BUDHADEV KARMASKAR
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 135 of 2010)

AUGUST 24, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Sex workers – Rehabilitation of – Court appointed Panel on Sex Workers – Portion of the Indian Law Institute Building allotted to the Panel – Central Government directed to provide to the Panel Ten lakhs while each State Government and each Union Territory directed to provide to the Panel Rs. 5 lakhs and Rs. 2 lakhs respectively – However, States/Union Territories which have no sex workers as stated in their affidavits need not make this payment – Each State Government to undertake survey through their Agencies in collaboration with the Central Government n the lines as recommended by the Panel to ascertain as to how many sex workers want rehabilitation and how many of them voluntarily continue in the same profession – Results of the surverys be reported to the Panel – If an incident of involvement of the family of the girl pushing her into the sex racket comes to notice of anyone concerned including NGOs, authorities, etc., such incident be reported to the Executive Chairman/ Secretary of the State Legal Services Authority – It will be open for the said Authority to take appropriate penal action against such illegality or person who may be found involved – All State Legal Services Authorities to provide a helpline number to the NGOs and to the State machinery as well as to the sex workers and victims of sex trade who are in distress and who are compelled to continue with the sex trade, so that they can avail the benefit of the helpline number for legal assistance, to get them rescued or any other assistance which may be offered to them by waty of Free Legal Aid – Approach

of the State of West Bengal, where the problem is most acute, is disappointing – Calcutta has a huge number of sex workers in Sonagachi, Free School Street etc. – Providing short stay homes to sex workers is hardly a solution to their problem – They must be provided a marketable technical skill so that they can earn their livelihood through such technical skill instead of by selling their bodies – As regards Delhi there seems to be no scheme of the Government for rehabilitation of sex workers – There are many red light areas such at the one in G.B. Road etc. in Delhi – UJWALA Scheme makes it clear that the Central Government has scheme only for rescued trafficked women but no scheme for those sex workers who voluntarily want to leave the sex trade – Proper effective scheme should be prepared for such women also – Central Government scheme has placed a condition that the rescued sex workers must stay in a corrective home in order to get technical training – No such condition should be imposed as many sex workers are reluctant to stay in these corrective homes which they consider as virtual prison – Central Government and State Governments to submit additional reports stating in greater – detail how they they are complying with orders of this Court – Appeal to public, and particularly to the youth of the country to contact members of the Panel and give their valuable suggestions and inputs – Further directions issued for ensuring compliance of Court orders – Constitution of India, 1950 – Article 21.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 135 of 2011.

From the Judgment & Order dated 25.07.2007 of the High Court of Calcutta in CRA No. 487 of 2004.

Solicitor General of India, Pradip Ghosh, Jayant Bhushan T.S. Doabia, Ashok Bhan, A. Mariarputham, AG, Dr. Manish Singhvi, Shail Kr. Dwivedi, Manjit Singh, S.V. Madhukar, AAG, Piyush K Roy, Rebbeca George, Gautam Talikar, Lajja Ram,

Gaurav Sharma, Sushma Suri, Anjani Aiyagari, Anil Katiyar, Sadhana Sandhu, Mohd, Khairati, D.S. Mahra, Irshad Ahmad, Vijay Verma, Anitha Shenoy, Ashutosh Sharma, Alka Sinha, Anuvrat Sharma, Anil Katiyar, Hemantika Wahi, Nupur Kanujuo Suveni, Mahesh Babu, Ramesk Allanki, Savita Dhanda, Ranjan Mozumbar (for Corporate Law Group), Anil Shrivastav, Rituraj Biswas, Gopal Singh, Manish Kumar, S. Wasim A. Quadiri, A.J. Faisal Banerjee, Tarjit Singh, Kamal Mohan Gupta, Abhishek Sood, Rohit Kr. Singh, Sunil Fernandes, Suhaas R. Joshi, Astha Sharma, P.V. Dinesh, Liz Mathew, Jogy Scaria, Sanjay V. Kharde (for Ahsa Gopalan Nair, Kh. Nobin Singh. Sapan Biswajit Meitei, Balaji Srinivasan, Radha Shyam Jena, Kuldip Singh, R.K. Pandey, M. Mohit Mudgil, Aruna Mathur, Avneesh Arputham, Yusuf Khan, Arputham, Aruna & Co. Aniruddha P. Mayee, Chanchal Kr. Gaguly, Abhijit Sengupta, Anil K. Jha, Chhaya Kumari, Atul Jha, Dharmendra Kr. Sinha, Saurabh Mishra, Vibha Datta Makhija, V.G. Pragasam, S.J. Aristotle, Prabhu Ramasubramaniam, Savita Singh, Tripti Tandon, Shefail Malhotra, Prakash Kumar Singh, Ravi Kant, A. Subhashini, Aishwarya Bhati, C.D. Singh, K.N. Madhusoodhanan, M.T. George, Subramonium Prasad, J.K. Bhatia, Manpreet Singh Doabia, Kiran Bhardwaj, Edward Belho, P. Athuimei R. Naga, K. Inatoli Sema, Nimshim Voshum, Ranjan Mukherjee for the appearin parties.

