, but that does not mean that they were out to falsely implicate the appellant. This is apart from the fact that police officers could not have procured a foreign made AK-56 rifle and the foreign made grenades on their own to be foisted against the appellant. No such cross-examination appears to have been done on those police officers. It is also difficult to accept the argument that anybody could have found the rifle which was lying in the thick bushes. There is evidence on record that the backside of the Red Fort had substantially thick bushes. Once the police officers had found the chit and the currency notes which gave



them a definite direction to proceed in their investigation, it was not likely that the police officers would visit that spot again and that is what had happened. We are also of the opinion that this discovery was fully proved, in that, the appellant had given the information that it was Abu Shamal @ Faisal who had thrown that rifle in his bid to escape from the spot where the bloody drama was performed, resulting in death of three persons. Even earlier to this discovery, Abu Shamal @ Faisal was eliminated in encounter and he was found with substantial quantity of firearm and ammunition. We, therefore, see no reason to accept the defence contention that this discovery was a fake discovery.

71. Insofar as third discovery was concerned, it was of the hand grenades, which the appellant discovered on 1.1.2001. The learned counsel did not even attempt to say that there was anything unnatural with this recovery except that the appellant was all through in the custody and could have been treated roughly for effecting this discovery of the grenades. There is nothing to support this version. Thus, the discovery statements attributed to the appellant and the material discovered in pursuance thereof would fully show the truth that the appellant was involved in the whole affair. The discovery of hand grenades behind the computer centre near Jamia Millia Islamia University was very significant. So also the discovery of the shop of Sher Zaman @ Shabbir (A-13), the Hawala dealer, as also the documents discovered therefrom, show the involvement of the appellant in the whole affair. In this behalf, we fully endorse the finding of the High Court. About these discoveries, one another complaint by the learned defence counsel was that no public witnesses were associated. In fact, there is ample evidence on record to suggest that though the investigating agency made the effort, nobody came forward. This was all the more so, particularly in case of the recovery of pistol from the appellant as also the discoveries vide Exhibit PW-148/E.

72. We have seen the evidence as also the so-called

explanations given by the appellant in his statement under Section 313 Cr.P.C. We are of the clear opinion that the detailed statement which he gave at the end of the examination was a myth and remained totally unsubstantiated. We have also considered the defence evidence of Ms. Qamar Farukhi (DW-1) and we are of the clear opinion that even that evidence has no legs to stand. Ms. Qamar Farukhi (DW-1) spoke about the marriage of her daughter Rehmana Yusuf Farukhi to the appellant. She deposed that the appellant had expressed his desire to marry Rehmana after reading the matrimonial advertisement. She asserted that her relatives contributed for the marriage and she had continued giving her money to Rehmana. There is nothing much in her cross-examination either. She admitted that moneys were paid into the account of Rehmana. She admitted that it was told to the appellant that Rehmana was suffering from Spinal Cord problem and was not fit for consummation of marriage. It is really strange that inspite of this, the appellant should have got married to Rehmana. Very strangely, the lady completely denied that she even knew that the appellant was a resident of Pakistan. Much importance, therefore, cannot be given to this defence witness. The High Court has held proved the following circumstances against the appellant:-

"(a) On the night of 22-12-2000 there was an incident of firing inside the Lal Quila when some intruders had managed to enter that area of Lal Quila where the Unit of 7 Rajputana Rifles of Indian Army was stationed.

(b) In that incident of shooting the intruders had fired indiscriminately from their AK-56 rifles as a result of which three army jawans received fire-arm injuries and lost their lives.

(c) The death of three army jawans was homicidal.

(d) Immediately after the quick reaction team of the



army fired back upon the intruders as a result of which the intruders escaped from the place of occurrence by scaling over the rear side boundary wall of Lal Quila towards the Ring Road side and when the place of occurrence was searched by the armymen many assault rifle fired cartridge cases were recovered from the place of occurrence.

(e) Immediately after the intruders who had resorted to firing inside the army camp had escaped from there calls were made by someone on the telephones of two BBC Correspondents one of whom was stationed at Sri Nagar and the other one was stationed at Delhi office of BBC and the caller had informed them about the shooting incident inside the Lal Quila and had also claimed the responsibility of that incident and that that was the job of Lashkar-E-Toiba, which the prosecution claims to be a banned militant organization indulging in acts of terrorism in our country.

(f) On the morning of 23-12-2000 one AK-56 rifle was recovered from a place near Vijay Ghat on the Ring Road behind the Lal Quila.

(g) On 23-12-2000 when the policemen conducted search around the Lal Quila in the hope of getting some clue about the culprits they found one piece of paper lying outside the Lal Quila near the rear side boundary wall towards Ring Road side and on that piece of paper one mobile phone number 9811278510 was written.

(h) The mobile phone number 9811278510 was used for making calls to the two BBC correspondents(PWs 39 and 41) immediately after the shooting incident inside Lal Quila and the caller had claimed the responsibility for that incident and

had informed them that the incident was the job of Lashkar-e-Toiba.

(i) The aforesaid mobile phone number found written on a piece of paper lying behind the Lal Quila had led the police up to flat no. 308-A Ghazipur, New Delhi where accused Mohd. Arif @ Ashfaq was found to be living and when on being suspected of being involved in the shooting incident he was apprehended on the night of 25/26-12-2000 one pistol and some live cartridges were recovered from his possession for which he did not have any license.

(j) At the time of his arrest in case FIR No. 688/2000 one mobile phone having the number 9811278510 was recovered from his possession and it was the same mobile number from which calls had been made to the two BBC correspondents for informing them about the incident and Lashkar-e-Toiba being responsible for that incident.

(k) Immediately after his apprehension accused Mohd. Arif @ Ashfaq admitted his involvement in the shooting incident inside Lal Quila and also disclosed to the police about his another hide-out at G-73, Batla House, Muradi Road, Okhla, New Delhi and pursuant to his disclosure the police had gone to that hide-out where the occupant of that house started firing upon the police team and when the police team returned the firing that person, who was later on identified by accused Mohd. Arif @ Ashfaq to be one Abu Shamal @ Faizal, died because of the firing resorted to by the policemen. From house no. G-73, where the encounter had taken place, one AK-56 rifle and some live cartridges and hand grenades were recovered.



(l) Accused Mohd. Arif @ Ashfaq while in police custody had also disclosed to the police that one assault rifle had been thrown near Vijay Ghat after the incident. The police had already recovered one AK-56 rifle from Vijay Ghat on the morning of 23-12-2000. Accused Mohd. Arif @ Ashfaq had thus the knowledge about the availability of that AK-56 rifle at Vijay Ghat.

(m) Accused Mohd. Arif @ Ashfaq had also got recovered one AK-56 rifle and some ammunition from behind the Lal Quila on 26-12-2000.

(n) Accused Mohd. Arif @ Ashfaq had also got recovered three hand grenades from some place behind his computer centre in Okhla on 1-1-2001 pursuant to his another disclosure statement made by him while in police custody.

(o) When the assault rifle fired cartridge cases which were recovered from the place of occurrence by the armymen after the intruders had escaped from there were examined by the ballistic expert along with the AK-56 rifle which was recovered at the instance of accused Mohd. Arif @ Ashfaq from behind the Lal Quila on 26-12-2000 and the AK-56 rifle which was recovered from Vijay Ghat on 23-12-2000 it was found by the ballistic expert(PW-202) that some of the assault rifle fired cartridge cases had been fired from the rifle recovered from behind Red Fort and some had been fired from the other rifle which was recovered from Vijay Ghat.

(p) Appellant - accused Mohd. Arif @ Ashfaq was a Pakistan national and had entered the Indian territory illegally.

(q) After making illegal entry into India appellant -

accused Mohd. Arif @ Ashfaq had been representing to the people coming in his contact during his stays at different places that he was a resident of Jammu and was doing the business of shawls while, in fact, he had no such business and he had been collecting money through hawala channels.

(r) Accused Mohd. Arif @ Ashfaq had obtained a forged ration card Ex. PW-164/A wherein not only his house number mentioned was not his correct address but even the name of his wife shown therein was not Rehmana Yusuf Faukhi. He had also forged his learner driving license Ex. PW-13/C as well as one document Ex. PW-13/E purporting to be a photocopy of another ration card in his name with his residential address of Ghaziabad where he admittedly never resided and he submitted that document with a the Ghaziabad Transport Authority for obtaining permanent driving license. In the learner driving license also he had shown his residential addresses where he had never actually resided. All that he did was to conceal his real identity as a militant having entered the Indian territory with the object of spreading terror with the help of his other associate militants whom unfortunately the police could not apprehend and some expired before they could be tried."

73. In addition to these circumstances, there is another circumstance that a message was intercepted by the BSF while Exhibit PW 162/A and proved by PW-162 Inspector J.S. Chauhan dated 26.12.2000 wherein there was a specific reference to the accused. Still another circumstance would be that the accused had no ostensible means of livelihood and yet he deposited Rs.29,50,000/- in three accounts, namely, Standard Chartered Grindlays Bank, Connaught Place (known



as ANZ Grindlays Bank) bearing account No.32263962 of M/s. Nazir & Sons, Standard Chartered Grindlays Bank bearing account No.28552609 of Bilal Ahmad Kawa and Standard Chartered Bank bearing account No.32181669 of Farooq Ahmed Qasid and also deposited some amounts in the account of Rehmana Yusuf Faruqi and he had no explanation of these huge amounts, their source or their distribution. Lastly, the appellant gave a fanciful and a completely false explanation about his entering in India and his being a member of RAW and thereby, his having interacted with Nain Singh (PW-20).

74. We are in complete agreement with the findings regarding the incriminating circumstances as recorded by the High Court. On the basis of the aforementioned circumstances, the High Court came to the conclusion that the appellant was responsible for the incident of shooting inside the Lal Quila (Red Fort) on the night of 22.12.2000, which resulted in the death of three soldiers of Army. It has also been held by the High Court that this was a result of well planned conspiracy between the appellant and some other militants including deceased Abu Shamal @ faizal who was killed in an encounter with the police at House No. G-73, Batla House, Muradi Road, Okhla, New Delhi. The High Court has also deduced that it was at the instance of the appellant that the police could reach that spot. The High Court has further come to the conclusion that it was in a systematic manner that the appellant came to India illegally and collected highly sophisticated arms and ammunition meant for mass destruction. The High Court further held that he chose to select the Red Fort for an assault alongwith his other associates, the Red Fort being a place of national importance for India. The High Court has also recorded a finding that the chosen attack was on the Army Camp which was stationed there to protect this monument of national importance. The High Court has, therefore, deduced that it was an act of waging war against the Government of India. It is further held that the associates, with whom the appellant had entered into conspiracy, had attacked the Army Camp, which suggests that

there was a conspiracy to wage war against the Government of India, particularly, because in that attack, sophisticated arms like AK-47 and AK-56 rifles and hand grenades were used. The High Court also took note that this aspect regarding waging war was not even argued by the learned counsel appearing for defence. It is on this basis that the appellant was held guilty for the offences punishable under Sections 120-B, 121-A, 121, IPC, Section 120-B read with Section 302, IPC and Sections 468/471/474, IPC and also the offences under Sections 186/353/120-B, IPC. He was also held guilty for the offence under Section 14 of the Foreigners Act, since it was proved that the appellant, a foreigner, had entered the territory of India without obtaining the necessary permissions and clearance. Similarly, the appellant was also held guilty for the offences under the Arms Act as well as the Explosive Substances Act on account of his being found with a pistol and live cartridges.

75. The law on the circumstantial evidence is, by now, settled. In *Sharad Birdhichand Sarda Vs. State of Maharashtra* [1984 (4) SCC 116], this Court drew out the following test for relying upon the circumstantial evidence:-

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

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

(3) The circumstances should be of a conclusive nature and tendency.

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

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



The principle of this judgment was thereafter followed in number of decisions, they being *Tanviben Pankaj Kumar Divetia Vs. State of Gujarat* [1997 (7) SCC 156], *State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru* [2005 (11) SCC 600], *Vikram Singh & Ors. Vs. State of Punjab* [2010 (3) SCC 56], *Aftab Ahmad Anasari Vs. State of Uttaranchal* [2010 (2) SCC 583] etc. It is to be noted that in the last mentioned decision of *Aftab Ahmad Anasari Vs. State of Uttaranchal* (cited supra), the observation made is to the following effect:-

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified *even though it may be that one or more of these facts, by itself/themselves, is/are not decisive.* The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. *But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be.* There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a

false defence may be called into aid only to lend assurance to the Court……….." (Emphasis supplied).

The Court further went on to hold that in applying this principle, distinction must be made between the facts called primary or basic, on the one hand, and the inference of facts to be drawn from them, on the other. The Court further mentioned that:-

> "in drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

To the similar effect are the observations made in *Vikram Singh & Ors. Vs. State of Punjab* (cited supra).

76. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused. We respectfully agree with the principles drawn in the above mentioned cases and hold that the prosecution was successful in establishing the above mentioned circumstances against the appellant, individually, as well as, cumulatively. There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is guilty on the basis of the proved



circumstances against him nor could there be any quantitative test made applicable. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proved circumstances. In our opinion, the present case is such, as would pass all the tests so far devised by this Court in the realm of criminal jurisprudence.

77. However, we must, at this stage, take note of the argument raised by the learned counsel for the defence that the appellant has suffered a prejudice on account of his being a Pakistani national. The learned counsel contended that on account of his foreign nationality and in particular that of Pakistan, the whole investigating agency as well as the Courts below have viewed his role with jaundiced eyes. The learned counsel pointed out that all the other accused who were acquitted did not have foreign nationality. We must immediately note that the criticism is entirely misplaced, both against the investigating agency and the Courts below. The investigation in this case was both scientific and fair investigation. This was one of the most difficult cases to be investigated as there could have been no clue available to the investigating agency. The small thread which became available to the investigating agency was the chit found alongwith some Indian currency at the back of the Red Fort wall in a polythene packet. We must pay compliments to the Investigating Officer S.K. Sand (PW-230) as also to all the other associated with the investigation for being objective and methodical in their approach. It has to be borne in mind that not a single incidence of ill-treatment to the appellant was reported or proved. Again, the timely

recording of the D.D. Entries, scientific investigation using the computer, the depth of investigation and the ability of the investigating agency to reach the very basis of each aspect lend complete credibility to the fairness of the investigation. We, therefore, reject this argument insofar as the investigating agency is concerned. Similar is the role played by the trial and the appellate Courts. It could not be distantly imagined that the Courts below bore any prejudice. The trial held before the trial Judge was the epitome of fairness, where every opportunity was given to the accused persons and more particularly, to the present appellant. Similarly, the High Court was also very fair in giving all the possible latitude, in giving patient hearing to this accused (appellant). The records of the trial and the appellate Courts truly justify these inferences. We, therefore, reject this argument of the learned defence counsel.

78. It was then argued that there could be no conviction for the conspiracy in the absence of conviction of any other accused for that purpose. The argument is per se incorrect. It is true that out of the original 22 accused persons, ultimately upto this level, it is only the present appellant who stands convicted. We must, however, point out that as many as 8 accused persons against whom the investigating agency filed a chargesheet are found to be absconding. The Investigating Officer had collected ample material during the investigation against these 8 accused persons who were (1) Sabir @ Sabarulla @ Afgani (A-12), Sher Zaman Afgani S/o Mohd. Raza (A-13), Abu Haider (A-14), Abu Shukher (A-15), Abu Saad (A-16), Zahur Ahmad Qasid S/o Gulam Mohd. Qasid (A-17), Bilal Ahmad Kawa S/o Ali Mohd. Kawa (A-18) and Athruddin @ Athar Ali @ Salim @ Abdulla S/o Ahmuddin (A-19). Besides these absconding accused persons, 3 others were Abu Bilal (A-20), Abu Shamal (A-21) and Abu Suffian (A-22). All these three persons were already dead when the chargesheet was filed against them. The charge of conspiracy was against all the accused persons. The conspiracy also included the dead accused Abu Shamal who was found to be



hiding and who was later killed in exchange of fire with the police. The whereabouts of Abu Shamal were known only due to the discovery statement by the appellant, in which a very clear role was attributed to Abu Shamal, who was also a part of the team having entered the Red Fort and having taken part in the firing and killing of three soldiers. It has also come in the evidence that the other accused who was absconding in the present case, namely, Abu Bilal (A-20), was killed in exchange of fire with police in 2002 near Humayun's Tomb. It is to be remembered that the negative of the photograph of Abu Bilal (A-20) was seized at the time of arrest of the appellant, from his wallet. Indeed, the act of firing at the Army was not by a single person. The learned Solicitor General, therefore, rightly submitted that the case of the prosecution that there was a conspiracy to attack the Red Fort and kill innocent persons, was not affected even if the other accused persons who were alleged to have facilitated and helped the appellant, were acquitted. The question of a single person being convicted for an offence of conspiracy was considered in *Bimbadhar Pradhan Vs. The State of Orissa* [AIR 1956 SC 469]. Paragraph 14 thereof is relevant for us, which is as follows:-

> "14. Another contention raised on behalf of the appellant was that the other accused having been acquitted by the trial court, the appellant should not have been convicted because the evidence against all of them was the same. There would have been a great deal of force in this argument, not as a question of principle but as a matter of prudence if we were satisfied that the acquittal of the other four accused persons was entirely correct. In this connection the observations of this Court in the case of *Dalip Singh v. State of Punjab* [1954] (1) SCR 145, and of the Federal Court in *Kapildeo Singh v. The King* [1949] F.C.R. 834, are relevant. It is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the

> court is in a position to find that two or more persons were actually concerned in the criminal conspiracy. If the courts below had come to the distinct finding that the evidence led on behalf of the prosecution was unreliable, then certainly no conviction could have been based on such evidence and all the accused would have been equally entitled to acquittal. But that is not the position in this case as we read the judgments of the courts below."

The learned Solicitor General also relied on the decision in *State of Himachal Pradesh Vs. Krishna Lal Pradhan* [1987 (2) SCC 17] and cited the observations to the effect that the offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act by illegal means, and the performance of an act in terms thereof. It is further observed:-

> "If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences."

The learned Solicitor General further relied on the decision in *State through Superintendent of Police, CBI/SIT Vs. Nalini & Ors.* [1999 (5) SCC 253], wherein in paragraph 662, the following observations were made:-

> "In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may performance intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who



> drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

Again in *Firozuddin Basheeruddin & Ors. Vs. State of Kerala* [2001 (7) SCC 596], while stating the principles of conspiracy, the Court observed as follows:-

> "Conspiracy is not only a substantive crime. It also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would not render that person liable. Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to warrant treating each member as a casual agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendant's liability than the fact that the crime was performed as a part of a larger division of labor to which the accused had also contributed his efforts.

Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions a declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions. Explaining this rule, Judge Hand said:

> "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. what one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all (*Van Riper v. United States* 13 F.2d 961, 967, (2d Cir. 1926)."

Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confreres."

Our attention was also invited to the observations made in *Yashpal Mittal Vs. State of Punjab* [1977 (4) SCC 540] at page 543. The observations are to the following effect:-

"The offence of criminal conspiracy under Section 120A is a distinct offence introduced for the first time in 1913 in Chapter VA of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every



collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspiratOrs. In achieving the goal several offences, may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. The significance of criminal conspiracy under Section 120A is brought out pithily by this Court in *Major B. G. Darsay v. The State of Bombay:* 1961 CriLJ 828 . thus:

> The gist of the offences is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to dc a single illegal act. It may comprise the commission of a number of acts. under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with have conspired to do three categories of illegal acts and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the '- offence of conspiracy has been committed. They ate all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

We are in respectful agreement with the above observations with regard to the offence of criminal conspiracy.

The main object of the criminal conspiracy in the first charge is undoubtedly cheating by personation. The other means adopted, inter alia, are preparation or causing to be prepared spurious passports; forging or causing to be forged entries and endorsements in that connection; and use of or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation and we find, the other offence described therein are steps, albeit, offences themselves, in aid of the ultimate crime. The charge does not connote plurality of objects of the conspiracy. That the appellant himself is not charged with the ultimate offence, which is the object of the criminal conspiracy, is beside the point in a charge under Section 120B IPC as long as he is a party to the conspiracy with the end in view. Whether the charges will be ultimately established against the accused is a completely different matter within the domain of the trial court."

The learned Solicitor General also invited our attention to the decision rendered in *Ajay Agarwal Vs. Union of India & Ors.* [1993 (3) SCC 609], wherein the following observations were made in paragraphs 8 and 24:-

"8. …… In Chapter VA, conspiracy was brought on statute by the Amendment Act, 1913 (8 of 1913). Section 120-A of the I.P.C. defines 'conspiracy' to mean that when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated as "criminal conspiracy. No agreement except an agreement to commit an offence shall amount to a criminal conspiracy,



unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof. Section 120-B of the I.P.C. prescribes punishment for criminal conspiracy. It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case (1832 B & AD 345) that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the Judges while referring the question to the House of Lords in *Mulcahy v. Reg* (1868) L.R. 3 H.L. 306 and the House of Lords in unanimous decision reiterated in Quinn v. Leathem 1901 AC 495 as under:

'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable of for a criminal object or for the

use of criminal means. (emphasis supplied)'

24. A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalized or done, attempted or even frustrated and vice versa."

Further in *Nazir Khan & Ors. Vs. State of Delhi* [2003 (8) SCC 461], the Court observed as under:-

"16. In Halsbury's Laws of England (vide 4th Ed. Vol. 11, page 44, page 58), the English Law as to conspiracy has been stated thus:

"Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indication offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.

The essence of the offence of conspiracy is the fact of combination by agreement. The



agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus rues in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

17. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. (See: *Bhagwan Swarup Lal Bishan Lal etc.etc. v. State of Maharashtra* AIR 1965 SC 682

18. Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the

conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.

19. The provisions of Section 120A and 120B, IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. Russell on crime (12 Ed.Vol. I, p.202) may be usefully noted-

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement is essential. More knowledge, or even discussion, of the plan is not, per se, enough."