The following order of the Court was delivered

O R D E R

"Madad chaahati hai ye hawwaa ki beti
Yashodaa ki hamjins raadhaa ki beti
Payambar ki ummat zulaikhaa ki beti
Sanaakhwaan-e-taqdees-e-mashriq kahaan hain?
Zaraa mulk ke rahbaron ko bulao
Ye kooche ye galiyaan ye manzar dikhao
Sanaakhwaan-e-taqdees-e-mashriq ko lao
Sanakhwaan-e-taqdees-e-mashriq kahaan hain?"

Sahir Luhdhianvi : Chakle

1. This order is in continuation of our earlier orders in this case which aim at providing a life of dignity to the sex workers in our country by giving them some technical skills through which they can earn their livelihood instead of by selling their bodies. The legal background of these orders is Article 21 of the Constitution, in which the word `life' has been interpreted by this Court to mean a life of dignity, and not just an animal life.

2. Mr. Pradip Ghosh, Chairman of the Panel appointed by us, submitted a report stating that a meeting of the Panel on Sex Workers was held at the Arbitration Room of M.C. Setalvad Lawyers' Chambers Block, Supreme Court on 05.08.2011. At a subsequent meeting held on 17.08.2011, the members of the Panel along with representatives of the State Governments of Delhi, Maharashtra, Karnataka, Tamil Nadu, Andhra Pradesh, West Bengal, Haryana and the Central Government as well as representatives of some NGOs and some senior Police Officers of the State of Tamil Nadu and Delhi were present. In its report the Panel has mentioned the State wise figures of sex workers rehabilitated so far.

3. By our orders dated 19.07.2011 and 02.08.2011 we had directed the Central Government and State Governments to provide certain funds to the Panel so that it could function effectively. However we are informed that as yet no funds have been provided, which is hampering the work of the Panel. The Panel has suggested that the Central government be directed to provide Rupees 10,00,000/-, each state Government a sum of Rupees 5,00,000/- and each union territory Rupees 2,00,000/- to the Panel. We accept this recommendation and direct accordingly, with the modification that States/Union Territories which have no sex workers as stated in their affidavits need not make this payment. This amount should be paid positively by 07.09.2011 to the Secretary General of this Court who will deposit it in a nationalized bank nominated by the Chairman of the Panel, Mr. Pradip Ghosh, Sr. Advocate.

4. Mr. Pradip Ghosh, Senior Advocate (whose full name

for Banking purpose is Pradip Kumar Ghosh) and Mr. Jayant Bhushan, Senior Advocate, who is a member of the Panel, are jointly authorized to open a bank account in the nationalized Bank where the money is deposited, to be operated jointly by them. The Chairman of the Panel will furnish to the Secretary General of this Court accounts of the expenditure incurred by the Panel from time to time. It will be open to the Chairman of the Panel to seek further orders of this Court in this connection.

5. It is also prayed in the report of the Panel submitted before us today that there is no proper accommodation for the functioning of the Panel. We agree that unless some accommodation is provided the Panel will not be able to function properly and effectively. We are informed that the Central Government has in its occupation a portion of the Indian Law Institute Building. We direct that the said accommodation/ office space shall be allotted forthwith to the Panel constituted by us, and not later than 01.09.2011. The said office space shall be properly furnished and equipped by the Central Government with computer, furniture etc. so that the Panel may be able to carry out the day to day activities thereon. Secretarial assistance and services of office attendants and other staff shall also be made available forthwith by the Central Government as requested by Shri Pradip Ghosh, Chairman of the Panel.

6. By our order dated 19.7.2011, this Court was pleased to direct the States/Union Territories and the Union of India to carry out surveys through their Agencies and to report to the Panel the findings of the said surveys. The survey was meant to ascertain as to how many sex workers want rehabilitation and how many of them would voluntarily continue in the same profession. Each State Government should undertake such survey through their Agencies in collaboration with the Central Government on the lines as recommended by the Panel. For this purpose, the help of NGOs, Expert Bodies and Demographers may be obtained by the Governments concerned. At the first instance, the said surveys may be made

with regard to the four Metropolitan Cities, namely, Delhi, Mumbai, Chennai and Kolkata. Subsequently other States and Union Territories should also carry out such surveys.

7. The Panel will make recommendations in respect of such surveys and the same should be complied with by the respective State Governments. The results of the surveys shall be reported to the Panel .

8. We convey our gratitude to the Central Government and various State Governments who sent their representatives to the meeting held on 17.08.2011. Many of them have made valuable contributions in the said meeting as mentioned in the report of the Panel. We request them to continue attending the Panel meetings whenever requested by the Chairman, and give all help in this connection.

9. We are happy to note that Mr. Pradip Ghosh, Chairman of the Panel has decided to add South India AIDS Action Programme through its director Ms. Indumati which is situated in Chennai, Shakti Vahini through Shri Ravi Kant which is a NGO based in Delhi, Prerana, an NGO based in Mumbai, and Mr. Tariq Khan, a social activist of Lucknow, as members of the Panel. Some of them have given valuable inputs in the meeting dated 17.08.2011 as mentioned in the Report of the Panel.

10. We were happy to note from the report of the Panel that the Government of Andhra Pradesh and Prajwala, a NGO operating in Andhra Pradesh, have substantially supported each other, both in their efforts in rehabilitation of sex workers as also in the representations made before the Panel with regard to the information as regards rehabilitation. Notwithstanding the changes in the State government from time to time, Prajwala and other NGOs have received consistent support from the State Government in this connection. This seems to be a unique feature in the State of Andhra Pradesh, and should be emulated by other States.

11. In its report the Panel has mentioned that the NGO Prerana, represented by Ms. Priti Patkar situated in Mumbai has rehabilitated 4973 sex workers between 198 and 2010. The rescued women were given vocational training and made economically self-sufficient.

12. Prerana has trained women as mobile crèches, petrol pump fillers, catering and hospitality , beauty care, fashion designing, starting their own enterprises as small businesses and also in some other areas of vocational replacement. Some young women have been placed in McDonalds, Dominos, PPCL Petrol Pump, Food Courts in Malls etc. These are some of the areas of employment for absorbing these former sex workers. These women who have been rehabilitated by Prerana have not been seen back in the flesh trade. It seems that they have been re-integrated in the mainstream and their past identity has been completely obliterated. Some of them are still in touch with Prerana and the reports reveal that they are doing well and some are settled with their children. Some have started a life with their former clients out of the arena of the flesh trade. Some are happy with the small business of their own that they run. Some have left for their native towns/villages. Women who move out of the city are always given a list of contacts whom they can approach in case they require any assistance. All this shows that Prerna has been doing excellent work.

13. In the State of Tamil Nadu in the year 2010-2011 532 sex workers were given vocational training, and 424 restored to their respective families. Many of them were minors.

14. Ms. Archana Ramasundaram, Additional DIG of Police (Crime), Tamil Nadu stated that the major stumbling block in the matter of rescue of victims of sex trafficking is that pimps get to know about the trafficked girls before the authorities come to know of them, and often even the family of the girl is involved in the racket. We are, therefore, of the view that if an incident of the involvement of the family of the girl pushing her

into the sex racket comes to the notice of anyone concerned including NGOs, authorities, etc. we direct that such incident be reported to the Executive Chairman/Secretary of the State Legal Services Authority. It will be open for the said Authority to take appropriate penal action against such illegality or person who may be found involved. Unless this nexus between the traffickers, pimps and the brothel owners, together with the family at times, is broken, successful rescue and rehabilitation becomes difficult.