Glanville Williams in the "Criminal Law" (Second Ed. P. 382) states-

> "The question arose in an Iowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'co-operate'."



The learned Solicitor General also referred to the summing up by Coleridge, J. in R. Vs. Murphy (ER) at page 508.

79. Ultimately, the learned Solicitor General relied on the celebrated decision in *State (NCT of Delhi) Vs. Navjot Sandhu* [2005 (11) SCC 600]. On this basis, it was urged by the learned Solicitor General that the circumstances which were found to have been established beyond doubt, led only to one conclusion that the appellant was responsible for the incident of shooting inside the Red Fort on the night of 22.12.2000, in which three Army soldiers were killed. This was nothing but a well planned conspiracy and the responsibility of this ghastly incident was taken up by Lashkar-e-Toiba. This was undoubtedly a conspiracy, well planned, alongwith some other militants including the deceased accused Abu Shamal who was also killed in the exchange of fire with the police. For this conspiracy, the appellant illegally entered India and he was receiving huge amounts of money to make it possible for himself to execute his design. It is for this purpose that he falsely created and forged number of documents. The whole idea was to legitimize his stay in India for which he got prepared a false ration card, a false license and also opened bank accounts with the false addresses. He had taken adequate care to conceal his real identity. He described himself as a trader and a resident of Jammu, which was also a patent falsehood. He went on to the extent of getting married allegedly on the basis of an advertisement. He also spent huge amounts without there being any source of money and deposited lakhs of rupees in some other bank accounts. It may be that those persons, in whose accounts he deposited money, might have been acquitted getting benefit of doubt regarding their complicity, but the fact remains that the appellant had no explanation to offer. Similarly, barely 14 days prior to the incident, he got married to Rehmana Yusuf Farukhi, another accused who was acquitted. It may be

that Rehmana Yusuf Farukhi also did not have any idea and, therefore, was granted the benefit of doubt; however, that does not, in any manner, dilute the nefarious plans on the part of the appellant. He collected highly sophisticated arms and ammunition and some arms were proved to have been used in the attack on the Red Fort. The attack on the soldiers staying in the Army Camp at Red Fort was nothing but a war waged against the Government of India. It was clear that there were more than one person. Therefore, it was nothing but a well planned conspiracy, in which apart from the appellant, some others were also involved.

80. The learned Solicitor General then urged that the appellant was rightly convicted for the offences punishable under Sections 120-B, 121-A, 121, IPC, Section 120-B read with Section 302, IPC, Sections 468/471/474, IPC, Sections 186/353/120-B, IPC and Section 14 of the Foreigners Act.

81. There was no argument addressed before us to the effect that there was no conspiracy. The only argument advanced was that the appellant alone could not have been convicted for the conspiracy, since all the other accused were acquitted. We have already stated the principles which have emerged from various decisions of this Court. Once the prosecution proves that there was a meeting of minds between two persons to commit a crime, there would be an emergence of conspiracy. The fact that barely within minutes of the attack, the BBC correspondents in Srinagar and Delhi were informed, proves that the attack was not a brainchild of a single person. The information reached to BBC correspondent at Srinagar and Delhi sufficiently proves that there was a definite plan and a conspiracy. Again the role of other militants was very clear from the wireless message intercepted at the instance of BSF. Unless there was a planning and participation of more than one persons, all this could never have happened. For the execution of the nefarious plans, the militants (more than one in number) entered under the guise of watching Son et Lumiere show and



while doing so, they smuggled arms inside the Red Fort. It is after the show taking the advantage of the darkness, they started shooting, in which they first killed the Sentry and then the other two persons who were the soldiers and then taking further advantage of the darkness, they scaled over the wall and fled. All this had to be a pre-planned attack for which the militants must have made a proper reconnaissance, must have also found out the placements of Army barracks and the escape route from the backside of the Red Fort. It was not a stray attack of some desperados, which was undoubtedly an extremely well-planned attempt to overawe the Government of India and also to wage war against the Government of India. It has already been held in *Kehar Singh Vs. State (Delhi Admn.)* [AIR 1988 SC 1883] that the evidence as to the transmission of thoughts sharing the unlawful design would be sufficient for establishing the conspiracy. Again there must have been some act in pursuance of the agreement. The offence under Section 121 of conspiring to wage a war is proved to the hilt against the appellant, for which he has been rightly held guilty for the offence punishable under Sections 121 and 121-A, IPC. The appellant is also rightly held guilty for the offence punishable under Section 120-B, IPC read with Section 302, IPC. In the aforementioned decision of Navjot Singh Sandhu it has been held by this Court:

> "Thus the conspirator, even though he may not have indulged in the actual criminal operations to execute the conspiracy, becomes liable for the punishment prescribed under Section 302, IPC. Either death sentence or imprisonment for life is the punishment prescribed under Section 302, IPC."

In this view, we agree with the verdict of the trial Court as well as the High Court.

82. No other point was argued before us at the instance of the defence. That leaves us with the question of punishment.

The trial Court awarded the death sentence to the appellant Mohd. Arif @ Ashfaq for the offence under Section 121 IPC for waging war against the Government of India. Similarly, he was awarded death sentence for the offence under Section 120B read with Section 302, IPC for committing murder of Naik Ashok Kumar, Uma Shankar and Abdullah Thakur inside the Red Fort on 22.12.2000. For the purpose of the sentences, the other convictions being of minor nature are not relevant. On a reference having been made to it, the High Court ultimately confirmed the death sentence. The High court also concurred with the finding of the trial Court that this was a rarest of the rare case. The High Court has observed that the counsel appearing for him did not highlight any mitigating circumstance justifying the conversion of death sentence to life imprisonment perhaps because the learned counsel was conscious of the futility of the submission. The High Court specifically found that accused had hatched a conspiracy to attack the Indian Army stationed inside the national monument for protecting it from any invasion by the terrorists and had executed also that conspiracy with the help of his other associate militants and in that process they had killed three army Jawans and more could also have lost their lives but for the immediate retaliation by the members of the Quick Reaction Team of the Army. In that view, the High Court concurred with the finding of this being a rarest of the rare case. The question is whether we should give the same verdict in respect of the death sentence.

83. This was, in our opinion, a unique case where Red Fort, a place of paramount importance for every Indian heart was attacked where three Indian soldiers lost their lives. This is a place with glorious history, a place of great honour for every Indian, a place with which every Indian is attached emotionally, and a place from where our first Prime Minister delivered his speech on 15th August, 1947, the day when India broke the shackles of foreign rule and became a free country. It has since then been a tradition that every Hon'ble Prime Minister of this country delivers an address to the nation on



every 15th August to commemorate that great event. This Fort was visualized and constructed by Mughal Emperor Shahjahan who is known as "Shahjahan the builder". It took nine years for its completion. It was here that Shahjahan ascended the Throne on 18th April, 1648 amidst recitation of sacred Aayates of Holy Quran and mantras from Hindu scriptures. The great historical monument thereafter saw the rule of number of Mughal Emperors including Aurangzeb. It also saw its most unfortunate capture by Nadir Shah. It was in 1837, the last Mughal Emperor Bahadurshah Zafar II took over the Throne. It must be remembered that it was during the empire of Bahadurshah Zafar II that the first war of Independence was fought. The Red Fort became the ultimate goal during that war of Independence which broke out in the month of May, 1857. The Fort breathed free air for a brief period. But ultimately in the month of September, 1857, it was captured by the British. Red Fort is not just one of the several magnificent monuments that were built by the Mughal emperors during their reign for nearly three centuries. It is not just another place which people from within and outside the country visit to have a glimpse of the massive walls on which the Fort stands or the exquisite workmanship it displays. It is not simply a tourist destination in the capital that draws thousands every year to peep and revel into the glory of the times by gone. Its importance lies in the fact that it has for centuries symbolised the seat of power in this country. It has symbolised the supremacy of the Mughal and the British empires just as it symbolises after independence the sovereignty of the world's largest democratic republic. It is a national symbol that evokes the feelings of nationalism amongst the countrymen and reminds them of the sacrifices that the freedom fighters made for the liberation of this country from foreign rule. No wonder even after the fall of the fort to the British forces in the first war of independence in 1857 and the shifting of the seat of power from the Red Fort to the Calcutta and later to New Delhi, Pt. Jawahar Lal Nehru after his historic "Tryst with Destiny" speech unfurled the tricolor from the ramparts of the

Red Fort on 15th August 1947. That singular event symbolised the end of the British rule in this country and the birth of an independent India. An event that is relived and re-acted every succeeding year since 1947, when every incumbent Prime Minister addresses the nation from atop this great and historic Fort reminding the countrymen of the importance of freedom, the need for its preservation and the values of constitutional democracy that guarantees the freedoms so very fundamental to the preservation of the unity and integrity of this country. An attack on a symbol that is so deeply entrenched in the national psyche was, therefore, nothing but an attack on the very essence of the hard earned freedom and liberty so very dear to the people of this country. An attack on a symbol like Red Fort was an assault on the nation's will and resolve to preserve its integrity and sovereignty at all costs. It was a challenge not only to the Army battalions stationed inside the monument but the entire nation. It was a challenge to the very fabric of a secular constitutional democracy this country has adopted and every thing that is good and dear to our countrymen. It was a blatant, brazenfaced and audacious act aimed to over awe the Government of India. It was meant to show that the enemy could with impunity reach and destroy the very vitals of an institution so dear to our fellow countrymen for what it signified for them. It is not for no reason that whosoever comes to Delhi has a yearning to visit the Red Fort. It is for these reasons that this place has become a place of honour for Indians. No one can ever forget the glorious moments when the Indians irrespective of their religions fought their first war of Independence and shed their blood. It was, therefore, but natural for the foreigner enemies to plan an attack on the army specially kept to guard this great monument. This was not only an attack on Red Fort or the army stationed therein, this was an arrogant assault on the self respect of this great nation. It was a well thought out insult offered to question the sovereignty of this great nation by foreign nationals. Therefore, this case becomes a rarest of rare case. This was nothing but an undeclared war by some foreign mercenaries like the present appellant and his other partner in



conspiracy Abu Shamal and some others who either got killed or escaped. In conspiring to bring about such kind of attack and then carrying out their nefarious activities in systematic manner to make an attack possible was nothing but an attempt to question the sovereignty of India. Therefore, even without any reference to any other case law, we held this case to be the rarest of rare case. Similar sentiment was expressed by this Court in *State v. Navjot Singh Sandhu* [2005 (11) SCC 600]. The Court expressed its anguish in the following words.

> "In the instant case, there can be no doubt that the most appropriate punishment is death sentence. That is what has been awarded by the trial Court and the High Court. The present case, which has no parallel in the history of Indian Republic, presents us in crystal clear terms, a spectacle of rarest of rare cases. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperiling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is a terrorist act of gravest severity. It is a classic example of rarest of rare cases. This question of attack on the army and the killing of three soldiers sent shock waves of indignation throughout the country. We have no doubt that the collective conscience of the society can be satisfied by capital punishment alone."

We agree with the sentiments expressed in *Navjot Singh Sandhu's* case (cited supra):

> "The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators, can only be compensated by giving the maximum punishment to the person who is proved to be the conspirator in this treacherous act."

84. A conspiracy to attack the Indian Army unit stationed

in Red Fort and the consequent un-provoked attack cannot be described excepting as waging war against India and there can be no question of compromising on this issue. The trial Court has relied on number of other cases including the case of *Navjot Singh Sandhu* (cited supra) as also the case of *State of Tamil Nadu v. Nalini* [AIR 1999 SC 2640]. We do not want to burden the judgment by quoting from all these cases. However, we must point out that in *Machhi Singh v. State of Punjab's* case [1983 (3) SCC 470] a principle was culled out that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, same can be awarded. The fourth test includes the crime of enormous proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality are committed. Applying both the tests here we feel that this is a case where the conscience of the community would get shocked and it would definitely expect the death penalty for the appellant. Three persons who had nothing to do with the conspirators were killed in this case. Therefore, even *Machhi Singh's* case (cited supra) would aptly apply. Even in *Bachan Singh v. State of Punjab* [AIR 1980 SC 898] case, this Court referred to the penal statutes of States in *USA framed after Furman v. Georgia* (1972) 33 L Ed 2d 346: 408 US 238) in general and Clause 2(a),(b), (c) and (d) of the Indian Penal Code (Amendment) Bill duly passed in 1978 by Rajya Sabha. Following aggravating circumstances were suggested by the Court in that case as aggravating circumstances:-

"(a) If the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed



forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member of public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under S.43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under S.37 and S.129 of the said Code."

The Court then observed that there could be no objection to the acceptance of these indicators. The Court, however, preferred not to fetter the judicial conscience by attempting to make an exhausting enumeration one way or the other. The circumstance at "(c)" would be fully covering the present case since the three soldiers who lost their lives were the members of the armed forces and Abdullah one of them was actually doing his Sentry duty though there is no evidence available about as to what duty the other two were doing. But there is no reason to hold that their murder was in any manner prompted by any provocation or action on their part. This would be an additional circumstance according to us which would justify the death sentence. During the whole debate the learned defence counsel did not attempt to bring any mitigating circumstance. In fact, this is a unique case where there is one most aggravating circumstance that it was a direct attack on the unity,

integrity and sovereignty of India by foreigners. Thus, it was an attack on Mother India. This is apart from the fact that as many as three persons had lost their lives. The conspirators had no place in India. Appellant was a foreign national and had entered India without any authorization or even justification. This is apart from the fact that the appellant built up a conspiracy by practicing deceit and committing various other offences in furtherance of the conspiracy to wage war against India as also to commit murders by launching an unprovoked attack on the soldiers of Indian Army. We, therefore, have no doubts that death sentence was the only sentence in the peculiar circumstance of this case. We, therefore, confirm the judgment of the trial Court and the High Court convicting the accused and awarding death sentence for the offences under Section 302, IPC. We also confirm all the other sentences on all other counts and dismiss these appeals.

R.P. Appeal dismissed.



ORISSA POWER TRANSMISSION CORPORATION LTD.
*v.*
KHAGESWAR SUNDARAY AND ORS.
(Civil Appeal No. 6904 of 2011)

AUGUST 11, 2011

**[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]**

*Service Law – Advance increments – Entitlement to – Cut-off date – Office order passed by the Orissa State Electricity Board (OSEB) that Lower Division Clerks (LDCs) in OSEB shall be granted two advance increments in the time-scale of pay on their becoming graduates while in service – Wages of OSEB employees revised – OSEB constituted an Anomaly Committee to examine the issue with regard to advance increments in the revised scales of pay – Anomaly Committee made recommendation that the benefit of advance increments in the revised scales of pay be confined to employees who graduated or had passed the Accounts Examinations on or before 30.06.1971 – Recommendations of the Anomaly Committee accepted by the OSEB – Respondent Nos.1 to 5, who were working as LDCs under the OSEB, and had passed graduate examinations in the years 1974 - 1976, were not granted advance increments by the OSEB – They filed writ petition – High Court allowed the writ petition holding that the decision of the OSEB did not disclose any reason, far less any justifiable reason, to confine the benefit of the two advance increments only to the employees fulfilling the criteria by a cut-off date i.e. 30.06.1971 and hence the decision was arbitrary – High Court accordingly quashed the decision of the OSEB so far as respondent Nos. 1 to 5 were concerned and directed that two advance increments be notionally given to them in their pre-revised scale of pay with effect from the respective dates they acquired the degree qualifications in the year 1974-1976 and on that basis fix their*

*current pay and pay their current salary accordingly – On appeal, held: The view taken by the High Court that the decision of OSEB was arbitrary and discriminatory is not sustainable in law – The OSEB as the employer was fully with its powers to decide the cut-off date for the employees to become a graduate or passing the Accounts Examinations to be eligible to the two advance increments in the revised scales of pay and the decision of the OSEB could not be held to be arbitrary only because the reason for decision was not stated in the proceedings of the meeting of the OSEB in which the decision was taken – Order of the High Court set aside and the writ petition of respondent Nos. 1 to 5 dismissed – Constitution of India, 1950 – Article 14.*

*State of Bihar and Ors. v. Ramjee Prasad and Ors.* **(1990) 3 SCC 368: 1990 (2) SCR 468 and** *National Council Education and Ors. v. Shri Shyam Shiksha Prashikshan Sansthan and Ors.* **(2011) 3 SCC 238: 2011 (2) SCR 291 – relied on.**

*Sushma Sharma (Dr.) v. State of Rajasthan* **1985 supp. SCC 45;** *UGC vs. Sadhana Chaudhary* **(1996) 10 SCC 536: 1996 (6) Suppl. SCR 392;** *Ramrao vs. All India Backward Class Bank Employees Welfare Association* **(2004) 2 SCC 76: 2004 (1) SCR 19 and** *State of Punjab vs. Amar Nath Goyal* **(2005) 6 SCC 754: 2005 (2) Suppl. SCR 549 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1990 (2) SCR 468** | **relied on** | **Para 7** |
| **2011 (2) SCR 291** | **relied on** | **Para 8** |
| **1985 Supp. SCC 45** | **referred to** | **Para 8** |
| **1996 (6) Suppl. SCR 392** | **referred to** | **Para 8** |
| **2004 (1) SCR 19** | **referred to** | **Para 8** |
| **2005 (2) Suppl. SCR 549** | **referred to** | **Para 8** |



CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6904 of 2011.

From the Judgment & Order dated 18.12.2007 of the High Court of Orissa at Cuttac in O.J.C. No. 5768 of 1994.

Raj Kumar Mehta , Antrryami, Upadhyay for the Appellant.

Shibashish Mishra, Umang Shankar, Ugra Shankar Prasad for the Respondents.

The order of the Court was delivered by

**O R D E R**

**A. K. PATNAIK, J.** 1. Leave granted.

2. This is an appeal against the order dated 18.12.2007 of the Division Bench of the Orissa High Court in OJC No.5768 of 1994.

3. The facts very briefly are that the Orissa State Electricity Board (for short 'the OSEB') decided in its meeting held on 02.05.1970 that Lower Division Clerks (for short 'the LDCs') in the Circles, Divisions and Sub-Divisions of the OSEB shall be granted two advance increments in the time-scale of pay attached to the post on their becoming graduates while in service. Accordingly, an office order was passed by the Secretary of the OSEB on 17.06.1970 and LDCs of the OSEB would be granted two advance increments on their becoming graduates while in service. On 03.10.1970, a Tripartite Settlement was entered into by the OSEB with the Employees Unions regarding revision of wages of the employees of the OSEB and on 30.06.1971 an office order was issued by the Secretary of the OSEB giving the details of the revised scales of pay, dearness allowance and house rent allowance admissible to the employees of the OSEB as on 01.04.1969. Thereafter in terms of settlement dated 03.10.1970, the OSEB constituted an Anomaly Committee which was to examine inter

alia the issue with regard to advance increments in the revised scales of pay for employees who became graduates while in service. The Anomaly Committee recommended inter alia that two advance increments which were given to LDCs working in the different Circles, Divisions and Sub-Divisions of the OSEB in the Pre-revised scale of Rs.80-135 may be given such advance increments in the revised scale of pay when the employees become graduates or pass Accounts Examinations on or before 30.06.1971 and such advance increments may not be given to those employees who become graduates or pass Accounts Examinations subsequent to 30.06.1971. The recommendations of the Anomaly Committee were considered by the OSEB in its meeting held on 12.05.1973 and the OSEB accepted the recommendations of the Anomaly Committee saying that the employees, who graduated or passed Accounts Examinations on or before 30.06.1971, would be eligible for such two advance increments. The decision of the OSEB was followed by a Circular dated 16.07.1973 clearly saying that the benefit of advance increments shall be allowed in the revised pay-scale to the employees who have graduated or have passed the Accounts Examinations on or before 30.06.1971. The respondent Nos.1 to 5, who have been working as LDCs under the OSEB, passed the graduate examinations in the years 1974, 1975 and 1976 and were not granted two advance increments by the OSEB.

4. Aggrieved, the respondent Nos.1 to 5 filed a writ petition before the Orissa High Court being OJC No.1428 of 1979 and the writ petition was disposed of by the High Court with a direction to the OSEB to dispose of the representations of the respondent Nos. 1 to 5. Pursuant to the direction of the High Court, the OSEB rejected the representations. Thereafter, respondent Nos.1 to 5 filed another writ petition being OJC No.2237 of 1981 claiming two advance increments. The OSEB in its counter-affidavit filed before the High Court stated that the earlier notification of 1970 under which two advance increments were given to employees of the OSEB who graduated while in



service had been withdrawn. The High Court in its order dated 12.04.1989 held that since the basis of the relief claimed by respondent Nos. 1 to 5 was the notification of 1970 which had been withdrawn, the High Court cannot grant any relief to the respondent Nos. 1 to 5 but reserved liberty to the said respondents to challenge the legality of the decision of the OSEB taken in its meeting held on 12.05.1973 confining the benefit of advance increments to those employees who had become graduates or passed Accounts Examinations on or before 30.06.1971. The respondent Nos. 1 to 5 filed a fresh writ petition being OJC No.5768 of 1994 praying for quashing the decision of the OSEB in 1973 and the office order dated 16.07.1973 confining the benefit of advance increments in the revised scales of pay to the employees who graduated or had passed the Accounts Examinations on or before 30.06.1971.