Ms. Ramasundaram also suggested that instead of producing the rescued women in person in court, a system of video conferencing could be effective so that the girls do not have to actually travel and are, therefore, safe and hidden from the pimps.

We are further of the view that all the State Legal Services Authorities should provide a helpline number to the NGOs and to the State machinery as well as to the sex workers and victims of sex trade who are in distress and who are compelled to continue with the sex trade, so that they can avail the benefit of the helpline number for providing legal assistance, to get them rescued or any other assistance which may be offered to them by way of Free Legal Aid. The State Legal Services Authorities thereafter may direct them to the concerned and appropriate authorities for taking remedial measures in that regard and also report the matter to the Panel which has been constituted by us.

15. Ms. Indumati representing South India AIDS Action Program from Chennai who participated on behalf of the said NGO stated that many of the sex workers want to learn additional skills but they still want to continue with their old profession in the red light area because some of their clients are very persistent and keep on coming back and are unwilling to let the sex workers leave the profession. For many sex workers, the rehabilitation process is important but only if they are old and cannot get any income by selling their bodies. Many

of them want vocational training only to add to their income while continuing with their sex work. Unless the attitude of the public in general towards the sex workers undergoes a change so as to remove the stigma attached to their profession, and there is more acceptability of the rehabilitated sex workers in the mainstream, it is difficult to persuade the sex workers to get rehabilitated leaving their old profession.

16. There is always a prevailing fear that by opting for rehabilitation they may be worse off by losing their old livelihood and also not being able to survive in the alternative vocation unless there is ready acceptance of the former sex workers in the mainstream.

17. As regards the State of West Bengal, it is well know that Calcutta has a huge number of sex workers in Sonagachi, Free School Street etc. The Government of West Bengal stated that there is no convincing data available in respect of the number of sex workers rehabilitated so far and it will take time to collect the same from the service providers. However, they are running 17 homes under the Swadhar Schemes and two Homes under the Ujwala Scheme and 43 Short Stay Homes. These Homes give shelter to rescued sex workers.

18. In this connection we wish to say that providing short stay homes to sex workers is hardly a solution to their problem. They must be provided a marketable technical skill so that they can earn their livelihood through such technical skill instead of by selling their bodies. Merely sending them to homes is sending them to starvation. We were, therefore, disappointed by the approach of the State of West Bengal, where the problem is most acute. Much more needs to be done by the State Government.

19. At the Panel meeting, the representative of the State Government who was a director in the Department of Social Welfare stated that 15 sex workers have been permanently rehabilitated in the sense that they have been given direct

employment and are now married. Some sex workers have been successfully employed as Anganwadi workers and helpers. He also estimated that about another one thousand sex workers have been rehabilitated in the State in the sense that they have been given new jobs and are not likely to return to their old profession, but this is not a verified figure. Some of the rescued sex workers who were from Bangladesh and Nepal were repatriated to the countries of their origin. Ms. Bharti Dey representing Durbar Mahila Samanwaya Committee (DMSC) questioned the basis of calculation of the figures given by the Government representative. She also questioned as to where and how the sex workers have been rehabilitated.

20. On behalf of DMSC and USHA Multipurpose Cooperative Society, Dr. S. Jana and Ms. Bharti Dey who spoke at the meeting also submitted written responses, stating that:

(a) DMSC itself has employed about 500 sex workers in their Health intervention Program. On enquiry, it has been learnt by DMSC that 55 have ceased to work in their old profession while the rest continue to sell sex while still holding jobs as health workers. It was learnt that those 55 who really gave up their old profession were at the fag end of their working life in sex work. They were neither able to compete with their younger colleagues nor able to perform the jobs that was required of them.

(b) According to the records maintained by USHA, 8 sex workers employed as Field Collectors for the Cooperative Societies, Bank have discontinued sex work. Another 10 women have started working as beautician and do not engage in sex work.

(c) According to DMSC, the inference drawn from these findings is that while women may leave sex work but they do not leave the sex work sector.

Those who stop selling sex find alternative work in the red light area itself. This is because they do not experience adverse stigma and discrimination among their peers as they would face outside the red light area.