5. The High Court allowed the writ petition being OJC No.5768 of 1994 by the impugned order dated 18.12.2007. In the impugned order, the High Court observed that respondent Nos. 1 to 5 will get the benefit of only Rs.6/- in their monthly pay. The High Court held that other employees similarly placed like the respondent Nos.1 to 5 had been given the benefit and there should not have been any discrimination and they should not have been denied the same benefit of two advance increments. The High Court also held that the proceedings of the meeting of the OSEB held on 12.05.1973 in which the decision to grant two advance increments to the employees who had graduated or had passed the Accounts Examinations on or before 30.06.1971 did not disclose any reason, far less any justifiable reason, to confine the benefit of the two advance increments only to the employees fulfilling the criteria by a cut-off date and hence the decision of the OSEB was arbitrary. The High Court accordingly quashed the decision of the OSEB taken on 12.05.1973 so far as respondent Nos. 1 to 5 were concerned and directed that two advance increments be notionally given to respondent Nos. 1 to 5 in their Pre-revised scale of pay with effect from the respective dates they acquired

the degree qualifications in the year 1974-1976 and on that basis fix their current pay and pay their current salary accordingly. The High Court, however, observed that the impugned order will be confined to only respondent Nos. 1 to 5 and shall not be a precedent for others.

6. We have heard learned counsel for the parties and we find that in the proceedings of the meeting of the OSEB held on 12.05.1973, it is stated that the Wage Board Award recommending revised scales of pay was not clear if the advance increments were to continue and the Anomaly Committee after considering the matter had recommended that the benefit of advance increments should be given to employees who graduated or passed the Accounts Examinations on or before 30.06.1971 and that those who have passed the concerned examinations after this date shall not be eligible for this benefit. In the proceedings of the meeting of the OSEB held on 12.05.1973 it was also made clear that the OSEB accepted the recommendations of the Anomaly Committee not to allow advance increments in the case of employees who had obtained the degree or passed the Accounts Examinations subsequent to 30.06.1971. If respondent Nos. 1 to 5 desired to challenge this decision of the OSEB as arbitrary and discriminatory, they should have placed sufficient materials before the court to demonstrate that the cut-off date of 30.06.1971 adopted by the OSEB was arbitrary and discriminatory and that the decision of the OSEB was violative of Article 14 of the Constitution. In the impugned order, the High Court has not referred to any such materials and has instead held that the proceedings of the meeting of the OSEB did not disclose any reason, far less any justifiable reason, to confine the benefit of two advance increments to employees who graduated or passed the Accounts Examinations on or before 30.06.1971.

7. We are of the considered opinion that the view taken by the High Court that in the absence of any reason given by the decision of the OSEB in its meeting held on 12.05.1973 to



fix the cut-off date of 30.06.1971 for becoming a graduate or passing the Accounts Examinations for an employee to be entitled to the two advance increments, its decision was arbitrary and discriminatory is not sustainable in law. The OSEB as the employer was fully with its powers to decide the cut-off date for the employee to become a graduate or passing the Accounts Examinations to be eligible to the two advance increments in the revised scales of pay and the decision of the OSEB could not be held to be arbitrary only because the reason for decision was not stated in the proceedings of the meeting of the OSEB in which the decision was taken. This Court in *State of Bihar and Others vs. Ramjee Prasad and Others* [(1990) 3 SCC 368] held:

> "the choice of date cannot be dubbed as arbitrary even if no particular reason is forthcoming for the same unless it is shown to be capricious or whimsical or wide off the reasonable mark".

8. In a recent case in *National Council for Teacher Education and Others vs. Shri Shyam Shiksha Prashikshan Sansthan and Others* [(2011) 3 SCC 238] this Court after referring to various earlier authorities on the point in *Sushma Sharma (Dr.) vs. State of Rajasthan* [1985 supp. SCC 45], *UGC vs. Sadhana Chaudhary* [(1996) 10 SCC 536], *Ramrao vs. All India Backward Class Bank Employees Welfare Association* [(2004) 2 SCC 76] and *State of Punjab vs. Amar Nath Goyal* [(2005) 6 SCC 754] has reiterated this position of law and has held the cut-off dates specified in clauses (4) and (5) of Regulation 5 of the National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2007 to be valid.

9. We, therefore, allow this appeal and set aside the impugned order of the Division Bench of the High Court and dismiss the writ petition of respondent Nos. 1 to 5. There shall be no order as to costs.

B.B.B. Appeal allowed.

MRS. SATIMBLA SHARMA AND ORS.
*v.*
ST. PAUL'S SENIOR SECONDARY SCHOOL AND ORS.
(Civil Appeal No. 2676 of 2010)

AUGUST 11, 2011

**[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]**

*Service Law:*

*Equal pay for equal work – Claim for, by teachers of private unaided schools – Held: Teachers of private unaided schools have no right to claim salary equal to that of their counter-parts working in Government Schools and Government aided schools – Education/Educational Institutions.*

*Equal pay for equal work – Claim against private unaided minority schools – Held: Unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) are not State within the meaning of Article 12 – As the right to equality under Article 14 is available against the State, it cannot be claimed against unaided private minority schools – Constitution of India, 1950 – Articles 12, 14 30, 39(d).*

*Writ:*

*Writ of mandamus – Issuance of, to a private unaided school to pay salary and allowances to its teachers equal to the salary and allowance payable to teachers of Government/ Government aided Schools – Held: Court cannot issue a mandamus since salary and allowances of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law – State Government directed to consider making rules u/ s.23 r/w*





*s.38(2)(l) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution – Right of children to free and compulsory Education Act, 2009 – ss.23, 38(2)(l) – Article 39(d).*

*Writ of mandamus – Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid to the teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty – In the instant case, there was no statutory provision and, therefore, a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions.*

**In 1923, respondent no.1-School was established as a mission school by respondent no.2. Till 1976, the school received grant-in-aid. From 1977-78, the school was not receiving any grant-in-aid from the Government and the teachers were being paid less than the teachers of Government Schools and Government aided schools in the State Government. Dissatisfied with their salary and allowances, some of the teachers (appellants) filed writ petitions before the High Court for direction to pay the salary and allowances at par with the teachers of Government Schools and Government aided schools. The Single Judge of the High Court allowed the writ petition and directed respondent nos.1 and 2 to pay to the teachers the salary and allowances at par with their counterparts working in the Government Schools. On appeal, the Division Bench of the High Court set aside the judgment of the Single Judge. The instant appeal was filed challenging the order of the Division Bench of the High Court.**

**Disposing of the appeal, the Court**

**HELD: 1. The Division Bench the High Court rightly**

**held that the teachers of private unaided minority schools had no right to claim salary equal to that of their counterparts working in Government schools and Government aided schools. The teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work. [Para 9] [213-D-H]**

*Frank Anthony Public School Employees' Association v. Union of India & Ors.* **(1986) 4 SCC 707: 1987 (1) SCR 238 – held inapplicable.**

**2. The Court could not issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. [Para 11] [215-D-E]**

**3. Where a statutory provision casts a duty on a private unaided school to pay the same salary and**



**allowances to its teachers as are being paid to the teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the instant case, there was no statutory provision and, therefore, a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions. [Para 11] [215-G-H; 216-A-B]**

**4. In the instant case, there were no executive instructions issued by the Government requiring private schools to pay the same salary and allowances to their teachers as were being paid to teachers of Government schools or Government aided schools. [Para 12] [216-E]**

**5. A mandamus cannot be issued to respondent nos.1 and 2 on ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in clause (5)(b) that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. Similarly, a mandamus cannot be issued to give effect to the recommendations of the report of Education Commission 1964-66 that the scales of pay of school teachers belonging to the same category but working under different managements such as government, local bodies or private managements should be the same, unless the recommendations are incorporated in an executive instruction or a statutory provision. [Para 13] [216-F-H; 217-A]**

**6. The Right of Children to Free and Compulsory Education Act, 2009 has provisions in Section 23**

**regarding the qualifications for appointment and terms and conditions of service of teachers. Sub-section (3) of Section 23 provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. Section 38 of the 2009 Act empowers the appropriate Government to make rules and Section 38(2)(l) of the 2009 Act provides that the appropriate Government, in particular, may make rules prescribing the salary and allowances payable to, and the terms and conditions of service of teachers, under sub-section (3) of section 23. Section 2(a) defines "appropriate Government" as the State Government within whose territory the school is established. The State of Himachal Pradesh, respondent no.3 in this appeal, is, thus, empowered to make rules under sub-section (3) of Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances payable to, and the terms and conditions of service of, teachers. Article 39(d) of the Constitution provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. Respondent no.3 should, therefore, consider making rules under Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution as early as possible. [Para 14] [217-B-F]**

*State of H.P. v. H.P. State Recognised & Aided Schools Managing Committees and Others* **(1995) 4 SCC 507;** *Mohini Jain v. State of Karnataka* **(1992) 3 SCC 666: 1992 (3) SCR 658;** *K. Krishnamacharyulu and Others vs. Sri Venkateswara Hindu College of Engineering and Another* **(1997) 3 SCC 571: 1997 (3) SCC 571;** *Sushmita Basu & Ors. v. Ballygunge Siksha Samity & Ors.* **(2006) 7 SCC 680: 2006 (6) Suppl. SCR 506 – referred to.**



**Case Law Reference:**

| | | |
|---|---|---|
| **1987 (1) SCR 238** | **held inapplicable** | **Para 5, 10** |
| **(1995) 4 SCC 507** | **referred to** | **Para 6** |
| **1992 (3) SCR 658** | **referred to** | **Para 6** |
| **1997 (3) SCC 571** | **referred to** | **Para 6** |
| **2006 (6) Suppl. SCR 506** | **referred to** | **Para 11** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2676 of 2010.

From the Judgment & Order dated 25.07.2008 of the Division Bench of High Court of Himachal Pradesh at Shimla in LPA No. 48 of 2004.

Dhruv Mehta, Sanjay Katyal, Sriram Krishna, Kuldip Singh for the Appellants.

S.K. Dubey, Niraj Sharma, Vikrant Singh Bais, Sumit Kumar Sharma, Naresh K. Sharma for the Respondents.

The Judgment of the Court was delivered by

**A. K. PATNAIK, J.** 1. This is an appeal against the judgment dated 25.07.2008 of the Division Bench of the High Court of Himachal Pradesh, Shimla, in Letters Patent Appeal No.48 of 2004.

2. The facts very briefly are that in 1923 the respondent No.1-School (for short 'the School') was initially established as a mission school by the respondent No.2. The School adopted the 10+2 system in 1993 and is presently affiliated to the Himachal Pradesh Board of School Education. Before independence in 1947 the School was receiving grant-in-aid from the British Indian Government and thereafter from the Government of India upto 1950. From 1951 to 1966, the School received grant-in-aid from the State Government of Punjab.

After the State of Himachal Pradesh was formed, the School received grant-in-aid from the Government of Himachal Pradesh during the years 1967 to 1976. From the year 1977-1978, the School has not been receiving any grant-in-aid from the Government of Himachal Pradesh and the teachers of the School are being paid less than the teachers of Government schools and Government aided schools in the State of Himachal Pradesh.

3. Not satisfied with their salary and allowances, some of the teachers of the School filed a Writ Petition, CWP No.1038 of 1996, in the High Court of Himachal Pradesh for a direction to pay the salary and allowances at par with the teachers of Government schools and Government-aided schools and by judgment dated 11.10.2004 the learned Single Judge of the High Court of Himachal Pradesh allowed the Writ Petition and directed the respondent nos.1 and 2 to pay to the writ petitioners salary and allowances at par with their counter-parts working in the Government schools from the dates they were entitled to and at the rates admissible from time to time. Aggrieved by the judgment of the learned Single Judge, the respondent nos.1 and 2 filed Letters Patent Appeal No.48 of 2004 (for short 'the LPA') before the Division Bench of the High Court and by the impugned judgment dated 25.07.2008, the Division Bench of the High Court set aside the judgment of the learned Single Judge and dismissed the Writ Petition of the appellants.

4. Learned counsel appearing for the appellants submitted that the appellants do the same work as the teachers of Government schools and Government aided schools and yet are being paid lower than the teachers of Government schools and Government aided schools. He further submitted that the Himachal Pradesh State Government Recognized Aided Schools Teachers' Association and others had filed Writ Petitions, C.W.P. No.413 of 1989 and 414 of 1989, in the Himachal Pradesh High Court for appropriate writs/directions



to the State Government to pay 95% of the grant-in-aid towards approved expenditure in a school year to the privately managed recognized schools borne on the grant-in-aid list with a view to enable the managements of such schools to pay the teachers and allied staff of the schools, the same pay scales and allowances as are paid to their counter-parts working in the Government schools in the State of Himachal Pradesh and by order dated 09.09.1992, a Division Bench of Himachal Pradesh held that teachers of such private recognized aided schools are entitled to same emoluments as received by their counter-parts in the State Government and allowed the writ petitions and directed the State Government and the management of the private recognized aided schools to work out the emoluments of the teachers and pay the same to teachers of the private recognized aided schools. He further submitted that against the order dated 09.09.1992 of the Division Bench of Himachal Pradesh High Court, the State of Himachal Pradesh came up in appeal to this Court in Civil Appeal Nos. 1233 and 1234 of 1993 but this Court dismissed these two appeals on 10.05.1995. He vehemently argued that only with a view to wriggle out from the liability to pay salary and allowances to its teachers and staff at par with the salary and allowances of Government schools, the School has unilaterally decided to stay out of the grant-in-aid scheme since 1977-1978. He submitted that the learned Single Judge rightly held in his judgment dated 11.10.2004 in C.W.P. No.1038 of 1996 filed by the petitioners that the School, which had been receiving grant-in-aid till 1977-1978, could not of its own volition stop to receive grant-in-aid and rightly directed the School to pay to the appellants salary and allowances at par with their counter-parts working in the Government schools.

5. Learned counsel for the appellants submitted that the Division Bench of the High Court has set-aside the judgment of the learned Single Judge after taking an erroneous view in the impugned judgment that the School was under no obligation to have accepted the grant-in-aid which would have led to

diminution of its rights guaranteed under Article 30(1) of the Constitution. He further submitted that the Division Bench of the Himachal Pradesh High Court has also sustained the contention of the School that the teachers of private recognized schools had no right to claim salary equal to that of their counter-parts working in Government schools and Government aided schools. He submitted that Rule 45-Q of the Grant-in-Aid Rules of the State of Himachal Pradesh provides that management shall introduce such scales of pay and allowances for teachers and other staff members as prescribed by the Government for corresponding staff in Government schools. He submitted that if the teachers of Government aided schools are entitled to same salary and allowances as the teachers of the Government schools, there is no reason as to why only the teachers of private unaided schools should be denied the salary and allowances of Government schools. He submitted that if the pay and allowances of the teachers of private minority schools such as respondent no.1 are not made the same as that of the pay and allowances of the teachers of the Government schools and Government aided schools, the teachers of private minority schools will suffer discrimination and their right to equal pay for equal work under Article 14 read with Article 39(d) of the Constitution will be violated. He relied on the decision of this Court in *Frank Anthony Public School Employees' Association v. Union of India & Ors.* [(1986) 4 SCC 707] wherein Section 12 of the Delhi School Education Act which made the provisions of Section 10 providing for parity of scales of pay and allowances of the employees of the recognized private schools with that of the schools run by the appropriate authority inapplicable to unaided minority institutions as discriminatory.

6. Learned counsel for the appellants submitted that in *State of H.P. vs. H.P. State Recognised & Aided Schools Managing Committees and Others* [(1995) 4 SCC 507] this Court relying on Mohini Jain case [(1992) 3 SCC 666] held that the right to education is a fundamental right guaranteed under Part-III read with Part-IV of the Constitution of India. He submitted



that since the right to education is a fundamental right, school education has a public element in it and the Court can always issue a mandamus to enforce a public duty in matters of education. He submitted that in *K. Krishnamacharyulu and Others vs. Sri Venkateswara Hindu College of Engineering and Another* [(1997) 3 SCC 571] employees of a non-aided private educational institution claimed parity in pay-scales with the employees of Government institutions and this Court held that the employees had an enforceable right and there was an element of public interest in such a claim and the teachers of a private unaided institution is entitled to avail the remedy provided under Article 226 of the Constitution and they cannot be denied the same benefits which were available to other teachers working in Government institutions.

7. Learned counsel for the appellants submitted that the School is provisionally affiliated to the Council for the Indian School Certificate Examinations and the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in clause (5)(b) that the salary and allowances and other benefits of the staff of the school must be comparable to that prescribed by the State Department of Education. He referred to the report of the Education Commission 1954-66 to the Ministry of Education, Government of India, recommending that the scales of pay of school teachers belonging to the same category but working under different managements such as government, local bodies or private managements should be the same and this principle of parity should be adopted forthwith. He submitted that sub-section (3) of Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 (for short 'the 2009 Act') provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. He referred to Section 38(2)(l) of the 2009 Act which provides that the appropriate Government may, by notification, prescribe the salary and allowances payable to, and the terms and conditions of service

of, teacher under sub-section (3) of section 23. He submitted that the appropriate Government as defined in Section 2(a) of the 2009 Act, namely, the State Government, therefore, can issue a notification prescribing the salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of section 23 of the 2009 Act.

8. Learned counsel for the respondent nos.1 and 2, on the other hand, supported the impugned judgment of the Division Bench of the High Court. He further submitted that if the School is made to pay to its teachers the same salary and allowances of teachers of Government schools and Government aided schools, it will have to increase the school fees and this would affect the students whose parents cannot afford higher school fees.

9. In our considered opinion, the Division Bench the High Court has rightly held in the impugned judgment that the teachers of private unaided minority schools had no right to claim salary equal to that of their counter-parts working in Government schools and Government aided schools. The teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work.



10. In *Frank Anthony Public School Employees' Association v. Union of India & Ors.* (supra), relied on by learned counsel for the appellants, the scales of pay and other terms and conditions of service of teachers and other employees of the Frank Anthony Public School, New Delhi, which was a private unaided minority institution, compared very unfavourably with those of their counterparts of the Delhi Administration Schools and the Frank Anthony Public School Employees' Association sought equalization of their pay-scales and conditions of service with those of teachers and employees of Government schools. Sections 8 to 11 of the Delhi School Education Act dealt with the terms and conditions of service of employees of recognized private schools. Section 10 of the Delhi School Education Act provided that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of the recognized private schools shall not be less than those of the corresponding status in schools run by the appropriate authority. Section 12 of the Delhi School Education Act, however, provided that the provisions of Sections 8 to 11 including Section 10 were not applicable to unaided minority institutions. The case of teachers of Frank Anthony Public School was that if Sections 8 to 11 were made applicable to them, they would at least be as well off as teachers and other employees of Government schools. The Frank Anthony Public School Employees' Association therefore challenged Section 12 of the Delhi School Education Act as discriminatory and violative of Article 14 of the Constitution and this Court held that Section 12 of the Delhi School Education Act insofar as it makes the provisions of Sections 8 to 11 inapplicable to unaided minority schools is discriminatory. This was thus a case in which the employees of unaided minority institutions were not given the benefits available to employees of other private institutions under Sections 8, 9, 10 and 11 of the Delhi School Education Act only on the ground that unaided minority institutions enjoy autonomy of administration under Article 30(1) of the Constitution and this Court held that this could not be a rational

basis for differentiation of service conditions, pay and other service benefits between employees of unaided minority institutions and the employees of other private schools and the Court declared Section 12 as discriminatory. In other words, the State by making a statutory provision in Section 12 of the Delhi School Education Act which was discriminatory, had violated the mandate to the State under Article 14 of the Constitution not to deny the equal protection of the laws within its territories. This decision in the case of *Frank Anthony Public School Employees' Association v. Union of India & Ors.* (supra) does not assist the appellants in any manner because the guarantee of equality, as we have said, is not available against an unaided private minority school.

11. We also do not think that the Court could issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law. In *Sushmita Basu & Ors. v. Ballygunge Siksha Samity & Ors.* [(2006) 7 SCC 680], the teachers of a recognized private school known as Ballygunge Siksha Sadan in Calcutta filed a Writ Petition in the High Court of Calcutta praying for issuance of writ of mandamus directing the authorities of the school to fix the salary of teaching and non-teaching staff of the school and to remove all anomalies in the scales of pay as recommended by the Third Pay Commission as extended to other Government aided schools and Government schools and this Court held that in the absence of statutory provision no such direction can be issued by the High Court under Article 226 of the Constitution. Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there



was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of Government schools and therefore a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions.

12. In *K. Krishnamacharyulu and Others vs. Sri Venkateswara Hindu College of Engineering and Another* (supra), relied upon by the learned counsel for the appellants, executive instructions were issued by the Government that the scales of pay of Laboratory Assistants as non-teaching staff of private colleges shall be at par with the government employees and this Court held that even though there were no statutory rules, the Laboratory Assistants as non-teaching staff of private college were entitled to the parity of the pay-scales as per the executive instructions of the Government and the writ jurisdiction of the High Court under Article 226 of the Constitution is wide enough to issue a writ for payment of pay on par with government employees. In the present case, there are no executive instructions issued by the Government requiring private schools to pay the same salary and allowances to their teachers as are being paid to teachers of Government schools or Government aided schools.

13. We cannot also issue a mandamus to respondent nos.1 and 2 on the ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in clause (5)(b) that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. Similarly, we cannot issue a mandamus to give effect to the recommendations of the report of Education Commission 1964-66 that the scales of pay of school teachers belonging to the same category but

working under different managements such as government, local bodies or private managements should be the same, unless the recommendations are incorporated in an executive instruction or a statutory provision. We, therefore, affirm the impugned judgment of the Division Bench of the High Court.

14. We, however, find that the 2009 Act has provisions in Section 23 regarding the qualifications for appointment and terms and conditions of service of teachers and sub-section (3) of Section 23 of the 2009 Act provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. Section 38 of the 2009 Act empowers the appropriate Government to make rules and Section 38(2)(l) of the 2009 Act provides that the appropriate Government, in particular, may make rules prescribing the salary and allowances payable to, and the terms and conditions of service of teachers, under sub-section (3) of section 23. Section 2(a) defines "appropriate Government" as the State Government within whose territory the school is established. The State of Himachal Pradesh, respondent no.3 in this appeal, is thus empowered to make rules under sub-section (3) of Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances payable to, and the terms and conditions of service of, teachers. Article 39(d) of the Constitution provides that the State shall, in particular, directs its policy towards securing that there is equal pay for equal work for both men and women. Respondent no.3 should therefore consider making rules under Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution as early as possible.