(d) It was emphasized that the so-called Homes run under the Government sponsored projects virtually operate as prison houses so much so that even if a sex worker may not be willing to leave the profession they would not like to live in the so-called Homes. The reluctance is not so much due to loss of earning but more because they do not want to be imprisoned or to lose their freedom.

21. Mrs. Sunanda Bose, representing All Bengal Women's Union, emphasized that stereotypical vocational training would not work any more as the women earn more in sex work than they are able to earn by giving up their profession. More innovative jobs have to be offered to them to induce them to leave the profession. She gave the example of one sex worker who was rescued by her who is now working as a Petrol Pump Operator and earns about Rs.7,000/- per month.

22. Mrs. Bose made valuable suggestions and various inputs with regard to rehabilitation of the sex workers.

23. As regards Delhi there seems to be no scheme of the State Government for rehabilitation of sex workers. This is indeed regrettable. There are many red light areas such as the one in G. B. Road etc. in Delhi. The State Government needs to do much more in this connection.

24. Shakti Vahini, represented by Shri Ravi Kant, stated in the Panel meeting that not a single victim of commercial sexual exploitation has been rehabilitated in Delhi. The Joint Commissioner of Police (Crime) of Delhi Police made significant contributions at the said meeting by making certain

important suggestions. He pointed out that the reluctance on the part of the sex workers to leave their profession is because they are not sure about their future in the alternative livelihood and as to what security they would have in their life ahead since it seems to them that nothing is on a permanent basis. This lack of faith is not in the rehabilitation process but rather in its structure. The rehabilitation Scheme must be made more effective and sensitive as to the mindset of the victims. He pointed out various problems in the implementation of rescue operation and the rehabilitation process, some of which were agreed to by the representatives of the NGOs also.

25. As regards the Central Government, Ms. Sangeeta Verma, Economic Adviser, Ministry of Women & Child Development, Government of India who represented the Central Government at the Panel meeting, explained the significance of the UJWALA Scheme which has five components utilized for rehabilitation of sex workers. She also pointed out that if the sex workers do not wish to go back home, then another program called STEP is available for them which is being implemented by the Central Government effectively. She pointed out that poverty is the main factor which pushes vulnerable women to prostitution. She emphasized that the Central Government has Schemes in place which may be availed of by the sex workers who are voluntarily willing to opt for their rehabilitation, although these are not specially earmarked for the sex workers. Even such general schemes can be made use of by them once they are willing to come out of the sex trade . We request the panel to investigate whether these schemes exist largely on paper only, or whether they have been actually implemented.

26. From a perusal of the UJWALA Scheme it appears that the Central Government has scheme only for rescued trafficked women but no scheme for those sex workers who voluntarily want to leave the sex trade. In our opinion, proper effective scheme should be prepared for such women also. In this connection, we would like to say that the Central Government scheme has placed a condition that the rescued

sex workers must stay in a corrective home in order to get technical training. In our opinion, no such condition should be imposed as many sex workers are reluctant to stay in these corrective homes which they consider as virtual prison.

27. From a perusal of the report of the Panel dated 23.08.2011 we are not satisfied that the Central Government and State Governments are effectively carrying out the spirit of our orders in this case. While a few officers have indeed been motivated, much more needs to be done by the authorities. Hence by the next date of hearing the Central Government and State Governments must submit additional reports stating in greater detail how they are complying with our orders.

28. In our dated 02.08.2011 we observed:-

> "We are fully conscious of the fact that simply by our orders the sex workers in our country will not be rehabilitated immediately. It will take a long time, but we have to work patiently in this direction. What we have done in this case is to present the situation of sex workers in the country in the correct light, so as to educate the public. It is ultimately the people of the country, particularly the young people, who by their idealism and patriotism can solve the massive problems of sex workers. We, therefore, particularly appeal to the youth of the country to contact the members of the panel and to offer their services in a manner which the panel may require so that the sex workers can be uplifted from their present degraded condition. They may contact the panel at the email address: panelonsexworkers@gmail.com."

We again reiterate our appeal to the public, and particularly to the youth of the country to contact members of the panel at the e-mail address panelonsexworkers@gmail.com and give their valuable suggestions and inputs. This would surely be of great help to the Panel.