15. With these observations, the appeal is disposed of. There shall be no order as to costs.

D.G. Appeal disposed of.



ORIENTAL BANK OF COMMERCE & ANR.
*v.*
R.K. UPPAL
(Civil Appeal No. 128 of 2007)

AUGUST 11, 2011

**[AFTAB ALAM AND R.M. LODHA, JJ.]**

*Oriental Bank of Commerce Officer Employees (Discipline and Appeal) Regulations, 1982: Regulation 17 – Dismissal from service for misconduct – Appeal by delinquent u/regulation 17 for assailing dismissal order and for grant of personal hearing – Appellate authority rejecting the request for personal hearing and dismissing appeal – Justification of – Held: Regulation 17 affords to an employee right of appeal – The said provision does not expressly provide for personal hearing to the delinquent – In the absence of personal hearing to the delinquent, it cannot be said that the very right of appeal is defeated – In the instant case, appellate authority addressed the points raised in the appeal and critical to the decision and held that on consideration of the inquiry record and facts and circumstances of the case, the findings and the order passed by disciplinary authority were based on evidence brought on record of inquiry and not founded on past record or any other matter not connected with inquiry as alleged by the delinquent in the appeal – The order of the appellate authority cannot be said to suffer from vice of lack of reasons – Service law – Judgment/Order – Natural justice.*

*Administrative law: Principle of natural justice – Applicability of – Held: The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with and so forth – Natural justice.*

*Appeal: Right of appeal – Held: Is not an inherent right – None of the facets of natural justice requires that there should be right of appeal from any decision – Natural justice.*

*Judgment/Order: By the appellate authority – Held: The appellate authority must record reasons in support of its order to indicate that it has applied its mind to the grounds raised but it is not the requirement of law that an order of affirmance by the appellate authority must be elaborate and extensive – Appeal.*

**The inquiring authority found the respondent guilty of misconduct. The disciplinary authority concurred with the findings of the inquiring authority and keeping in view the seriousness of charges and gravity of the proved conduct, it imposed the penalty of dismissal. The respondent preferred an appeal under regulation 17 of the Oriental Bank of Commerce Officer Employees (Discipline and Appeal) Regulations, 1982 assailing his dismissal order on diverse grounds and also requested for grant of personal hearing. The appellate authority rejected the respondent's request for personal hearing and dismissed his appeal. The respondent filed a writ petition before the High Court. The High Court allowed the delinquent's writ petition partly and set aside the order of the appellate authority and remitted the matter back to it with a direction to pass a reasoned order after giving an opportunity of hearing to the respondent. The instant appeal was filed challenging the order of the High Court.**

**Allowing the appeal, the Court**

**HELD: 1. It is now fairly well settled that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with and so forth. The**



**application of the doctrine depends upon the nature of jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case. [Para 18] [234-B-D]**

*Union of India & Anr. v. P.K. Roy & Ors.* **AIR 1968 SC 850: 1968 SCR 186 – relied on.**

**2. A right of appeal is not an inherent right. None of the facets of natural justice requires that there should be right of appeal from any decision. The extent of power of an appellate forum and the mode and manner of its exercise can always be provided in the provision that creates such right. Insofar as provision of appeal in regulation 17 of the Oriental Bank of Commerce Officer Employees (Discipline and Appeal) Regulations, 1982 is concerned, it must be stated that the said provision affords to an employee right of appeal against an order imposing upon him any of the penalties specified in regulation 4 or against the order of suspension referred to in regulation 12. It provides for limitation within which the appeal is to be preferred. As per the said provision, the appeal must be addressed to the appellate authority and submitted to the authority whose order is appealed against. The authority whose order is appealed against is required to forward the appeal together with its comments and also the record of the case to the appellate authority. The appellate authority then proceeds with the consideration of the appeal and considers whether the findings are justified; whether the penalty is excessive or inadequate and passes appropriate order confirming, enhancing, reducing or setting aside the penalty or remitting the case to the authority that imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case. The**

**appeal provision in regulation 17 of the 1982 Regulations does not expressly provide for personal hearing to the appellant. In the absence of personal hearing to the appellant, it cannot be said that the very right of appeal is defeated. One situation is, however, different. Where the appellate authority proposes to enhance the penalty, obviously, the appellate authority must issue notice to the delinquent asking him to show cause why penalty that has been awarded to him must not be enhanced and give him personal hearing. It is so because the appellate authority seeks to inflict such punishment for the first time which was not given by the disciplinary/punishing authority. Although there are no positive words in regulation 17, requiring that the appellant shall be heard before enhancement of the penalty, the fairness and natural justice require him to be heard. However, personal hearing may not be required where the appellate authority, on consideration of the entire material placed before it, confirms, reduces or sets aside the order appealed against. Regulation 17 of the 1982 Regulations does not require that in all situations personal hearing must be afforded to the delinquent by the appellate authority. [Paras 19, 21] [234-E-H; 235-A-E; 236-B-C]**

*State Bank of Patiala v. Mahendra Kumar Singhal* **(1994) Supp (2) SCC 463;** *Ganesh Santa Ram Sirur v. State Bank of India and Anr.* **(2005) 1 SCC 13: 2004 (6) Suppl. SCR 101 – relied on.**

*Ram Niwas Bansal v. State Bank of Patiala & Anr.* **(1998) 4 SLR 711 – referred to.**

**3. The order of the appellate authority cannot be labelled as a non-speaking order. The order does not suffer from the vice of non-application of mind. The appellate authority has addressed the points raised in the appeal and critical to the decision, albeit briefly. It is true that the appellate authority must record reasons in**



**support of its order to indicate that it has applied its mind to the grounds raised but it is not the requirement of law that an order of affirmance by the appellate authority must be elaborate and extensive. Brief reasons which indicate due application of mind in decision making process may suffice. Each ground raised in the appeal has been dealt with briefly. The appellate authority held that on consideration of the inquiry record and facts and circumstances of the case, the findings and the order passed by disciplinary authority are based on evidence brought on record of inquiry and not founded on past record or any other matter not connected with inquiry as alleged by the delinquent in the appeal. Consequently, the appellate authority concurred with the view of the disciplinary authority and found no justification to interfere with the penalty awarded by the disciplinary authority. The order of the appellate authority, by no stretch of imagination can be said to suffer from vice of lack of reasons. The High Court was clearly in error in setting aside and quashing the order passed by the appellate authority and in directing the appellate authority to pass a reasoned order after giving an opportunity of hearing to the respondent. [Paras 22-24] [236-D-G; 239-E-H; 240-A]**

*Ram Chander v. Union of India & Ors.* **(1986) 3 SCC 103: 1986 (2) SCR 980;** *Union of India and Anr. v. Jesus Sales Corporation* **(1996) 4 SCC 69: 1996 (3) SCR 894;** *Managing Director, ECIL, Hyderabad and others v. B. Karunakar and Ors.* **(1993) 4 SCC 727: 1993 (2) Suppl. SCR 576;** *Y. Malleswara Rao* v. *Chief General Manager, State Bank of India, Hyderabad & Ors.* **2006 LAB. I.C. 1384 – referred to.**

**Case Law Reference:**

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| **(1998) 4 SLR 711** | **referred to** | **Para 10, 11, 17, 21** |

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| **1986 (2) SCR 980** | **referred to** | **Para 10, 12, 15** |
| **(1994) Supp (2) SCC 463** | **relied on** | **Para 12** |
| **1996 (3) SCR 894** | **referred to** | **Para 13,14,17** |
| **2004 (6) Suppl. SCR 101** | **relied on** | **Para 15, 20** |
| **1993 (2) Suppl. SCR 576** | **referred to** | **Para 15, 16, 17, 21** |
| **2006 LAB. I.C. 1384** | **referred to** | **Para 17** |
| **1968 SCR 186** | **relied on** | **Para 18** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 128 of 2007.

From the Judgment & Order 23.01.2006 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 19115 of 2004.

K.N. Bhatt, Rajat Arora (for Rajiv Nanda) for the Appellants.

Ram Lal Roy (for R.N. Keshwani) for the Respondent.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. Two questions presented for consideration in this appeal by special leave, at the instance of the appellants—Oriental Bank of Commerce and its General Manager – are: (one) whether in terms of regulation 17 of Oriental Bank of Commerce Officer Employees (Discipline and Appeal) Regulations, 1982 (for short, 'the 1982 Regulations'), the appellate authority is required to accord personal hearing to the respondent in a departmental appeal; and (two) whether the order dated June 4, 2004 passed by the appellate authority in the appeal preferred by the respondent under regulation 17 suffers from infirmity for want of reasons.



2. The brief facts leading to the above questions are these : the respondent—R.K. Uppal (hereinafter referred to as 'delinquent') faced departmental inquiry under regulation 6 of the 1982 Regulations for acts of omission and commission committed by him while working as Senior Manager/Incumbent In-charge at 19-D, Chandigarh Branch. The article of charges served on the delinquent contained four charges, namely : (I) between the period September 14, 1999 to December 20, 1999, while recommending sanction of credit facilities and further enhancements in the account of M/s. Dunroll Industries Limited, the delinquent failed to ensure that the proposal has been properly appraised/processed and all the relevant information has been recorded in the process note; (II) the delinquent recommended release of working capital facilities aggregating to Rs. 64 lac in the account of M/s. Dunroll Industries Limited for the unit located at Sikandarabad (UP) at a distance of approximately 300 k.m. from the branch although the monitoring of unit at such a distant place was not possible; (III) the delinquent recommended enhancement of Rs. 175 lac in the Bank Guarantee limit on November 17, 2000 in the account of M/s. Dunroll Industries Limited without ensuring satisfactory conduct of the account and without going into the details of the transactions and implications thereof and (IV) the delinquent released credit facilities in the account of M/s. Dunroll Industries Limited without complying with the terms of sanction.

3. On March 17, 2003, Shri M.K. Ghosh, Commissioner for Departmental Inquiries, Central Vigilance Commission, was appointed inquiring authority to inquire into the above charges levelled against the delinquent.

4. The delinquent submitted his reply and denied the charges. The inquiring authority after recording the evidence submitted its report on November 11, 2003. Charge I and Charge II were held to be partly proved while Charge III and Charge IV were held to be proved.

5. The findings and report of the inquiring authority were sent to the delinquent who in response submitted his representation on December 15, 2003. The disciplinary authority concurred with the findings of the inquiring authority and keeping in view the seriousness of charges and gravity of the proved conduct, it imposed the penalty of dismissal vide order dated February 14, 2004.

6. The delinquent preferred appeal under regulation 17 of the 1982 Regulations assailing his dismissal order on diverse grounds and also requested for grant of personal hearing. The appellate authority rejected the delinquent's request for personal hearing and dismissed his appeal vide its order dated June 4, 2004.

7. The delinquent challenged the order of penalty dated February 14, 2004 and also the order of the appellate authority before the High Court of Punjab and Haryana. The Division Bench of that Court vide its order dated January 23, 2006 allowed the delinquent's writ petition partly and set aside the order of the appellate authority and remitted the matter back to it with a direction to pass a reasoned order after giving an opportunity of hearing to the petitioner. It is this order which is impugned in the present appeal.

8. We have heard Mr. K.N. Bhatt, senior counsel for the appellants and Mr. Ram Lal Roy, counsel for the respondent.

Re : Question (one)

9. Regulation 17 of the 1982 Regulations reads as follows:-

"17. Appeals :

(i) An officer employee may appeal against an order imposing upon him any of the penalties specified in regulation 4 or against the order of suspension referred to in regulation 12. The appeal shall lie to



the Appellate Authority.

(ii) An appeal shall be preferred within 45 days from the date of receipt of the order appealed against. The appeal shall be addressed to the Appellate Authority and submitted to the authority whose order is appealed against. The authority whose order is appealed against shall forward the appeal together with its comments and the records of the case to the Appellate Authority. The Appellate Authority shall consider whether the findings are justified or whether the penalty is excessive or inadequate and pass appropriate orders. The Appellate Authority may pass an order confirming, enhancing, reducing or setting aside the penalty or remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case….."

10. The High Court has taken a view that regulation 17 of the 1982 Regulations impliedly requires that a delinquent who has preferred appeal is afforded an opportunity of personal hearing by the appellate authority. While taking such view, the High Court relied on a decision of this Court in *Ram Chander v. Union of India & Ors.*[1] and a Full Bench decision of that Court in *Ram Niwas Bansal v. State Bank of Patiala & Anr.*[2] .

11. We shall refer to the above two decisions first. In Ram Chander's case1 before this Court, the appellant who was employed as Shunter, Grade 'B' in the Railways was removed from service after holding disciplinary inquiry wherein his guilt of misconduct was held to be proved. The inquiry officer proceeded ex-parte against the delinquent as he did not appear and recorded a finding that misconduct was proved. The disciplinary authority (General Manager) concurred with the

1. (1986)3 SCC 103.

2. (1998) (4) SLR 711.

view of the inquiry officer; formed a provisional view that penalty of removal should be imposed on him and issued a show cause notice to the delinquent in this regard. This time, the delinquent did respond to the show cause notice and submitted his explanation. The disciplinary authority was not satisfied with the delinquent's response and imposed the penalty of removal. The delinquent preferred a departmental appeal before the Railway Board under the relevant Rules. His appeal was dismissed by the appellate authority. The delinquent then challenged the orders of the appellate authority and disciplinary authority before the High Court in a writ petition. The writ petition was dismissed and so also the Letters Patent Appeal preferred by him. The matter then reached this Court in an appeal by special leave. Inter alia, the contention of the delinquent before this Court was that it was incumbent upon the appellate authority to afford him personal hearing before his appeal was decided. Construing the relevant Rules, namely, Rule 18(ii) of the Railway Servants (Discipline & Appeal) Rules, 1968 and Rule 22(2) of the said Rules, this Court held (at pages 117-118) as under :

> "25. ..........Such being the legal position, it is of utmost importance after the Forty-Second Amendment as interpreted by the majority in Tulsiram Patel [(1985) 3 SCC 398] case that the appellate authority must not only give a hearing to the government servant concerned but also pass a reasoned order dealing with the contentions raised by him in the appeal. We wish to emphasize that reasoned decisions by tribunals, such as the Railway Board in the present case, will promote public confidence in the administrative process. An objective consideration is possible only if the delinquent servant is heard and given a chance to satisfy the authority regarding the final orders that may be passed on his appeal. Considerations of fair play and justice also require that such a personal hearing should be given.
>
> 26. In the result, the appeal must succeed and is allowed.



> The judgment and order of a learned Single Judge of the Delhi High Court dated August 16, 1983 and that of the Division Bench dismissing the letters patent appeal filed by the appellant in limine by its order dated February 15, 1984 are both set aside, so also the impugned order of the Railway Board dated March 11, 1972. We direct the Railway Board to hear and dispose of the appeal after affording a personal hearing to the appellant on merits by a reasoned order in conformity with the requirements of Rule 22(2) of the Railway Servants (Discipline and Appeal) Rules, 1968, as expeditiously as possible, and in any event, not later than four months from today."

In our opinion, in Ram Chander's case1, this Court has not laid down as an absolute proposition that in matters of departmental appeal against the punishment order of a disciplinary authority, the appellate authority must invariably afford personal hearing to a delinquent.

12. Insofar as, Punjab and Haryana High Court is concerned, it is true that in *Ram Niwas Bansal*[2] while dealing with a similar regulation, i.e. regulation 70 of the State Bank of Patiala (Officers) Service Regulations, 1979, the Full Bench of that Court has read into such rule a provision of right of personal hearing to a delinquent but we find it difficult to approve that view. As a matter of fact, the judgment of this Court in the case of *State Bank of Patiala Vs. Mahendra Kumar Singhal*[3] was not brought to the notice of that Court nor that judgment was adverted to which lays down in clear terms that the rule of natural justice does not necessarily in all cases confer a right of audience at appellate stage. This is what this Court said (at page 464) in *Mahendra Kumar Singhal*[3] :

> "2. Heard counsel on both sides. The respondent was visited with the punishment of dismissal from service. He filed a departmental appeal which came to be dismissed,

3. (1994) Supp (2) SCC 463.

whereupon he moved the High Court by way of a writ petition. The High Court quashed the order of the appellate authority on the ground that no personal hearing was given before the appeal was dismissed. The matter was, therefore, remitted to the appellate authority to dispose of the appeal after hearing the delinquent personally. It is against the said order that the present appeal is filed.

3. No rule has been brought to our attention which requires the appellate authority to grant a personal hearing. The rule of natural justice does not necessarily in all cases confer a right of audience at the appellate stage. That is what this Court observed in *F.N. Roy v. Collector of Customs, Calcutta* [1957 SCR 1151 = AIR 1957 SC 648]. We, therefore, think that the impugned order is not valid. Our attention was, however, drawn to the decision in *Mohinder Singh Gill v. Chief Election Commissioner,* New Delhi [(1978) 1 SCC 405] wherein observation is made in regard to the right of hearing. But that was not a case of a departmental inquiry, it was one emanating from Article 324 of the Constitution. In our view, therefore, those observations are not pertinent to the facts of this case."

13. In *Union of India and Anr. v. Jesus Sales Corporation*[4], this Court was concerned with an appeal that was filed against the judgment of the Full Bench of the Delhi High Court holding that an oral hearing has to be given by appellate authority before taking a decision under 3rd proviso to sub-section (1) of Section 4-M of the Imports and Exports (Control) Act, 1947. The Court noticed Section 4-M of that Act and in paragraph 3 at page 73 of the Report framed the question as to whether the requirement of hearing to the appellants has to be read as an implicit condition while construing the scope of 3rd proviso to sub-section (1) of Section 4-M. This Court held (at pages 74-75) as under :

4. (1996) 4 SCC 69.



"5. The High Court has primarily considered the question as to whether denying an opportunity to the appellant to be heard before his prayer to dispense with the deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court have been referred to. It need not be pointed out that under different situations and conditions the requirement of compliance of the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi-judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points

raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded. This is all the more important in the context of taxation and revenue matters. When an authority has determined a tax liability or has imposed a penalty, then the requirement that before the appeal is heard such tax or penalty should be deposited cannot be held to be unreasonable as already pointed out above. In the case of *Shyam Kishore v. Municipal Corpn. of Delhi* [(1993) 1 SCC 22] it has been held by this Court that such requirement cannot be held to be harsh or violative of Article 14 of the Constitution so as to declare the requirement of pre-deposit itself as unconstitutional. In this background, it can be said that normal rule is that before filing the appeal or before the appeal is heard, the person concerned should deposit the amount which he has been directed to deposit as a tax or penalty. The non-deposit of such amount itself is an exception which has been incorporated in different statutes including the one with which we are concerned. Second proviso to sub-section (1) of Section 4-M says in clear and unambiguous words that an appeal against an order imposing a penalty shall not be entertained unless the amount of the penalty has been deposited by the appellant. Thereafter the third proviso vests a discretion in such appellate authority to dispense with such deposit unconditionally or subject to such conditions as it may impose in its discretion taking into consideration the undue hardship which it is likely to cause to the appellant. As such it can be said that the statutory requirement is that before an appeal is entertained, the amount of penalty has to be deposited by the appellant; an order dispensing with such deposit shall amount to an exception to the said requirement of deposit. In this background, it is difficult to hold that if the appellate authority has rejected the prayer of the appellant to dispense with the deposit unconditionally or has dispensed with such deposit subject to some conditions without



hearing the appellant, on perusal of the petition filed on behalf of the appellant for the said purpose, the order itself is vitiated and is liable to be quashed being violative of the principles of natural justice.

14. Thus, in *Jesus Sales Corporation*[4], it was held by this Court that under the relevant rule, it was not obligatory upon the appellate authority to hear the appellant.

15. In *Ganesh Santa Ram Sirur v. State Bank of India and Anr.*[5], the appellate authority proposed to enhance the penalty imposed upon the delinquent by the punishing authority. The disciplinary authority recommended to the punishing authority the punishment of reduction in substantive salary at one stage. The punishing authority accepted the recommendation of the disciplinary authority and imposed the punishment accordingly. The appellate authority proposed to enhance the penalty to an order of removal. In this context, inter alia, one of the contentions raised before this Court was that the order of removal from service could not be sustained as no personal hearing was given to the delinquent before the enhancement of punishment even though personal interview was specifically asked for. The Court noticed various judgments of this Court including the Constitution Bench judgment in *Managing Director, ECIL, Hyderabad and others v. B. Karunakar and Ors.*[6] and also the judgment of the Punjab and Haryana High Court in Ram Niwas Bansal2. In paragraph 31 at page 29 of the Report, it was held that the approach and test adopted in B. Karunakar6 should govern all cases where the complaint is not that there was no hearing, no notice and no opportunity but one of not affording the proper hearing that is adequate or a full hearing or violation of a procedural rule or requirement governing that inquiry. We have not been able to discern anything in *Ganesh Santa Ram Sirur*[5] that lays down that the appellate authority must, in all cases of departmental

5. (2005) 1 SCC 13.

6. (1993) 4 SCC 727

appeal, afford personal hearing to the delinquent.

16. Be it noted that the principal question for consideration in *B. Karunakar*[6] was whether the report of the inquiry officer/authority who/which is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to guilt or otherwise of the employee and the punishment, if any, to be awarded to him. While dealing with this question and its diverse facets, the Court exhaustively considered the principles of natural justice in the context of furnishing the report of the inquiry officer/authority to the delinquent employee. *B. Karunakar*[6] does not deal with the question of necessity of affording a personal hearing to a delinquent by the appellate authority.

17. Mr. K.N. Bhatt, learned senior counsel for the appellants cited a Single Bench decision of Andhra Pradesh High Court in *Y. Malleswara Rao v. Chief General Manager, State Bank of India, Hyderabad & Ors.*[7]. In that case the delinquent was visited with the penalty of removal from service. The concerned delinquent preferred appeal before the appellate authority and one of the contentions raised before the High Court was that the appellate authority failed to afford a personal hearing to the delinquent and, therefore, the order of the appellate authority suffered from transgression of an essential principle of natural justice. The Single Judge of the High Court referred to decisions of this Court in *Mahendra Kumar Singhal*[3], *Jesus Sales Corporation*[4] and *Ganesh Santa Ram Sirur*[5] and also the decision of Full Bench of Punjab and Haryana High Court in *Ram Niwas Bansal*[2]. The Single Judge also referred to few decisions of other High Courts and followed the proposition propounded by this Court in *Mahendra Kumar Singhal*[3] viz; that in the absence of the specific requirement by

7. 2006 LAB I.C. 1384.



the relevant rules, there is no right to a personal hearing at the appellate stage and the rules of natural justice do not require that in all cases a right of audience should be provided at the appellate stage.

18. It is now fairly well settled that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. In the words of Ramaswami, J. (*Union of India & Anr. v. P.K. Roy & Ors.*[8]) the extent and application of the doctrine of natural justice cannot be imprisoned within the straitjacket of a rigid formula. The application of the doctrine depends upon the nature of jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.

19. A right of appeal is not an inherent right. None of the facets of natural justice requires that there should be right of appeal from any decision. The extent of power of an appellate forum and the mode and manner of its exercise can always be provided in the provision that creates such right. Insofar as provision of appeal in regulation 17 of the 1982 Regulations is concerned, it must be stated that the said provision affords to an employee right of appeal against an order imposing upon him any of the penalties specified in regulation 4 or against the order of suspension referred to in regulation 12. It provides for limitation within which the appeal is to be preferred. As per the said provision, the appeal must be addressed to the appellate authority and submitted to the authority whose order is appealed against. The authority whose order is appealed against is required to forward the appeal together with its comments and also the record of the case to the appellate authority. The appellate authority then proceeds with the consideration of the appeal and considers whether the findings are justified; whether

8. AIR 1968 SC 850

the penalty is excessive or inadequate and passes appropriate order confirming, enhancing, reducing or setting aside the penalty or remitting the case to the authority that imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case. The appeal provision in regulation 17 of the 1982 Regulations does not expressly provide for personal hearing to the appellant. Is the right of personal hearing to the appellant implicit in the provision? We think not. In our considered view, in the absence of personal hearing to the appellant, it cannot be said that the very right of appeal is defeated. One situation is, however, different. Where the appellate authority proposes to enhance the penalty, obviously, the appellate authority must issue notice to the delinquent asking him to show cause why penalty that has been awarded to him must not be enhanced and give him personal hearing. It is so because the appellate authority seeks to inflict such punishment for the first time which was not given by the disciplinary/punishing authority. Although there are no positive words in regulation 17, requiring that the appellant shall be heard before enhancement of the penalty, the fairness and natural justice require him to be heard.

20. It is true that in *Ganesh Santa Ram Sirur*[5], this Court did not accept the contention of the delinquent relating to non-grant of personal hearing to him by the appellate authority before the enhancement of the punishment. But it was so in the peculiar fact-situation of the case. First, this Court observed that Charge 5 of granting loan to the spouse under SEEUY Scheme in violation of Rule 34(3) of the State Bank of India (Supervising Staff) Service Rules was found by the appellate authority more serious and grave in nature. Secondly and more importantly, the Court noticed that delinquent in his appeal before the appellate authority admitted that he had committed misconduct of disbursing the loan to his wife in a Scheme which was meant for educated unemployed youth. To our mind, thus, there is no inconsistency in the judgment of this Court in *Ganesh Santa Ram Sirur*[5] and our statement above that where the appellate



authority proposes to enhance the penalty, the appellate authority must issue notice to the delinquent and give him personal hearing.

21. However, personal hearing may not be required where the appellate authority, on consideration of the entire material placed before it, confirms, reduces or sets aside the order appealed against. Regulation 17 of the 1982 Regulations does not require that in all situations personal hearing must be afforded to the delinquent by the appellate authority. The view taken by the Full Bench of Punjab and Haryana High Court in the case of *Ram Niwas Bansal*[2] is too expansive and wide and cannot be held to be laying down correct law particularly in light of the judgment of this Court in *Mahendra Kumar Singhal*[3]. We answer this question accordingly.

Re : Question (two)

22. The High Court has faulted the order of the appellate authority also on the ground of it being a non-speaking order. Is it so? We have carefully perused the order of the appellate authority and we find that the order dated June 4, 2004 cannot be labelled as a non-speaking order. The order does not suffer from the vice of non-application of mind. The appellate authority has addressed the points raised in the appeal and critical to the decision, albeit briefly. It is true that the appellate authority must record reasons in support of its order to indicate that it has applied its mind to the grounds raised but it is not the requirement of law that an order of affirmance by the appellate authority must be elaborate and extensive. Brief reasons which indicate due application of mind in decision making process may suffice. Each ground raised in the appeal has been dealt with briefly as would be apparent from the following consideration of the matter by the appellate authority:

> "The contention of the appellant that no departmental action can be taken against him during pendency of criminal proceedings before the Court is not tenable; as

departmental enquiry is independent of criminal proceedings and as such there is no bar to pass the order of punishment by the Disciplinary Authority during the pendency of criminal proceedings.

The appellant has alleged that Inquiring Authority has erred in holding the imputation 2 & 3 under Article of Charge No. 1 as proved. On carefully perusing the evidence brought on record of the enquiry and other related record, I find that Disciplinary Authority has fully considered evidence/ submissions made by the appellant and based on that the article of charge no. 1 is held partly proved against the appellant. This does not, however, mean that the Disciplinary Authority has in anyway exonerated the appellant of this charge. Hence, I do not find any force/ substance in the allegation of the appellant. I find that on the basis of evidence adduced in the inquiry, article of charge no. 1 has been rightly held as partly proved against the appellant.

The appellant has further contended that PO had not furnished any proof of his having recommended the proposal to the Regional Office. I have perused the relevant record and evidence adduced in respect of the charge. It is evident from Ex. MEX 10/6 (which is admitted document in the enquiry) that the appellant had sent letter dated 24-10-2000 based on which Regional Office permitted the party to avail facility for unit at Sikandrabad which was 300 kms away from Chandigarh and in this way, it was not possible for the branch to monitor the unit at such a distant place. Although the appellant has not disputed reference of letter dated 24-10-2000 in Ex. MEX 10/6, yet due to its non-production by the PO, the IA has held this charge as partly proved. On the basis of evidence brought on record of enquiry and after considering submission of appellant, I find that Disciplinary Authority has rightly held article of charge no. 2 as partly proved and



contention of the appellant that this charge should be set aside is devoid of any merit.

The appellant has contended that he had recommended the proposal keeping in view the General Manager's instructions. The appellant had neither produced any document nor adduced any evidence in his defence to substantiate this fact. However, during general examination by the Inquiring Authority, he has admitted that he had no exposure of processing of the guarantees and proposal was analysed at Regional Office and he had just recommended it. This clearly shows that the appellant recommended enhancement of bank guarantee limit of Rs. 175 lacs in the account of M/s. Dunroll Industries Ltd. without ensuring satisfactory conduct of the account and without going into details of transaction and implications thereof. After carefully analyzing the evidence adduced during the enquiry, I find that the article of charge no. 3 against the appellant is rightly held proved by Disciplinary Authority. I therefore, do not find any merit/force in the allegations of the appellant.

The Appellant has contended that common seal on all documents had been affixed and all the documents are valid. On careful perusal of documents ME-23/1/2 and after evaluating evidence of PW-1 during regular hearing held on 20-9-2003, I observe that article of charge no. 4 against the appellant in respect of releasing credit facilities in the account of M/s. Dunroll Industries Ltd. without complying with terms of sanction is rightly held proved by the Disciplinary Authority. Hence I do not find any force/merit in contention of the appellant that article of charge no. 4 has been wrongly upheld by the Inquiring Authority.

The appellant has also referred to some pending enquiry proceedings against him in respect of charge sheet dated 12-8-2003 in the matter of Bankarpur Cold Storage and has contended that it is against principles of natural justice

A to take into account past service record without valid legal grounds. After perusing relevant enquiry record, I find that Disciplinary Authority in his order has referred to certain lapses/irregularities attributable to the appellant for the misconduct committed by him while posted as Sr. Manager/Incumbent In-charge, B/O 19-D, Chandigarh. B Having regard to imposition/inflictment of penalty of dismissal on the appellant w.e.f. 14-2-2004 by the Disciplinary Authority under Regulation 4(j) of Oriental Bank of Commerce Officer Employees (Discipline & Appeal) Regulations, 1982 it was not open to the bank to C pursue pending charge sheet dated 12-8-2003 against the appellant as referred to in the appeal. Disciplinary Authority, therefore, has rightly stated in his order dated 14-2-2004 that "no action is required to be taken at this stage" in relation to this charge sheet. Hence, I do not find D any force/merit in the allegations of the appellant that Disciplinary Authority has taken into account the matter of pending inquiries in respect of charge sheet dated 12-8-2003. As such, there is no violation of principles of natural justice as alleged."

E

Having discussed the matter as above, the appellate authority held that on consideration of the inquiry record and facts and circumstances of the case, the findings and the order dated February 14, 2004 passed by disciplinary authority are based on evidence brought on record of inquiry and not founded on F past record or any other matter not connected with inquiry as alleged by the delinquent in the appeal. Consequently, the appellate authority concurred with the view of the disciplinary authority and found no justification to interfere with the penalty awarded by the disciplinary authority. G

23. The order of the appellate authority, by no stretch of imagination can be said to suffer from vice of lack of reasons. We answer question no. (two) in the negative.

H 24. In our view, the High Court was clearly in error in setting



A aside and quashing the order dated June 4, 2004 passed by the appellate authority and in directing the appellate authority to pass a reasoned order after giving an opportunity of hearing to the petitioner (respondent herein).

B 25. The appeal is, accordingly, allowed and the judgment and order dated January 23, 2006 passed by the High Court of Punjab and Haryana is set aside. The parties shall bear their own costs.

D.G. Appeal allowed.

STATE OF RAJASTHAN & ORS.
*v.*
JEEV RAJ & ORS.
(Civil Appeal Nos. 1585-1586 of 2005)

AUGUST 11, 2011

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

*RAJASTHAN LAND REVENUE ACT:*

*Power to grant patta – 'Bapi Patta' for 603.16 bighas of land granted – Patta cancelled, but later restored in respect of 460.15 bighas by Public Health and Engineering Department (PHED) – Held: It was the Land Revenue Department which alone had the power under the Act to grant land to any person – The allotment of land was without jurisdiction as the PHED was not empowered to transfer the land.*

*Section 259 -- Jurisdiction of civil court – Patta for 603.16 bighas of agricultural land cancelled as the said land was the part of catchment area of a canal – By order dated 23.4.1969 PHED restored 460.15 bighas of land – Order dated 23.4.1969 cancelled – Revision petition pending before Revenue Minister -- Suit filed before the Court of Munsif – Decreed – Subsequently, Revenue Minister cancelled the order dated 23.4.1969 – Division Bench of High Court in appeal arising of a writ petition upheld the validity of the order dated 23.4.1969 on the principle of res judicata – Held: In view of s. 259, jurisdiction of civil court is ousted – Further, the validity of allotment order dated 23.4.1969 was not considered on merits – Therefore, principle of res judicata shall not apply – It is not in dispute that validity of the order dated 23.4.1969 has not been adjudicated by any appellate / revisional forum – Therefore, it is desirable that since the State Government*





*is going to decide the allotment of 143 bighas of land, it may as well decide the grant of remaining 460.15 bighas of land allotted by order dated 23.4.1969 – The Court is also of the view that in larger public interest no land can be allotted or granted if it obstructs the flow of water – Impugned order of High Court is set aside and Revenue Department of the State Government is directed to decide the matter afresh – Res judicata.*

**On 12.10.1941 respondent no. 1 and his brother were granted 'Bapi Patta' No. 14 for 603.16 bighas of agricultural land. However, as the land in question was part of the catchment area of the canal and the stone slabs constructed by the respondents were obstructing the flow of water, the patta was cancelled on 19.7.1942 and the respondents were paid Rs. 9,377/- as compensation. In the year 1968, the respondents again claimed compensation of Rs. 73,885/- as price of the land in question and the stone slabs. The Public Health and Engineering Department (PHED), by an order dated 23.4.1969 restored the land in question (460.15 bighas) to the respondents in lieu of compensation amount. However, the restoration of the land was cancelled by the State Government on 1.5.1973. The respondents challenged the order in a writ petition and the single Judge of the High Court quashed the order dated 1.5.1973 with liberty to the State Government to reopen the order dated 23.4.1969 by giving opportunity of hearing to the respondents. The State Government, accordingly, issued notice to the respondents to recall the order dated 23.4.1969 and for their eviction. The respondents filed objections, and also filed a suit in the Court of Munsif. The suit was decreed on 30.6.1982. Subsequently, in the revision petition for cancellation of plot granted in 1969, the Revenue Minister by order dated 15.12.1992, cancelled the order dated 23.4.1969. The respondents challenged the said order in a writ petition**

**before the High Court and the single Judge allowed the same. The Division Bench of the High Court dismissed the appeal of the State Government and allowed the cross-objections of the respondents as regards 460.15 bighas of land and remitted the matter to the Revenue Minister as far as the remaining land of 143 bighas was concerned. Aggrieved, the State Government filed the appeals.**

**Allowing the appeals, the Court**

**HELD: 1.1 The order passed on 23.04.1969 was by the Public Health Engineering Department whereas it was the Land Revenue Department which alone had the power under the Land Revenue Act to grant land to any person. Thus, the allotment of land was without jurisdiction as the PHED was not empowered to transfer such a huge chunk of 460.15 bighas of land which is now an integral part of the city of Jodhpur. [para 9] [250-C-D]**

**1.2 It is not in dispute that the validity of the order dated 23.04.1969 has not been adjudicated by any appellate/revisional forum. The respondents cannot be conferred with such huge benefit of 460.15 bighas of land without any proper adjudication on merits about the grant of allotment of land. The judgment and decree dated 30.06.1982 does not dwell upon the merits of the validity of the allotment dated 23.04.1969 but instead proceeds that such allotment on 23.04.1969 would entail the order of injunction. [para 10] [250-F-G]**

**1.3 The single Judge, on 24.11.1976, set aside the order of cancellation passed on 01.05.1973 and referred the matter back to the State Government to consider it on merits. However, the Division Bench of the High Court upheld the validity of order dated 23.04.1969 on the principle of *res judicata*. The principle of *res judicata* shall not apply inasmuch as neither the subject matter of**



**validity of allotment dated 23.04.1969 was considered on merits by the Munsif Court nor the decree passed by the civil court was within its jurisdiction because the Land Revenue Act prohibits the jurisdiction of the civil court (s.259). This has led to the validity of the order dated 23.04.1969 being left unexamined by the State Government despite orders of the single Judge of the High Court dated 24.11.1976. [para 10] [250-G-H; 251-A-C]**

*Sabitri Dei and Others. vs. Sarat Chandra Rout and Others* **1996 (1) SCR 1168 =(1996) 3 SCC 301;** *Sushil Kumar Mehta vs. Gobind Ram Bohra* **1989 (2) Suppl. SCR 149 = (1990) 1 SCC 193 – relied on.**

**1.4 Therefore, it is desirable that since the State Government is going to decide the allotment of 143 bighas of land in pursuance of the impugned judgment, let the State Government may as well decide the grant of remaining 460.15 bighas of land allotted by order dated 23.04.1969 in accordance with law. It is also to point out that even the Division Bench in its judgment dated 14.10.2003 has clearly recorded the fact that the land in question was part of the catchment area for canal and stone slabs were obstructing the flow of water and, therefore, "Bapi Patta" No. 14 granting 603.16 bighas of land was cancelled and compensation of Rs.9,377/- was paid to the appellants for stone slabs which had been removed. The Court also accepts the statement of the intervenor, that in the larger public interest no land can be allotted or granted if it obstructs the flow of water. This principle has been reiterated by this Court in several orders. [paras 11 and 12] [251-D-G; 252-C-D]**

**1.5 The impugned order passed by the High Court on 14.10.2003 is, therefore, set aside and the Revenue Department of the State of Rajasthan is directed to decide**

**the matter afresh in accordance with law after issuing notice to all the parties concerned. [para 13] [252-F-G]**

**Case Law Reference:**

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|---|---|---|
| **1996 (1) SCR 1168** | **relied on** | **para 9** |
| **1989 (2) Suppl. SCR 149** | **relied on** | **para 9** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1585-1586 of 2005.

From the Judgment & Order dated 14.10.2003 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal (w) No. 270 of 2002 and in D.B. Cross Objection No. 1 of 2003.

Dipankar Gupta, Dr. Manish Singhvi, Milind Kumar, Puneet Jain, L.N. Gahlot, Pratibha Jain, Gp. Capt. Karan Singh Bhati, Aishwarya Bhati, K. Singh, R. Bhaskar for the appearing parties.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. These appeals arise from the final judgment and order dated 14.10.2003 passed by the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal (W) No. 270 of 2002 and D.B. Cross Objection No. 1 of 2003 wherein the appeal filed by the appellants herein was dismissed and the cross objection filed by the respondents was allowed by the High Court.

2. **Brief facts:**

(a) On 12.10.1941, respondent No.1 and his brother Pusa Ram (since expired)-his legal representatives are on record, were granted 'Bapi Patta' No. 14 for agricultural land measuring about 603.16 bighas in Village Gevan, Tehsil Jodhpur by the then Jodhpur Government. As the land in question was part of the catchment area of the feeder canal of Kaliberi canal and



stone slabs which were constructed by the respondents were obstructing the flow of water, on 19.07.1942, at the request of the Public Health and Engineering Department (in short "the PHED"), Jodhpur Government cancelled the patta and removed the stone slabs.

(b) On 05.09.1945, the respondents claimed compensation of Rs.37,826/- for the loss of their land and stone slabs. On 14.06.1949, the State Government made payment of Rs.9,377/- as compensation to the respondents.

(c) Thereafter, in the year 1968, after a gap of about 20 years, the respondents again claimed compensation of Rs.73,885/- as price of the aforesaid land and stone slabs from the PHED through a notice. The PHED passed an order dated 23.04.1969 to restore the land in question to the respondents in lieu of compensation amount sought for by them. In compliance of the said order, the possession of 460.15 Bighas of land was restored to them on 27.05.1969 and the same was also mutated in their name.

(d) On some complaints being made, the restoration of the land was cancelled by the State Government on 01.05.1973. Challenging the same, the respondents filed writ petition before the High Court. The learned single Judge of the High Court, by order dated 24.11.1976, quashed the order dated 01.05.1973 and directed that in case the State wants to reopen the order dated 23.04.1969, it can do so by giving proper opportunity of hearing to the petitioners therein. After the aforesaid judgment, on 25.03.1978, a notice was served on the respondents by the PHED stating that it wanted to get the land back from the respondents which had been restored to them for its own use and order dated 23.04.1969 was sought to be recalled. It was also stated that the respondents are liable to be evicted from the land in question. The respondents filed objections against the notice for recalling the order dated 23.04.1969.

(e) Since the notice for recalling the order dated

23.04.1969 has not been formally dropped, the respondents filed a suit in the Court of Munsif and Judicial Magistrate, Jodhpur City, Jodhpur. The Munsif Magistrate, by order dated 30.06.1982, decreed the suit restraining the State Government from making any alterations in the contract that has come into existence in pursuance of the order dated 23.04.1969. Notices were sent to the respondents to appear before the Revenue Minister as the Revision Petition for cancellation of the plot granted in the year 1969 was pending before him. The parties appeared before the Revenue Minister. By order dated 15.12.1992, the Revenue Minister cancelled the order dated 23.04.1969.

(f) Challenging the order of the Revenue Minister, the respondents filed a petition being W.P. No. 1526 of 1993 before the High Court. The learned single Judge of the High Court, by order dated 19.03.2002, allowed the same.

(g) Against the said judgment, the State filed D.B. Civil Special Appeal (W) No. 270 of 2002 and the respondents also filed cross objections before the High Court. The Division Bench of the High Court, by impugned judgment dated 14.10.2003, dismissed the appeal filed by the State and allowed the cross objection filed by the respondents herein.

(h) Aggrieved by the said order of the Division Bench, the State Government filed these appeals before this Court by way of special leave petitions.

3. Heard Dr. Manish Singhvi, learned counsel for the appellants, Mr. Dipankar Gupta, learned senior counsel for respondent Nos. 1-6 and Ms. Bhati, learned counsel for the intervenor.

4. The main issue in these appeals is about the grant of 460.15 bighas of land on 23.04.1969 by the PHED to the respondents herein. As far as the remaining land of 143 bighas is concerned, even the Division Bench of the High Court, in the



impugned order, remitted the matter to the Revenue Minister. Inasmuch as the issue of remaining land of 143 bighas raised by the respondents is pending before the Revenue Minister, the same is not relevant for our present consideration.

5. It is the contention of the learned counsel for the State that the order dated 23.04.1969 about the grant of 603.16 bighas of land (including 460.15 bighas - the subject matter of present proceedings) was ex facie without jurisdiction as it was allotted by the PHED on flimsy and fallacious grounds about cancellation of patta way back in the year 1942 and the compensation sought in the year 1968. It is relevant to note that the same was cancelled way back in 1973. Inasmuch as opportunity of hearing was not given, the learned single Judge of the High Court, by order dated 24.11.1976, remanded back to the State Government for deciding the matter afresh after giving due opportunity of hearing to the respondents herein.

6. On behalf of the State, it was pointed out that it has legitimate grievance with the allotment dated 23.04.1969 by the PHED. The cancellation was made way back in the year 1942 for allotment made in the year 1941 on the ground of violation of lease conditions. The respondents have claimed huge compensation for construction said to have been made during subsistence of lease in the year 1949 itself and filed application for compensation with regard to the cancellation of patta in the year 1968. According to the State, the said application was barred by limitation and it was also filed before wrong forum, i.e., the PHED, when it should have been filed before the Land Revenue Department, which is the appropriate Department.