29. List this case again before us on 15.9.2011.

30. Copy of this order will be sent by the Registry of this Court to the Chief Secretaries and Secretaries of the Home/ Social Welfare/Women's Welfare Department of all State Governments/Union Territories and shall also be sent to the Secretaries of the concerned Departments of the Central Government e.g. Home Ministry, Urban Development Ministry, Ministry of Social Welfare, Women's Welfare Ministry etc. They will ensure compliance of this order. Copy of this order as well as our previous orders in this regard and of the Panel reports shall also be forwarded to the National Commission For Women, New Delhi through its Chairperson, and the Chairperson of the National Commission is requested to depute one or more of its members to regularly attend the meetings of the panel, whose dates will be informed in advance by the Chairman of the Panel. Copies of this order will also be given to all the counsels in this case free of charge.

B.B.B. Matter adjourned.

UNIFLEX CABLES LTD.
v.
COMMISSIONER, CENTRAL EXCISE, SURAT-II
(Civil Appeal No. 5870 of 2005)

AUGUST 24, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Excise – Central Excise Rules, 1944 – Rules 173Q(1) and 173-B – Exemption Notification – Benefit under – Entitlement to – Notification no. 205/88–C.E. dated 25.05.88 as amended by Notification no.57/95 granted exemption from payment of central excise duty in respect of manufacture of wind mills, parts of wind mills and specially designed devices which run on wind mills – Appellant filed declaration claiming nil rate of duty so as to avail benefit under the aforestated notification for the insulated electrical cables manufactured by it and supplied to the manufacturers of wind mills for using the same as part of wind mills – Commissioner, Central Excise, however, confirmed demand of excise duty and also imposed penalty under Rule 173Q(1) – Order upheld by Tribunal – Two issues: 1) Whether the insulated electrical cables manufactured by the appellant were eligible for exemption under the said exemption notification and 2) Whether imposition of penalty was justified in view of the facts and circumstances of the case – Held: The first issue is no more res integra in view of the Supreme Court judgment in the case of Nicco Corporation Ltd and is decided in favour of the Revenue – As regards the second issue about the imposition of penalty, the Commissioner, himself in his order-in-original has stated that the issue involved in the case was of interpretational nature – Keeping in mind the said factor, the Commissioner thought it fit not to impose harsh penalty and a penalty of Rs. 5 lakhs was imposed on the appellant*

while confirming the demand of the duty – The Commissioner also found that it was difficult to hold that the appellant knowingly dealt with excisable goods which were cleared without payment of duty – The Department itself also did not take it as a formal case of offence – In view of the aforesaid facts, no penalty could be and is liable to be imposed on the appellant – Central Excise Tariff Sub-Heading No.8544.00.

The appellant is engaged in the manufacture of insulated wires and cables falling under Central Excise Tariff Sub-Heading No.8544.00. It claimed benefit under Notification no. 205/88 – C.E. dated 25.05.88 as amended by Notification no. 57/95 which granted exemption from payment of central excise duty in respect of manufacture of wind mills, parts of wind mills and any specially designed devices which run on wind mills. The appellant filed declaration under Rule 173-B of the Central Excise Rules, 1944 claiming nil rate of duty so as to avail benefit under the aforestated notification for the insulated cables manufactured by it and supplied to the manufacturers of wind mills for using the same as part of wind mills. As the appellant had not paid excise duty on the electrical cables supplied to the manufacturers of wind mills, show cause notices were issued to the appellant by the Revenue-Authorities for recovery of excise duty. According to the Authorities, the electric cables were neither parts nor specially designed devices, which were necessary for manufacturing or running wind mills. For the aforestated reasons, according to the authorities, benefit under the aforestated notification could not have been availed by the appellant. Ultimately, the Commissioner, Central Excise confirmed the demand of excise duty and imposed penalty under Rule 173Q(1) of the Rules. The appellant preferred appeal before the Tribunal which was dismissed. Aggrieved, the appellant preferred the instant appeal under Section 35-L (b) of the Central Excise Act, 1944.

Two issues arose for adjudication in the present case: 1) Whether the insulated electrical cables manufactured by the appellant would be eligible for exemption under the above mentioned exemption notification and 2) Whether imposition of penalty was justified in view of the facts and circumstances of the case.