7. It is also the grievance of the State that the allotment dated 23.04.1969 was cancelled on 01.05.1973, however, the High Court set aside the same on 24.11.1976 on the limited ground that there was violation of natural justice and directed the State Government to decide it afresh after giving opportunity of hearing. In those circumstances, the State wants to exercise its power under the Land Revenue Act read with the orders

passed by the learned single Judge of the High Court dated 24.11.1976 and the Revenue Minister dated 15.12.1992.

8. It was highlighted that the judgment of the trial Court dated 30.06.1982 is also nullity since there was no discussion on merits with regard to the validity of allotment dated 23.04.1969. Though it was pointed out by the counsel for the respondents that it was hit by the principle of res judicata as clarified by the counsel for the appellants, the principle of res judicata shall only apply if there is discussion or finding on the same subject matter. A perusal of the decree of injunction that had been passed on 23.04.1969 shows that it did not advert to the merits of the case at all. It is also not in dispute that the subject matter, namely, validity of allotment dated 23.04.1969 has not been gone into.

9. It is also relevant to point out that by virtue of Section 259 of the Land Revenue Act, the jurisdiction of the Civil Court is ousted and if any decree is passed by the Civil Court contrary to the said provision, the same is a nullity in the eyes of law. If the decree is passed coram non judice, as in the present case, then it is a nullity in the eyes of law and it shall not operate as *res judicata*. This proposition has been enunciated in *Sabitri Dei and Others. vs. Sarat Chandra Rout and Others,* (1996) 3 SCC 301, wherein this Court held that once a decree is held to be a nullity, the principle of constructive res judicata will have no application and its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in any collateral proceeding. This proposition has been reiterated in *Sushil Kumar Mehta vs. Gobind Ram Bohra* (1990) 1 SCC 193. It was held in the aforesaid case that,

> "Thus it is settled law that normally a decree passed by a court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a court without jurisdiction over the subject-matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings."



It is also relevant to note that the order passed on 23.04.1969 was by the PHED whereas it was the Land Revenue Department which alone had the power under the Land Revenue Act to grant land to any person. Thus the allotment of land was also without jurisdiction as the PHED was not empowered to transfer such a huge chunk of 460.15 bighas of land which is now an integral part of the city of Jodhpur.

10. It is also not in dispute that the validity of the order dated 23.04.1969 has not been adjudicated by any appellate/ revisional forum and according to the learned counsel for the State, it wants to decide the validity of order dated 23.04.1969 on merits and, in that event, the respondents shall have full opportunity to put-forth their case and objections, if any, available under the law. As rightly pointed out by the learned counsel for the State, the respondents cannot be conferred with such huge benefit of 460.15 bighas of land without any proper adjudication on merits about the grant of allotment of land. As pointed out earlier, the judgment and decree dated 30.06.1982 does not dwell upon the merits of the validity of the allotment dated 23.04.1969 but instead proceeds that such allotment on 23.04.1969 would entail the order of injunction. The learned single Judge, on 24.11.1976, set aside the order of cancellation passed on 01.05.1973 and referred the matter back to the State Government to consider it on merits. The learned single Judge, on 24.11.1976, has again remitted the matter to the

State Government because no opportunity of hearing was given with regard to 460.15 bighas of land. However, the Division Bench of the High Court upheld the validity of order dated 23.04.1969 on the principle of *res judicata*. As discussed and observed above, the principle of *res judicata* shall not apply inasmuch as neither the subject matter of validity of allotment dated 23.04.1969 was considered on merits by the Munsif Court nor the decree passed by the Civil Court was within its jurisdiction because the Land Revenue Act prohibits the jurisdiction of the Civil Court. This has led to the validity of the order dated 23.04.1969 being left unexamined by the State Government despite orders of the learned single Judge of the High Court dated 24.11.1976.

11. In view of the same, it is desirable that since the State Government is going to decide the allotment of 143 bighas of land in pursuance of the impugned judgment, we are of the view that let the State Government may as well decide the grant of remaining 460.15 bighas of land allotted vide order dated 23.04.1969 in accordance with law. It is also to point out that even the Division Bench in its judgment dated 14.10.2003 has clearly recorded the fact that the land in question was part of the catchment area for canal and stone slabs which were obstructing the flow of water and, therefore, "Bapi Patta" No. 14 granting 603.16 bighas of land was cancelled. The Division Bench has also recorded the stand of the State Government that soon after "Bapi Patta" was granted, it was realized that the same had been granted wrongly because the land fell under the catchment area of Kailana Lake and it was for this reason that subsequently in 1942, the said patta was cancelled and compensation of Rs.9,377/- was paid to the appellants therein for stone slabs which had been removed. Further, the Revenue Minister, in his order dated 15.12.1992, has clearly recorded that it came to the knowledge that "Bapi Patta" cannot be granted to the appellants therein inasmuch as the aforesaid land falls within the catchment area of feeder canal of Kaliberi and, therefore, the patta was cancelled on 19.07.1942.



Inasmuch as the land in question was being utilized as catchment area of potable water, grant of "Bapi Patta" was *void ab initio* and, therefore, it was cancelled. Even the learned single Judge, in his order dated 19.03.2002, has recorded while narrating the facts that on 09.03.1978, the Chief Engineer of the PHED had issued notices to the respondents along with others mentioning that the land was falling in the feeder canal catchment area and, therefore, the PHED wanted back the complete land of 603 bighas.

12. We also accept the statement of Mangal Singh, the intervenor, that in the larger public interest no land can be allotted or granted if it obstructs the flow of water. The above principle has been reiterated by this Court in several orders. We have already noted the prohibition, i.e., entertaining a suit by the Civil Court in the Land Revenue Act. Further, the land in question belongs to the Revenue Department of the State of Rajasthan and the PHED had no jurisdiction whatsoever to restore 460.15 bighas of land in favour of the respondents herein. It is needless to mention that while passing fresh orders as directed above, the State Government has to issue notice to all the parties concerned and decide the same in accordance with law.

13. In view of the above discussion, factual materials, legal issues considering public interest, we set aside the impugned order passed by the High Court on 14.10.2003 and direct the Revenue Department of the State of Rajasthan to decide the matter afresh as discussed above and pass fresh orders within a period of four months from the date of the receipt of this judgment after affording opportunity to all the parties concerned. Both the appeals are allowed on the above terms. No order as to costs.

R.P. Appeals allowed.

RAM MEHAR SINGH
*v.*
STATE OF N.C.T. OF DELHI AND ORS.
(Criminal Appeal Nos.1585-86 of 2011)

AUGUST 12, 2011

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

***Code of Criminal Procedure, 1973**: ss.107/151 – Criminal proceedings under – Dispute between writ petitioners and others regarding immovable property – Proceedings u/ ss.107/151 initiated against the writ petitioners – Grievance of writ petitioners that the police illegally detained them by invoking the provisions of ss.107/151 and thereby violated their fundamental rights – High Court quashed the proceedings u/ss.107/151 and held that instead of resorting to the provisions of ss.107/151 Cr.P.C., the provisions of s.145 should have been invoked and also awarded a sum of ?50,000 as token compensation to writ petitioners – High court further gave liberty to the writ petitioners to file suits for damages for tortuous liability against the erring police officials and directed the Commissioner of Police to initiate disciplinary proceedings against the erring police officials – Held: Admittedly, the police officials i.e. appellants were not impleaded by name in the writ petitions – Thus, while hearing the writ petitions and writ appeals, these appellants were not given an opportunity of hearing at all – The impugned judgments are set aside except to the extent that in all these cases the proceedings u/ss.107/151 stood quashed.*

**Dispute arose between the writ petitioners and others regarding immovable property. The proceedings under Sections 107/151 Cr.P.C. were initiated against the writ petitioners. The grievance of the writ petitioners in two separate writ petitions before the High Court was that the police illegally detained them for one day by invoking**





**the provisions of Sections 107/151 Cr.P.C. and thereby violated their fundamental rights. The High Court allowed the writ petitions and quashed the proceedings under Sections 107/151 Cr.P.C. and held that instead of resorting to the provisions of Sections 107/151 Cr.P.C., the provisions of Section 145 Cr.P.C. could have been invoked and also awarded a sum of Rs. 50,000 as token compensation. In the first case, the Court further gave liberty to the said writ petitioner to file suits for damages for tortuous liability against the erring police officials. In the second case, the court further gave directions to the Commissioner of Police to initiate disciplinary proceedings against the appellants. The State of NCT filed appeals which were dismissed by the Division Bench of the High Court. The instant appeals were filed by the aggrieved police officials.**

**Disposing of the appeals, the Court**

**HELD: 1. Admittedly, the police officials i.e. appellants were not impleaded by name in the writ petitions. Thus, while hearing the writ petitions, these appellants were not given an opportunity of being heard at all before the writ court and the Single Judge passed certain orders/directions adversely affecting them. Before the Division Bench also none of these appellants were impleaded and both the appeals stood dismissed by the common judgment. Thus, even before the Division Bench, all these appellants had not been given any opportunity to appear or plead their defence. Even on merit, the opinion of the High Court in the first case, that the proceedings under Section 145 Cr.P.C. could have been resorted to instead of Sections 107/151 Cr.P.C. did not seem to be correct. In fact it is the officer on spot who has to take a decision as to what provisions should be resorted to according to the prevailing circumstances. Even in another case if there had been altercation,**

**abusing, threatening and beating, by no means, it can be held that resorting to the provisions of Sections 107/151 Cr.P.C. was totally unwarranted. The impugned judgments and orders are set aside except to the extent that in all these cases the proceedings under Sections 107/151 Cr.P.C. stood quashed. In first case liberty given by the High Court to file a civil suit for recovery of immovable property shall remain intact. [Paras 11-13] [259-B-G]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1585-1586 of 2011.

From the Judgment and Order dated 25.02.2008 of the High Court of Delhi at New Delhi in WP (Criminal) No. 2448 of 2006.

WITH

Criminal Appeal Nos. 1587-1588 of 2011.

K.K. Mohan for the Appellant.

Sadhna Sandhu, Anil Katiyar, D.S. Mahra, A.P. Mohanty, C. Balakrishna and Anil Kumar Sangal for the Respondents.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. Leave granted in all the cases.

2. The criminal appeals arising out of S.L.P.(Crl.) Nos.5998-5999 of 2008 have been filed against the common judgment and order dated 28.5.2008 passed by the High Court of Delhi in L.P.A. Nos. 286/2008 and 289/2008. Though the matters had arisen before the Division Bench from different judgments of the Single Judge Bench, however, the same had been heard together and disposed of by the impugned judgment and in all these cases, the Division Bench dismissed the appeals filed by the State of N.C.T. of Delhi, respondents herein, against the judgments of the learned Single Judge



dated 28.2.2008 in W.P. (Crl.) No. 1392 of 2007 and 25.2.2008 passed in W.P. (Crl.) No. 2448 of 2006, wherein it has been alleged by the writ petitioners that the police authorities had misused their powers while resorting to the provisions of Sections 107/151 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) and violated their fundamental rights. A learned Single Judge had quashed the criminal proceedings under Sections 107/151 Cr.P.C.; awarded a token compensation and further directed the Central Bureau of Investigation (hereinafter called CBI) to investigate the cases against the police officials who had allegedly misused their powers, and directed the police administration to initiate proceedings against such officials.

3. Facts and circumstances giving rise to Criminal Appeals arising out of SLP (Crl.) Nos. 5998-5999 of 2008 are that there had been some dispute between one Shri Raj Kumar Bansal and his wife Smt. Urvashi Bansal. The writ petitioner Shri Purshottam Ramnani being a family friend helped Smt. Urvashi Bansal financially by giving a huge amount of loan and as the same was not returned, dispute arose between them regarding the immovable properties. On the complaint of Smt. Urvashi Bansal, the proceedings under Sections 107/151 Cr.P.C. were initiated against the writ petitioner and in that respect he was produced before the Special Executive Magistrate, Jahangir Puri, Delhi (hereinafter called the Magistrate) on 25.8.2007, wherein he was released on furnishing personal bond. The said Shri Purshottam Ramnani filed W.P.(Crl.) No. 1392 of 2007 on 31.10.2007 alleging that in case there was some dispute regarding the immovable property, the police could not resort to the provisions of Sections 107/151 Cr.P.C., and since he had been detained in jail for one day, there was violation of his fundamental rights, therefore, he should be awarded compensation and erring police officials be punished.

4. The writ petition was heard and disposed of by the learned Single Judge vide judgment and order dated 28.2.2008

granting all reliefs sought by the writ petitioner to the effect that proceedings under Sections 107/151 Cr.P.C. were quashed. The court held that the writ petitioner was illegally detained by invoking provisions of Sections 107/151 Cr.P.C. and the provisions of Section 145 Cr.P.C. could have been invoked; a sum of Rs.50,000/- was awarded as token compensation. The court further gave liberty to the said writ petitioner to file suits for damages for tortuous liability against the erring police officials and also for recovery of possession of the immovable property.

5. Being aggrieved, the State of NCT of Delhi preferred L.P.A. No.286 of 2008 and the same was dismissed by the impugned judgment and order dated 28.5.2008.

6. The present appellant was SHO of the police station concerned at the relevant time. Admittedly, in the writ petition he was not a party by name, nor any notice had ever been issued to him and he had no opportunity to defend himself. Even before the Division Bench in the L.P.A. filed by the State he was not impleaded as a party. Thus, the relevant submission on his behalf is that certain observations and directions have been made against him though he had never been heard.

7. Submission on behalf of the learned counsel for the contesting respondents has been that not giving an opportunity of hearing to the present appellant either before the learned Single Judge or the Division Bench remains immaterial, for the reason, that he would be heard by the concerned authorities during the disciplinary proceedings to be initiated in pursuance of the impugned judgments and orders. However, there is no denial by him of the fact that the present appellant had neither been made a party by name nor he had been given any notice of the proceedings and thus, he had no opportunity of being heard. The judgments of the courts below are based on the premises that instead of resorting to the provisions of Sections 107/151 Cr.P.C. the provisions of Section 145 Cr.P.C. could have been invoked in the present situation.



8. In Criminal Appeals arising out of SLP (Crl.) Nos. 6719-6720 of 2008, the facts had been that the appellant No.1-Sudesh Ranga being the SHO of the Police Station had received a complaint from Ashok Kumar Munna, the respondent herein against Keshav Kumar, respondent No.2 that the water from his toilet had been entering into the house of the complainant and damaged the entire wall because of seepage, and foul smell was also coming. On being asked, the respondent Keshav Kumar refused to carry out the repair and quarrelled with him and beaten him. In view of the said complaint, Keshav Kumar was detained under Sections 107/151 Cr.P.C. on 16.7.2006 and was produced before the Magistrate on 17.7.2006, wherein he was directed to be released on furnishing personal bond of Rs.5,000/- with one surety in the like amount. As he failed to furnish the personal bond he was sent to judicial custody and was released only on 18.7.2006 on furnishing the said bond. Keshav Kumar filed writ petition on 30.10.2006 alleging the violation of his fundamental rights by the police authorities by resorting to the provisions of Sections 107/151 Cr.P.C. The High Court entertained the said writ petition and asked the respondent therein to submit the status report. The High Court after considering the same disposed of the writ petition vide order dated 25.2.2008 quashing the proceedings under Sections 107/151 Cr.P.C.; directing to pay a token compensation to the complainant to the tune of Rs.50,000/- and further direction was issued to the Commissioner of Police to initiate disciplinary proceedings against the appellants.

9. Being aggrieved, the State of NCT of Delhi preferred L.P.A. No. 289 of 2008 which has been dismissed vide impugned judgment and order dated 28.5.2008. Hence, these appeals.

10. As both the matters had been disposed of by the Division Bench by the common judgment, we have heard them together alongwith other Criminal Appeals arising out of SLP (Crl) Nos. 1773 of 2008 and 5702 of 2008 and are being

disposed of by the common judgment.

11. Whatever may be the legal position, admittedly, the police officials i.e. appellants had not been impleaded by name in the writ petitions. The standing counsel appearing for the State of N.C.T. of Delhi had taken notice on behalf of the parties excluding the private parties. Thus, while hearing the writ petitions, these appellants had not been given an opportunity of hearing at all before the writ court and definitely the learned Single Judge passed certain orders/directions against them.

12. Being aggrieved, the State filed L.P.As. before the Division Bench wherein also none of these appellants had been impleaded and both the appeals stood dismissed by the common judgment and order dated 28.5.2008. Thus, even before the Division Bench, all these appellants had not been given any opportunity to appear or plead their defence. Even on merit, the opinion of the High Court in first case, that the proceedings under Section 145 Cr.P.C. could have been resorted to instead of Sections 107/151 Cr.P.C. does not seem to be correct. In fact it is the officer on spot who has to take a decision as what provisions should be resorted to according to the prevailing circumstances. Even in another case if there had been altercation, abusing, threatening and beating, by no means, it can be held that resorting to the provisions of Sections 107/151 Cr.P.C. was totally unwarranted.

13. We have decided other connected appeals arising out of SLP (Crl.) Nos. 1773 of 2008 and 5702 of 2008 giving reasons. These appeals stand disposed of in terms of the same. In view of the above, the judgments and orders impugned herein are set aside except to the extent that in all these cases the proceedings under Sections 107/151 Cr.P.C. stood quashed. In first case liberty given by the High Court to file a civil suit for recovery of immovable property shall remain intact.

D.G. Appeals disposed of.



RAJINDER SINGH PATHANIA & ORS.
*v.*
STATE OF N.C.T. OF DELHI & ORS.
(Criminal Appeal No. 1582 of 2011)

AUGUST 12, 2011

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

*Code of Criminal Procedure, 1973 – Sections 107/151 – Proceedings under – Against respondent no. 3 and 4 since police constables while patrolling found them quarrelling with each other in intoxicated condition at public place – Respondents produced before Magistrate and since they could not furnish bail bonds, were sent to judicial custody – Bonds furnished the next day and respondents were released – Writ petition by respondents seeking quashing of proceedings u/ss. 107/151 and to initiate proceedings against the said constables for illegal detention – High Court quashed the criminal case against respondent nos. 3 and 4 and directed Central Bureau of Investigation (CBI) to investigate the case against the constables and awarded a compensation of Rs.25,000/- each to the respondents for wrongful confinement – On appeal, held: On facts, it was not a fit case where investigation could be handed over to the CBI – It was not a case where State authorities were interested or involved in the incident – An arrest u/s. 151 can be supported when the person to be arrested designs to commit a cognizable offence – Jurisdiction vested in a Magistrate to act u/s. 107 is to be exercised in emergent situation – Proceedings u/ss. 107/151 were initiated four years ago and the High Court quashed the proceedings – At such a belated stage correctness of the decision to that extent does not require consideration – Even otherwise the said issue remains purely academic – As regards the issue of compensation, the High Court erred in awarding even token compensation to the tune*

*of Rs.25,000/- each as the High Court did not hold any enquiry and passed the order merely after considering the status report submitted by the State without hearing any of the persons against whom allegations of abuse of power had been made – Impugned judgment is set aside except to the extent that the proceedings u/ss. 107/151 against the respondents stood quashed – Investigation.*

**Appellant nos. 2 to 4-Constables while patrolling found respondent nos.3 and 4 fighting with each other in an intoxicated condition. They were booked under Sections 107/151 of the Code of Criminal Procedure, 1973 and were produced before the Special Executive Magistrate The respondents could not furnish the bonds and thus, the Magistrate sent them to judicial custody. The said respondents furnished the bond of Rs.15,000/- each on the next day, and were released. Thereafter, the respondents filed a writ petition for quashing of the proceedings under Sections 107/151 Cr.P.C. and to initiate criminal proceedings against appellant nos.2 to 4 and award them compensation for illegal detention. The High Court quashed the criminal case registered against respondent nos. 3 and 4 and directed the Central Bureau of Investigation to investigate the case against appellant nos. 2 to 4; and awarded a compensation of Rs.25,000/- each to the said respondents for wrongful confinement. Therefore, the appellants filed the instant appeals.**

**Allowing the appeals, the Court**

**HELD: 1.1 In the writ petition, altogether there were seven respondents, including the appellants and the Magistrate who had passed the order under Sections 107/151 Cr.P.C. The counsel for the State accepted notice on behalf of all the seven respondents. Most of the respondents before the writ court had been impleaded by name in personal capacity making allegations of exceeding their powers and abusing their positions.**



**There is nothing on record to show that the standing counsel had any communication with persons against whom allegations of mala fide had been alleged, particularly, appellant nos. 2 to 4 and the Magistrate. Thus, none of them had an opportunity of appearing before the High Court. The submission that as the State had been representing all of them, there was no need to hear each and every individual cannot be accepted. The impugned judgment and order in these appeals was passed in flagrant violation of the principles of natural justice. [Para 7] [269-C-G]**

**1.2 No further investigation or inquiry had been conducted on the charge of abusing, threatening and quarrelling by the writ petitioners with each other. Though the High Court reached the conclusion that the said respondents had been kept behind the bar for one day resulting into violation of their fundamental rights, without realising that since they failed to furnish bonds, no other option was available and they were sent to judicial custody in view of the order of the Magistrate. If the writ petitioners were aggrieved of the same, they could have challenged the same by filing appeal/revision. It cannot be understood under what circumstances the writ petition was entertained for examining the issue of illegal detention, particularly, in a case where there was a justification for keeping them in judicial custody. [Para 9] [270-G-H; 271-A-B]**

**1.3 In the instant case, the grievance of the writ petitioners basically had been against the two Constables and one Head Constable. It was not a case where it could be held that the State authorities were interested or involved in the incident. Thus, it was not a fit case where investigation could be handed over to the CBI. It is not only in the instant case that the High Court has directed CBI to investigate but it is evident from the other connected cases heard along with these appeals**

**and disposed of by separate order, the same Hon'ble Judge directed CBI enquiry in another paltry case under Sections 107/151 Cr.P.C. Thus, it is evident that the High Court has been passing such directions in a most casual and cavalier manner considering that each and every investigation must be carried out by some special investigating agency. [Paras 12 and 13] [271-E-H; 272-A-D]**

*Disha v. State of Gujarat and Ors.* **JT (2011) 7 SC 548;** *Ashok Kumar Todi v. Kishwar Jahan and Ors.* **JT (2011) 3 SC 50;** *Narmada Bai v. State of Gujarat* **JT (2011) 4 SC 279 – referred to.**

**1.4 The object of the Sections 107/151 Cr.P.C. are of preventive justice and not punitive. Section 151 should only be invoked when there is imminent danger to peace or likelihood of breach of peace under Section 107 Cr.P.C. An arrest under Section 151 can be supported when the person to be arrested designs to commit a cognizable offence. If a proceeding under Sections 107/151 appears to be absolutely necessary to deal with the threatened apprehension of breach of peace, it is incumbent upon the authority concerned to take prompt action. The jurisdiction vested in a Magistrate to act under Section 107 is to be exercised in emergent situation. Therefore, the Section 151, expressly lays down the requirements for exercise of the power to arrest without an order from a Magistrate and without warrant. If these conditions are not fulfilled and, a person is arrested under Section 151 Cr.P.C., the arresting authority may be exposed to proceedings under the law for violating the fundamental rights inherent in Articles 21 and 22 of the Constitution. [Paras 14 and 15] [272-D-H; 273-A-B]**

*Ahmed Noormohmed Bhatti v. State of Gujarat and Ors.* **AIR 2005 SC 2115: 2005 (2) SCR 879;** *Joginder Kumar v. State of U.P. and Ors.* **AIR 1994 SC 1349;** *D. K. Basu v. State of West Bengal* **AIR 1997 SC 610: 1996 (10) Suppl. SCR 28 – referred to.**



**1.5 In the instant case, the proceedings under Sections 107/151 Cr.P.C. were initiated on 4.2.2007 and the High Court has quashed the proceedings. At such a belated stage, correctness of the decision to that extent does not require consideration. Even otherwise the issue regarding quashing of those proceedings at this stage remains purely academic. [Para 16] [273-D]**

**1.6 As regards the issue of award of compensation in case of violation of fundamental rights of a person, though the High Courts and this Court in exercise of their jurisdictions under Articles 226 and 32 can award compensation for such violations but such a power should not be lightly exercised. These Articles cannot be used as a substitute for the enforcement of rights and obligations which could be enforced efficaciously through the ordinary process of courts. Before awarding any compensation there must be a proper enquiry on the question of facts alleged in the complaint. The court may examine the report and determine the issue after giving opportunity of filing objections to rebut the same and hearing to the other side. Awarding of compensation is permissible in case the court reaches the same conclusion on a re-appreciation of the evidence adduced at the enquiry. Award of monetary compensation in such an eventuality is permissible "when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers." [Para 17] [273-E-H; 274-A]**

*Sebastian M. Hongray v. Union of India* **AIR 1984 SC 1026:1984 (3) SCR 544 ;** *Bhim Singh, MLA v. State of J&K and Ors.* **AIR 1986 SC 494: 1985 (4) SCC 677;** *Smt. Nilabati Behera v. State of Orissa and Ors.* **AIR 1993 SC 1960:1993**

**(2) SCR 581;** *D.K. Basu v. State of W.B.* **AIR 1997 SC 610: 1996 (10) Suppl. SCR 284;** *Chairman, Railway Board and Ors. v. Mrs. Chandrima Das and Ors.* **AIR 2000 SC 988: 2000 (1) SCR 480;** *S.P.S. Rathore v. State of Haryana and Ors.* **(2005) 10 SCC 1;** *Sube Singh v. State of Haryana and Ors.* **AIR 2006 SC 1117: 2006 (2) SCR 67;** *Munshi Singh Gautam (D) and Ors. v. State of M.P.* **AIR 2005 SC 402: 2004 (5) Suppl. SCR 1092;** *Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi and Ors.* **AIR 2010 SC 475: 2009 (15) SCR 662 – referred to.**

**1.7 The High Court erred in awarding even token compensation to the tune of Rs.25,000/- each as the High Court did not hold any enquiry and passed the order merely after considering the status report submitted by the appellant no.1 without hearing any of the persons against whom allegations of abuse of power had been made. [Para 19] [275-A-B]**

**1.8 The judgment and order impugned is set aside except to the extent that the proceedings under Sections 107/151 Cr.P.C. against the contesting respondents stood quashed. [Para 20] [275-B-C]**

**Case Law Reference:**

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|---|---|---|
| **JT (2011) 7 SC 548** | **Referred to** | **Para 12** |
| **JT (2011) 3 SC 50** | **Referred to** | **Para 12** |
| **(2011) 4 SC 279** | **Referred to** | **Para 12** |
| **2005 (2 ) SCR 879** | **Referred to** | **Para 15** |
| **AIR 1994 SC 1349** | **Referred to** | **Para 15** |
| **1994 (4) SCC 260** | **Referred to** | **Para 15** |
| **1996 (10) Suppl. SCR 28** | **Referred to** | **Para 15** |
| **1984 (3) SCR 544** | **Referred to** | **Para 17** |



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| **1985 (4) SCC 677** | **Referred to** | **Para 17** |
| **1993 (2) SCR 581** | **Referred to** | **Para 17** |
| **1996 (10) Suppl. SCR 284** | **Referred to** | **Para 17** |
| **2000 (1) SCR 480** | **Referred to** | **Para 17** |
| **(2005) 10 SCC 1** | **Referred to** | **Para 17** |
| **2006 (2) SCR 67** | **Referred to** | **Para 18** |
| **2004 (5 ) Suppl. SCR 1092** | **Referred to** | **Para 18** |
| **2009 (15) SCR 662** | **Referred to** | **Para 18** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1582 of 2011.

From the Judgment and Order dated 25.02.2008 of the High Court of Delhi at New Delhi in WP (Criminal) No. 264 of 2007.

WITH

Criminal Appeal Nos. 1583 of 2011.

P.P. Malhotra, ASG, Pradeep Gupta, K.K. Mohan, Parinav Gupta, P.K. Dey, Sadhna Sandhu, MPS Tomar, Anil Katiyar, D.S. Mahra, Kanchan Kaur Dhodi, Anil Kumar Sangal, D.P. Mohanty, A.P. Mohanty and C. Balakrishna for the appearing parties.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. Leave granted in both the matters.

2. These appeals have been preferred against the same judgment and order dated 25.2.2008 passed by the High Court of Delhi in Writ Petition (Crl.) No.264 of 2007 by which the High Court has quashed the criminal case registered against respondent nos. 3 and 4; directed Central Bureau of

Investigation (hereinafter called 'CBI') to investigate the case in respect of the allegations made by the said respondents against the appellant nos. 2 to 4; and awarded a compensation of Rs.25,000/- each to the said respondents for wrongful confinement.

3. FACTS:

A. On 3.2.2007, Constable Virender Kumar, Head Constable Krishan Singh and Constable Jai Kumar, appellant nos. 2 to 4 respectively while patrolling in the area found that Sanjeev Kumar Singh and Dalip Gupta, respondent nos.3 and 4 respectively were fighting with each other in an intoxicated condition. The said appellants tried to pacify them but in vein. After realising that they were in drunken condition the aforesaid appellants took both the said respondents to the hospital for medical examination wherein they misbehaved with the Doctor and other staff of the hospital. After medical examination, it was opined that both the said respondents had taken alcohol.

B. The said respondents were booked under Sections 107/151 of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') and were produced before the Special Executive Magistrate (hereinafter called 'the Magistrate') on 4.2.2007. The Magistrate issued show cause notice as to why they should not be ordered to execute personal bond of Rs.5,000/- each with a surety in the like amount for maintaining peace for a period of one year. The said respondents could not furnish the bonds and thus, the Magistrate sent both of them to judicial custody. The said respondents furnished the bond of Rs.15,000/- each on the next day, i.e., 5.2.2007 and were released.

C. The said respondents filed Criminal Writ Petition No.264 of 2007 on 19.2.2007 before the High Court of Delhi praying mainly for quashing of the proceedings under Sections 107/151 Cr.P.C. and further asked to initiate criminal proceedings against the appellant nos.2 to 4 and award them



compensation for illegal detention. The writ petition came for hearing on 26.2.2007. The standing counsel appearing for the State took notice on behalf of all the respondents in the writ petition. The High Court directed the police authorities to submit the status report. The appellant no.1 after making an inquiry in the case submitted the status report on 10.7.2007. The petition was heard on 31.10.2007 and has been allowed vide judgment and order dated 25.2.2008. Hence, these appeals.

4. Shri P.P. Malhotra, learned Additional Solicitor General appearing for the State of NCT Delhi and Shri Pradeep Gupta, learned counsel appearing for the appellants, have submitted that both the said respondents had been under the influence of liquor and were fighting with each other at a public place, thus, there was danger of breach of peace and tranquillity. Appellant nos.2 to 4 tried to pacify them but the said respondents did not pay any heed. They had been booked under Sections 107/151 Cr.P.C. and produced before the Magistrate on the next day. The Magistrate after completing legal formalities directed that they may be released on furnishing the bonds to the tune of Rs.5,000/- each with a surety in the like amount. The said respondents were not in a position to submit the bail bonds on the said date and thus, could not be released on 4.2.2007. However, on the next day, they submitted the bail bonds voluntarily for a sum of Rs.15,000/- each, and thus, they were released. Factual averments made in the writ petition were totally false.

Appellants had not been served personal notices and had no opportunity to defend themselves. The order impugned has been passed in flagrant violation of the principle of natural justice. Such a petty matter does not require to be investigated by the CBI. Token compensation to the tune of Rs.25,000/- has been awarded to each of the said respondents without determining the factual controversy. Hence, the appeals deserve to be allowed.

5. On the contrary, the learned counsel appearing for the

respondent nos. 3 and 4 has opposed the appeals contending that the appellants had violated fundamental rights of the contesting respondents and detained them in jail without any justification, therefore, the matter is required to be investigated by the CBI or some other independent investigating agency. Token compensation has rightly been awarded by the High Court. The appeals lack merit and are liable to be dismissed.

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

7. In the writ petition, admittedly, altogether there were seven respondents, including the present appellants and the Magistrate who had passed the order under Sections 107/151 Cr.P.C. Record of the case reveals that the matter was listed for the first time on 26.2.2007 and the learned standing counsel for the State accepted notice on behalf of all the seven respondents therein. Most of the respondents before the writ court had been impleaded by name in personal capacity making allegations of exceeding their powers and abusing their positions. There is nothing on record to show that the standing counsel had any communication with persons against whom allegations of mala fide had been alleged, particularly, appellant nos. 2 to 4 and the learned Magistrate, respondent no.5 herein. Thus, none of them had an opportunity of appearing before the High Court. We do not find any force in the submission made by learned counsel appearing for the original writ petitioners that as the State had been representing all of them, there was no need to hear each and every individual. Undoubtedly, the judgment and order impugned in these appeals has been passed in flagrant violation of the principles of natural justice and, thus, liable to be set aside solely on this ground.

8. The status report had been submitted before the High Court after having proper investigation, stating that the writ petitioners had been under the influence of alcohol and been abusing, threatening and quarrelling each other at the public place. The police personnel could not control them. When they



were taken to the hospital for medical check up they were found intoxicated, and they misbehaved with the doctor and staff of the hospital also. It had been brought to the notice of the High Court that Sanjeev Kumar - respondent no. 3, had been threatening the police officials that his cousin Shri Aushutosh Kumar was a Metropolitan Magistrate in Tis Hazari Courts, Delhi and he would teach them a lesson for ever. It was further pointed out that Shri Aushutosh Kumar, MM, Tis Hazari Courts, Delhi from his mobile No. 9868932336 had a talk with appellant no.1-Rajender Singh Pathania, SHO, PS Samaipur Badli, at 10.00 P.M. on his mobile No. 9810030663 for more than three minutes on 3.2.2007. The Magistrate had passed the release order of the said respondents, however, they could not be released because they failed to furnish the personal bond with a surety in the like amount. The High Court while passing the order did not consider it proper to have an investigation on the material facts regarding demand of bribe to the tune of Rs.500 from the writ petitioners or regarding the mis-behaviour of the said respondents with the doctor and staff of the hospital. The medical report reveals that they were intoxicated. The relevant part of the medical report dated 3.2.2007 made at 8.00 p.m. in Babu Jagjivan Ram Memorial Hospital, Jahangirpuri, Delhi reads as under:

> "Smell of alcohol ++
>
> Patient had been irritating and misbehaving with the doctor and staff"

9. No further investigation or inquiry had been conducted on the charge of abusing, threatening and quarrelling by the writ petitioners with each other. Though the High Court reached the conclusion that the said respondents had been kept behind the bar for one day resulting into violation of their fundamental rights, without realising that since they failed to furnish bonds, no other option was available and they were sent to judicial custody in view of the order of the Magistrate. If the writ petitioners were

aggrieved of the same, they could have challenged the same by filing appeal/revision. We failed to understand under what circumstances the writ petition has been entertained for examining the issue of illegal detention, particularly, in a case where there was a justification for keeping them in judicial custody.

10. The High Court reached the conclusion that in spite of the fact that the Magistrate passed the order to furnish the bonds of Rs.5,000/- each, the bonds had been accepted for Rs.15,000/-. There is nothing on record to show that any of writ petitioners had raised the grievance before the Magistrate enhancing the amount of personal bonds. In fact, the said writ petitioners themselves voluntarily submitted bonds for Rs.15,000/- and therefore, no illegality could be found on that ground.

11. The judgment and order impugned herein shocked our judicial conscience as under what circumstances such a petty incident was considered by the High Court to be a fit case to be referred to the CBI for investigation.

12. This very Bench recently in *Disha v. State of Gujarat & Ors.,* JT (2011) 7 SC 548, while relying upon earlier judgments of this Court in *Ashok Kumar Todi v. Kishwar Jahan & Ors.,* JT (2011) 3 SC 50; and *Narmada Bai v. State of Gujarat,* JT (2011) 4 SC 279, came to the conclusion that for directing the CBI to hold the investigation the court must be satisfied that the opposite parties are very powerful and influential persons or the State authorities like top police officials are involved and the investigation has not proceeded with in proper direction or it has been biased. In such an eventuality, in order to do complete justice a direction to the CBI to investigate the case can be issued.

13. In the instant case, the grievance of the writ petitioners basically had been against the two Constables and one Head Constable. It was not a case where it could be held that the



State authorities were interested or involved in the incident. Thus, in our opinion, it was not a fit case where investigation could be handed over to the CBI.

It is not only in the instant case that the High Court has directed CBI to investigate but it is evident from the other connected cases which have been heard along with these appeals and are being disposed of by separate order, that on the same day i.e. 25.2.2008 the same Hon'ble Judge directed CBI enquiry in another paltry case under Sections 107/151 Cr.P.C. Further on 28.2.2008 CBI enquiry was directed in another case also under Sections 107/151 Cr.P.C.. Thus, it is evident that the High Court has been passing such directions in a most casual and cavalier manner considering that each and every investigation must be carried out by some special investigating agency.

14. The object of the Sections 107/151 Cr.P.C. are of preventive justice and not punitive. S.151 should only be invoked when there is imminent danger to peace or likelihood of breach of peace under Section 107 Cr.P.C. An arrest under S.151 can be supported when the person to be arrested designs to commit a cognizable offence. If a proceeding under Sections 107/151 appears to be absolutely necessary to deal with the threatened apprehension of breach of peace, it is incumbent upon the authority concerned to take prompt action. The jurisdiction vested in a Magistrate to act under Section 107 is to be exercised in emergent situation.

15. A mere perusal of Section 151 of the Code of Criminal Procedure makes it clear that the conditions under which a police officer may arrest a person without an order from a Magistrate and without a warrant have been laid down in Section 151. He can do so only if he has come to know of a design of the person concerned to commit any cognizable offence. A further condition for the exercise of such power, which must also be fulfilled, is that the arrest should be made only if it appears to the police officer concerned that the commission

of the offence cannot be otherwise prevented. The Section, therefore, expressly lays down the requirements for exercise of the power to arrest without an order from a Magistrate and without warrant. If these conditions are not fulfilled and, a person is arrested under Section 151 Cr.P.C., the arresting authority may be exposed to proceedings under the law for violating the fundamental rights inherent in Articles 21 and 22 of Constitution. (Vide: Ahmed Noormohmed Bhatti v. State of Gujarat and Ors., AIR 2005 SC 2115).

(See also: *Joginder Kumar v. State of U.P. and Ors.,* AIR 1994 SC 1349 , *D.K. Basu v. State of West Bengal,* AIR 1997 SC 610).

16. In the instant case the proceedings under Sections 107/151 Cr.P.C. were initiated on 4.2.2007 and the High Court has quashed the proceedings. At such a belated stage, correctness of the decision to that extent does not require consideration. Even otherwise the issue regarding quashing of those proceedings at this stage remains purely academic. So, we uphold the impugned judgment to that extent.

17. The issue of award of compensation in case of violation of fundamental rights of a person has been considered by this Court time and again and it has consistently been held that though the High Courts and this Court in exercise of their jurisdictions under Articles 226 and 32 can award compensation for such violations but such a power should not be lightly exercised. These Articles cannot be used as a substitute for the enforcement of rights and obligations which could be enforced efficaciously through the ordinary process of courts. Before awarding any compensation there must be a proper enquiry on the question of facts alleged in the complaint. The court may examine the report and determine the issue after giving opportunity of filing objections to rebut the same and hearing to the other side. Awarding of compensation is permissible in case the court reaches the same conclusion on a re-appreciation of the evidence adduced at the enquiry.



Award of monetary compensation in such an eventuality is permissible "when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers."

(Vide: *Sebastian M. Hongray v. Union of India,* AIR 1984 SC 1026; *Bhim Singh, MLA v. State of J&K & Ors.,* AIR 1986 SC 494; *Smt. Nilabati Behera v. State of Orissa & Ors.,* AIR 1993 SC 1960; *D.K. Basu v. State of W.B.,* AIR 1997 SC 610; *Chairman, Railway Board & Ors. v. Mrs. Chandrima Das & Ors.,* AIR 2000 SC 988; and *S.P.S. Rathore v. State of Haryana & Ors.,* (2005) 10 SCC 1).

18. In *Sube Singh v. State of Haryana & Ors.,* AIR 2006 SC 1117, while dealing with similar issue this Court held as under:

> "In cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, the courts may award compensation in a proceeding under Article 32 or 226. However, before awarding compensation, the Court will have to pose to itself the following questions: (a) whether the violation of Article 21 is patent and incontrovertible, (b) whether the violation is gross and of a magnitude to shock the conscience of the court, (c) whether the custodial torture alleged has resulted in death….. Where there are clear indications that the allegations are false or exaggerated fully or in part, the courts may not award compensation as a public law remedy under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/criminal action."

(See also: *Munshi Singh Gautam (D) & Ors. v. State of M.P.,* AIR 2005 SC 402; and *Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi & Ors.,* AIR 2010 SC 475).

19. In view of the above, we are of the considered opinion

that the High Court erred in awarding even token compensation to the tune of Rs.25,000/- each as the High Court did not hold any enquiry and passed the order merely after considering the status report submitted by the appellant no.1 without hearing any of the persons against whom allegations of abuse of power had been made. Such an order is liable to be set aside.

20. In view of the above, appeals succeed and are allowed. Judgment and order impugned herein is set aside except to the extent that the proceedings under Sections 107/151 Cr.P.C. against the contesting respondents stood quashed.

N.J. Appeals allowed.



RAVIRAJ UDUPA
*v.*
M/S UNITED INDIA INSURANCE COMPANY LTD. & ORS.
(Civil Appeal Nos. 7074-75 of 2011)

AUGUST 16, 2011

**[G. S. SINGHVI AND H.L. DATTU, JJ.]**

*Motor Vehicles Act, 1988:*

*s. 166 – Compensation for injuries suffered – Private contractor, aged 32 years and earning Rs.12,000/- per month met, with a motor accident – Tribunal considering the nature of injuries sustained, loss of future income on account of disability and other factors, awarded compensation of Rs.4,06,400/- with 8% interest – High Court without recording reasons reduced the amount to Rs.2,82,600/- with 6% interest – HELD: The High Court, while tinkering with the conclusion reached by the Tribunal, should have assigned reasons in support of its conclusion – It is time and again said that the reasons are the links between the materials on which certain conclusions are based and the actual conclusions – They disclose how the mind is applied to the subject matter for a decision and reveal a rational nexus between the facts considered and conclusions reached and thereby, exclude the chances to reach arbitrary, whimsical or capricious decision or conclusion – There is no legal infirmity with the order passed by the Tribunal and the findings and the conclusions reached by it while assessing the entitlement of the claimant for compensation for the injury sustained by him are upheld – The judgment and order passed by the High Court is reversed and the judgment and awarded passed by the Tribunal restored – Judgments/Orders – Reasons for – compensation.*

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7074-7075 of 2011.

From the Judgment & Order dated 31.01.2009 of the High Court of Karnataka at Bangalore in MFA No. 7617 of 2003(MV) and MFA. Crob. No. 218 of 2004(MV).

S.N. Bhat for the Appellant.

Shakil Ahmed Syed, K.L. Nandwani for the Respondents.

The Order of the Court was delivered by

**H.L. DATTTU, J.** 1. Leave granted.

2. Heard learned counsel for the parties to the lis and perused the record.

3. This appeal is directed against the Judgment and order passed by the High Court of Karnataka in MFA No. 7617 of 2003 and MFA Crob. No. 218 of 2004, whereby the High Court has reduced the compensation awarded by Motor Accident Claims Tribunal (in short, “Tribunal”), passed in MVC No. 329 of 2003 and the cross objection of the claimant for enhancement of compensation is dismissed.

4. The appellant/claimant had filed the petition under Section 166 of Motor Vehicles Act claiming compensation of Rs. 20,00,000/- with interest in view of the injuries sustained by him in a road accident. The claimant was a private contractor and he was aged about 32 years on the date of the accident and his monthly income was stated to be Rs. 12000/-. The vehicle was insured with M/s United India Insurance Company Ltd. (in short, “Insurance Company”), which did not seriously dispute the nature of injuries sustained by the claimant in the accident. He had sustained the fracture of condylar and proximal 1/3 of right fibula. The Tribunal, taking into consideration the nature of injuries sustained, the loss of future income on account of disability and other factors, had assessed the total compensation of Rs. 4,06,400/- (Rupees Four Lakhs Six Thousand FOur Hundred only) with interest at 8% p.a. on Rs.3,98,400/- from the date of petition till realization.



5. The Insurance Company, being aggrieved by the order of the Tribunal, had preferred an appeal before the High Court. The claimant had also filed cross objection for enhancement of compensation awarded by the Tribunal.

6. The High Court, by the impugned Judgment and order, has reduced the compensation to Rs. 2,82,600/- (Rupees Two Lakhs Eighty Two Thousand Six Hundred only) with interest at 6% p.a. from the date of petition till its realization. While doing so, to say the least, the High Court has not stated any reasons whatsoever. It has mechanically juggled with the arithmetical calculation made by the Tribunal while modifying a well considered and reasoned order passed by the Tribunal. In our view, the High Court, while tinkering with the conclusion reached by the Tribunal, should have assigned reasons in support of its conclusion. It is time and again said that the reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision and reveal a rational nexus between the facts considered and conclusions reached and thereby, excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. Therefore, we cannot agree with the conclusion reached by the High Court, which does not have supporting reasons.

7. We have carefully considered the findings and the conclusions reached by the Tribunal while assessing the entitlement of the claimant for compensation for the injury sustained by him. In our considered view, we do not find any legal infirmity with the order passed by the Tribunal. Therefore, while reversing the Judgment and order passed by the High Court in MFA No. 7617 of 2003, we restore the Judgment and award passed by the Tribunal dated 29.08.2003.

8. Accordingly, this appeal is allowed. Costs are made easy.

R.P. Appeal allowed.

DR. PUNEET GULATI AND ORS. ETC. ETC.
*v.*
STATE OF KERALA AND ORS. ETC. ETC.
(Civil Appeal Nos.7037-38 of 2011)

AUGUST 17, 2011

**[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER SINGH NIJJAR, JJ.]**

*Education/Educational institutions:*

*Reservation for local students for admission to super specialty Medical Courses in the State of Kerala commencing from the academic year 2010-2011 – Constitutional validity of – The prospectus for admissions provided that students who had completed MBBS or Post-graduate courses from Medical Colleges in Kerala and Doctors who had done Rural Service in Kerala, would be given preference for admission and students who were not from Kerala would get a chance for admission only if there were no students from the State of Kerala available for admission in the aforesaid courses – After commencement of selection process, the prospectus was amended limiting reservation in respect of candidates with Rural Service in Kerala to 10% of the seats and enlarging the scope for students of Kerala origin and children of members of All India Service in Kerala – Students who were from outside Kerala and had participated in the written examination, questioned the original as well as revised terms of the prospectus by way of writ petitions challenging the preferences and reservation provided to the local students in the prospectus – High Court while allowing the claim of the candidates who were from outside Kerala, on the ground that 100% reservation was unconstitutional, chose not to give any relief to the said students on the ground that the course had commenced more than 6 months prior to the matter being heard by the High Court – Held: The decision of High Court*





*regarding the constitutional validity of the first and second prospectus reserving 100% of the seats in the super specialty course for students from Kerala alone is upheld – However, since the appellant was not given admission to the said course, on the strength of an invalid policy, he deserved to be accommodated in the said course in some way – Since by interim order, seats were set apart for the writ petitioners, appellants to be accommodated in one of the seats – Accordingly directions passed.*

*Saurabh Chaudri & Ors. v. Union of India & Ors.* **(2003) 11 SCC 146: 2003 (5) Suppl. SCR 152 – referred to.**

**Case Law Reference:**

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|---|---|---|
| **2003 (5) Suppl. SCR 152** | **referred to** | **Para 5** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7037-7038 of 2011.

From the Judgment & Order dated 06.04.2011 of the High Court od Kerala at Ernakulam in WA Nos. 1399 and 1429 of 2010.

V. Giri,. S. Gopakumaran Nair, M.C. Dhingra, Gaurav Dhingra, John Methew, T.G.N. Nair, K.N. Madhusoodhanan, Anup Kumar, Romy Chacko, Liz Mathew, Amit Kumar, Ashish Kumar, Rekha Bakshi, Smita Madhu for the appearing parties.

The Order of the Court was delivered by

**ALTAMAS KABIR, J.** 1. Leave granted.

2. This is a classic example where despite having succeeded in the proceedings before the High Court, the Appellants have not got the fruits of their victory. Although, initially there were five petitioners in the two Special Leave Petitions (now appeals) which we are considering, during the pendency of the matters all the petitioners, other than Dr. Amish Kiran Bhai Mehta, opted for separate disciplines and are no

longer interested in admission to the Super Speciality Courses concerned. The appeals are, therefore, confined only to Dr. Amish Kiran Bhai Mehta.

3. The constitutional validity of reservations for local students by the State for admission to Super Speciality Medical Courses in the State of Kerala, commencing from the academic year 2010-2011, was the subject matter of the writ petition before the learned Single Judge of the Kerala High Court. The prospectus for admissions provided that students who had completed MBBS or Post-graduate courses from Medical Colleges in Kerala and Doctors who had done Rural Service in Kerala, would be given preference for admission and students who were not from Kerala would get a chance for admission only if there were no students from the State of Kerala available for admission in the aforesaid courses.

4. Altogether, 85 seats were available for the Super Speciality Courses in the DM and MCH groups, of which 19 seats were reserved for Doctors who were in Government service and the remaining 66 seats were available for selection in the open merit quota. After the selection process had commenced, the prospectus was amended limiting reservation in respect of candidates with Rural Service in Kerala to 10% of the seats and enlarging the scope for students of Kerala origin and children of members of All India Service in Kerala. Students who were from outside Kerala and had participated in the written examination, questioned both the original and revised terms of the different prospectus and challenged the preferences and reservation provided to the local students in the prospectus. The learned Single Judge dismissed their writ petitions on the ground that after participating in the entrance examination they were not entitled to challenge the prospectus. However, in the writ appeals preferred by the said students, the question as to whether it was open to the writ petitioners to challenge the prospectus in Court, was referred to a Full Bench, which, after holding that the writ petitions were maintainable,



remanded the matters to the appeal court for a decision on merits. In the appeals, the appellants prayed for restoration of the original prospectus, which would have the effect of restoring unlimited preference to Doctors having performed Rural Service in Kerala. The remaining writ appeals were filed by the State challenging the decision of the learned Single Judge declaring the provisions of the original prospectus and the revised prospectus providing for reservation for Kerala students only, as unconstitutional.

5. At this stage it may be kept in mind that challenge to the original and subsequent prospectus was based mainly on the ground that 100% reservation was unconstitutional as had been held by a Constitution Bench of this Court in *Saurabh Chaudri & Ors. Vs. Union of India & Ors.* [(2003) 11 SCC 146]. The Division Bench of the High Court has extracted the relevant portion from the judgment in *Saurabh Chaudri's* case, relating to reservation at the level of Super Speciality. It was, inter alia, held that the higher the level of speciality, the lesser the role of reservation.

6. The Division Bench agreed with the views expressed by the learned Single Judge, but while technically allowing the claim of the candidates who were from outside Kerala, on the ground that 100% reservation was unconstitutional, chose not to give any relief to the said students on the ground that the course had commenced more than 6 months prior to the matter being heard by the Division Bench of the High Court.

7. Mr. M.C. Dhingra, learned Advocate appearing for the appellants, submitted that a great injustice had been caused to the said appellants, who were denied admission to the Super Speciality Medical Courses in the State of Kerala on the basis of an invalid legislation, which was ultimately struck down by the High Court. Mr. Dhingra submitted that most of the candidates who had been admitted in the groups of Super Speciality Courses, were far below the appellants in merit.

Accordingly, despite being superior in merit, the appellants were denied admission in the aforesaid courses on the basis of a reservation policy, which was unconstitutional and was ultimately held to be so. Mr. Dhingra submitted that after striking down the reservation policy, as contained in the prospectus for admission to the Super Speciality Courses, the High Court ought to have evolved a mechanism by which the appellants were also admitted to the courses.

8. Ms. Liz Mathew, learned Advocate, who appeared for the State of Kerala, attempted to support the decision taken to admit the 10 students from the State of Kerala to the said course, but faced with the decision of both the learned Single Judge as well as the Division Bench, she had no other option but to accept the fact that the appellants had been discriminated against. Since the State of Kerala had not challenged the decision of the Division Bench on the question regarding 100% reservation, Ms. Mathew merely reiterated the views expressed by the Division Bench that it was too late to grant any relief to the appellants herein, as a long time had elapsed since the commencement of the courses. Ms. Mathew, however, stated that five seats had been kept apart in the relevant courses as per the direction of this Court for the Academic Session 2011-2012.

9. Mr. S. Gopakumaran Nair, learned Senior Advocate, who appeared for Dr. Cecil Kunnappilly, who was the 2nd candidate in the waiting list for admission to the M.Ch. Genito Urinary Surgery course, submitted that despite having been kept in the waiting list, his client would stand to be eliminated therefrom, if the appellant, Dr. Mehta was to be absorbed in the said discipline for the academic year 2011-2012.

10. Mr. V. Giri, learned Senior Advocate, and counsel appearing for the Medical Council of India, did not have much to add to the submissions made by Ms. Mathew and Mr. S. Gopakumaran Nair.



11. Having considered the judgment of the learned Single Judge and the Division Bench and the submissions made on behalf of the respective parties, we have no hesitation in upholding the decision of the learned Single Judge and the Division Bench as to the constitutional validity of the first and second prospectus reserving 100% of the seats in the said Super Speciality Courses for students from Kerala alone, but we are also convinced that since the appellant was not given admission to the aforesaid course, on the strength of an invalid policy, he deserves to be accommodated in the aforesaid course in some way.

12. By an interim order dated 20th July, 2011, we had stayed the admission process for the Super Speciality Courses for the year 2011-2012 in the Government Medical Colleges in Kerala. Subsequently, by order dated 22nd July, 2011, we had modified the said order on the prayer made on behalf of the State of Kerala by directing that the admission process could continue but 5 seats were to be set apart for the petitioners, 2 seats in the M.Ch. Genito Urinary Surgery Course, 1 seat in M.Ch. Neuro Surgery Course and 1 seat in the DM Cardiology Course.

13. Since, of the 5 seats reserved in terms of our order, 2 are available in the M.Ch. Genito Urinary Surgery Course, we direct that although the appellant, Dr. Mehta, did not sit for the entrance examination for the year 2011-2012, on the strength of his marks in the entrance examination for the year 2010-2011, he should be given admission in one of the two seats in the M.Ch. Genito Urinary Surgery course, which has been kept vacant in terms of our order dated 22nd July, 2011.

14. At this stage we may also consider the submissions which had been made by Mr. S. Gopakumaran Nair, learned Senior Advocate, that the candidate who was No.1 in the waiting list had opted for a different discipline, namely, Thoracic Surgery and had already been given admission in the

Trivandrum Government Medical College. Accordingly, Mr. Nair's client, Dr. Cecil Kunnappilly, could be considered for the second seat which has been kept vacant in terms of our order dated 22nd July, 2011. In the event the seat is available, Dr. Kunnappilly may be considered for allotment of the same, in accordance with the rules.

15. We make it clear that this order is being passed in the special facts of this case and should not be treated as a precedent in future cases. The concerned authorities will be at liberty to fill up the other three seats, which had been kept apart, in accordance with the Rules.

16. The appeals are disposed of accordingly. In the facts of this case, the parties shall bear their own costs in the appeals.

D.G. Appeals disposed of.



THE SECRETARY, ALL INDIA PRE-MEDICAL/PRE-DENTAL EXAMINATION, C.B.S.E. & ORS.
*v.*
KHUSHBOO SHRIVASTAVA & ORS.
(Civil Appeal No. 7024 of 2011)

AUGUST 17, 2011

**[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]**

*Education – Medical Admissions:*

*Bye-laws of All India Pre-Medical/Pre-Dental Entrance Examination, 2007 – All India Pre-Medical/Pre-Dental Entrance Examination conducted by CBSE – Representation filed by the candidate before CBSE for re-examination and re-totalling of her marks, rejected – Writ petition – High Court directed CBSE to produce answer sheets of the candidate on the condition that the candidate would deposit Rs. 25,000/- to prove her bonafides – Amount deposited – Comparison of answers of the candidate with model answers by the Single Judge of the High Court who held that she was not given two marks – However, no relief granted except directing to refund the amount deposited by the candidate – Division Bench of the High Court upheld the order and directed that the candidate be admitted in the MBBS course in the next academic session – On appeal, held: Bye-laws concerned did not provide for re-examination or re-evaluation of answers sheets – Thus, the appellants-Secretary Examination rejected the representation of the candidate for re-examination/re-evaluation of her answers sheets – Neither the Single Judge nor the Division Bench of the High Court could have substituted his/its own views for that of the examiners and awarded two additional marks to the candidate for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters – Impugned judgment of the Single Judge and the Division*

*Bench of the High Court are set aside and the writ petition is dismissed – Constitution of India, 1950 – Article 226.*

*Maharashtra State Board of Secondary and Higher SecondaryEducation and Anr. v. Paritosh Bhupeshkumar Sheth and Ors.* **(1984)4 SCC 27;** *Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna and Ors.* **(2004) 6 SCC 714: 2004 (3) Suppl. SCR 372 – relied on.**

*Board of Secondary Education v. Pravas Ranjan Panda and Anr.* **(2004) 13 SCC 383 – referred to.**

*Secretary, W.B. Council of Higher Secondary Education v. Ayan andOrs.* **(2007) 8 SCC 242: 2007 (10) SCR 464 – cited.**

**Case Law Reference:**

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| **2007 (10) SCR 464** | **Cited** | **Para 5** |
| **2004 (3) Suppl. SCR 372** | **Relied on** | **Para 7** |
| **(2004) 13 SCC 383** | **Referred to** | **Para 7** |
| **(1984) 4 SCC 27** | **Relied on** | **Para 8** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7024 of 2011.

From the Judgment & Order dated 06.02.2009 of the High Court of Judicature at Patna in L.P.A. No. 984 of 2008.

Altaf Ahmed, Tara Chandra Sharma, Neelam Sharma for the Appellants.

Saket Singh, Niranjan Singh for the Respondents.

The Order of the Court was delivered by

**A. K. PATNAIK, J.** 1. Leave granted.



2. This is an appeal against the judgment dated 06.02.2009 of the Division Bench of the Patna High Court in Letters Patent Appeal No.984 of 2008 (for short 'the LPA').

3. The facts very briefly are that the respondent No.1 appeared in the All India Pre-Medical/Pre-Dental Entrance Examination, 2007 conducted by the Central Board of Secondary Education (for short 'the CBSE'). She submitted a representation dated 07.06.2007 through her advocate to the CBSE for re-examination and re-totalling of her marks in Physics, Chemistry and Biology. The CBSE informed the advocate of respondent No.1 by letter dated 02.07.2007 that there was no provision for re-checking/re-evaluation of answer sheets of the candidates. Aggrieved, the respondent No.1 and others filed writ petition, C.W.J.C. No.7631 of 2007, in the Patna High Court under Article 226 of the Constitution for directing the CBSE to conduct a re-evaluation of her answer sheets and to re-total the marks and publish the result. The CBSE filed a reply contending inter alia that under the examination bye-laws pertaining to the All India Pre-Medical/Pre-Dental Entrance Examination, there was no provision for re-evaluation. The learned Single Judge of the Patna High Court, who heard the writ petition, passed orders directing the CBSE to produce the answer sheets of respondent No.1 on the condition that respondent No.1 would deposit Rs.25,000/- to prove her bonafide that her answer sheets were wrongly evaluated. The respondent No.1 deposited the amount of Rs.25,000/- and her answer sheets relating to Physics, Chemistry and Biology as well as the model answers were produced by the CBSE before the High Court. The learned Single Judge compared the answers of the respondent no.1 with the model answers and held in his order dated 20.10.2008 that the answers of respondent No.1 to question No.3(e) in the Botany paper and question No.20(a)-iii in Chemistry were correct but she was not given marks for her answers to the two questions. The learned Single Judge was of the view that if the answer sheets of respondent No.1 were correctly evaluated

she would have got two more marks. The learned Single Judge, however, held that the seats for the Pre-Medical Course on the basis of the All India Pre-Medical/Pre-Dental Entrance Examination, 2007 were already allotted to the successful candidates and the successful candidates had completed one year study and there was no interim order reserving any seat for respondent No.1 and therefore no relief could be granted to the respondent No.1 except directing refund of the amount of Rs.25,000/- deposited by her.

4. The respondent No.1 then filed the LPA before the Division Bench of the Patna High Court and contended that the learned Single Judge after having held that she was entitled to two more marks and also to admission in the MBBS Course should have directed the appellants to admit the respondent No.1 in the next academic session. The appellants, on the other hand, submitted opinions dated 10.02.2008 and 15.02.2008 of two experts which had not been placed before the learned Single Judge and contended that the findings of the learned Single Judge are not correct. The Division Bench of the High Court considered the opinions of the two experts and yet concurred with the findings of the learned Single Judge that two of the answers of respondent No.1 had not been correctly evaluated and that she was entitled to two more marks. The Division Bench of the High Court took note of the fact that respondent No.1 had approached the Court within eight days of the publication of the result and held that she was not to be blamed for the delay in disposing of the writ petition and hence relief should not be denied to the respondent No.1 only on the ground of lapse time. The Division Bench of the High Court therefore moulded the relief and directed that respondent No.1 be admitted in the MBBS Course in the next academic session 2009-2010.

5. Learned counsel for the appellants submitted that it is now well-settled in a series of decisions of this Court that in the absence of any provision in the relevant rules providing for re-examination or re-evaluation of answer sheets of a candidate



in an examination, the Court cannot direct such re-examination or re-evaluation. He relied on the decisions of this Court in *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors.* [(1984) 4 SCC 27], *Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna & Ors.* [(2004) 6 SCC 714] and *Secretary, W.B. Council of Higher Secondary Education v. Ayan & Ors.* [(2007) 8 SCC 242]. He further submitted that the High Court in exercise of its power under Article 226 of the Constitution could not substitute its own evaluation of the answers of a candidate for that of the examiner and in the present case the High Court has exceeded its power of judicial review under Article 226 of the Constitution.

6. Learned counsel for the respondents, on the other hand, supported the impugned judgment of the Division Bench of the High Court and submitted that the respondent no.1 was entitled to two additional marks for her two answers in Chemistry and Botany as found by the High Court in the impugned judgment and if these two marks were added to her total marks, she was entitled to admission to the MBBS Course as per her merit in the merit list. He, however, submitted that on account of the interim order passed by this Court staying the impugned judgment, the respondent no.1 was not admitted pursuant to the impugned judgment of the High Court, but she got admission in MBBS Course subsequently.

7. We find that a three-Judge Bench of this Court in *Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna & Ors.* (supra) has clearly held relying on *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors.* (supra) that in the absence of any provision for the re-evaluation of answers books in the relevant rules, no candidate in an examination has any right to claim or ask for re-evaluation of his marks. The decision in *Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna & Ors.* (supra) was followed by another three-Judge Bench of this

Court in *Board of Secondary Education v. Pravas Ranjan Panda & Anr.* [(2004) 13 SCC 383] in which the direction of the High Court for re-evaluation of answers books of all the examinees securing 90% or above marks was held to be unsustainable in law because the regulations of the Board of Secondary Education, Orissa, which conducted the examination, did not make any provision for re-evaluation of answers books in the rules.

8. In the present case, the bye-laws of the All India Pre-Medical/Pre-Dental Entrance Examination, 2007 conducted by the CBSE did not provide for re-examination or re-evaluation of answers sheets. Hence, the appellants could not have allowed such re-examination or re-evaluation on the representation of the respondent no.1 and accordingly rejected the representation of the respondent no.1 for re-examination/ re-evaluation of her answers sheets. The respondent no.1, however, approached the High Court and the learned Single Judge of the High Court directed production of answer sheets on the respondent no.1 depositing a sum of Rs.25,000/- and when the answer sheets were produced, the learned Single Judge himself compared the answers of the respondent no.1 with the model answers produced by the CBSE and awarded two marks for answers given by the respondent no.1 in the Chemistry and Botany, but declined to grant any relief to the respondent no.1. When respondent no.1 filed the LPA before the Division Bench of the High Court, the Division Bench also examined the two answers of the respondent no.1 in Chemistry and Botany and agreed with the findings of the learned Single Judge that the respondent no.1 deserved two additional marks for the two answers. In our considered opinion, neither the learned Single Judge nor the Division Bench of the High Court could have substituted his/its own views for that of the examiners and awarded two additional marks to the respondent no.1 for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters. This Court in *Maharashtra State Board of*



*Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors.* (supra) has observed :

> "…. As has been repeatedly pointed out by this Court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. …"

9. We, therefore, allow the appeal, set aside the impugned judgment of the learned Single Judge and the Division Bench of the High Court and dismiss the writ petition. There shall be no order as to costs. We are informed that the first respondent was admitted to the MBBS Course subsequently. If so, her admission in the MBBS Course will not be affected.

N.J. Appeal allowed.