Partly allowing the appeal, the Court

HELD:1. So far as the first issue is concerned, it is no more res integra in view of the judgment delivered by this Court in the case of Nicco Corporation Ltd.* The facts in the said case as well as in the present case are similar and, therefore, there is no need to consider the said issue again. In the circumstances, the first issue is decided in favour of the Revenue. It is also pertinent to note that the appellant has already paid sum towards excise duty. [Para 9] [597-G-H; 598-A]

** Nicco Corporation Ltd. v. Commissioner of Central Excise, Calcutta* **2006 (203) ELT 362(S.C.) – relied on.**

2. As regards the second issue about the imposition of penalty, the said order cannot be justified in the facts of the case. The Commissioner, himself in his order-in-original has stated that the issue involved in the case is of interpretational nature. Keeping in mind the said factor, the Commissioner thought it fit not to impose harsh penalty and a penalty of an amount of Rs. 5 lakhs was imposed on the appellant while confirming the demand of the duty. It is also evident from the said order that the Commissioner also found that except for the statement of the Excise Executive Director and Excise Clerk of the assessee company there was no other evidence pointing out any accusing finger at them in dealing with offending goods knowingly. A clear finding was recorded by the Commissioner that it was difficult to hold that the

appellant knowingly dealt with excisable goods which were cleared without payment of duty. Nor the department itself took it as a formal case of offence. In view of the aforesaid facts and also the fact that the Commissioner himself found that it is only a case of interpretational nature, no penalty could be and is liable to be imposed on the appellant. Consequently, the order of the Commissioner imposing penalty as also the order of the Tribunal so far as it confirms imposition of penalty upon the appellant are quashed. [Paras 9 to 13] [597-H; 598-A-G]

Case Law Reference:

2006 (203) ELT 362 (S.C.) relied on Paras 4, 5, 6, 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5870 of 2005.

From the Judgment & Order dated 7.7.2005 of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai.

Pramod B. Agarwala, Praveena Gautam, Abhishek Baid for the Appellant.

H.P. Rawal, ASG, K. Swami, Tanushree Sinha, B.K. Prasad, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. This is an appeal under Section 35-L (b) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'), against the Judgment and Order no A/1326/WZB/2005/C-iii dated 7.7.05 in Appeal No. E/1893/01, passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Branch, Mumbai.

2. The material facts are that the appellant is engaged in

the manufacture of insulated wires and cables falling under Central Excise Tariff Sub-Heading No.8544.00. The appellant claimed benefit under Notification no. 205/88 – C.E. dated 25.05.88 as amended by Notification no. 57/95. The said notification grants exemption from payment of central excise duty in respect of manufacture of wind mills, parts of wind mills and any specially designed devices which run on wind mills. As the appellant had received orders from various wind mill manufacturers for specially designed electrical cables, which were to be used in the manufacture of wind mills, the appellant filed a declaration under Rule 173-B of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') claiming nil rate of duty so as to avail benefit under the aforestated notification for the insulated cables manufactured by it and supplied to the manufacturers of wind mills for using the same as part of wind mills for the period commencing from May,1995 to February, 2006. The appellant reversed the modvat credit taken on inputs for Rs. 16,14,088.32 for availing the exemption benefit under notification no. 205/88.

3. As the appellant had not paid excise duty on the electrical cables supplied to the manufacturers of wind mills as stated hereinabove, three show cause notices had been issued to the appellant by the Revenue -Authorities for recovery of total excise duty amounting to Rs.66,92,604/-. According to the Authorities, the electric cables were neither parts nor specially designed devices, which were necessary for manufacturing or running wind mills. For the aforestated reasons, according to the authorities, benefit under the aforestated notification could not have been availed by the appellant. Ultimately, the Commissioner, Central Excise, Surat – II by an order dated 20.2.1998, confirmed the demand of excise duty amounting to Rs. 66,92,604 and imposed penalty under Rule 173Q(1) of the Rules. The said order was challenged before the Tribunal and the Tribunal allowed the appeal by remanding the matter to the Commissioner. After hearing the appellant, the Commissioner again took the same view by his order dated 22.3.2001.

4. Being aggrieved by the aforestated order dated 22.3.01, the appellant preferred an appeal before the Tribunal which was dismissed. The Tribunal relied on its earlier order passed in *NICCO CORPORATION LIMITED v. COMMISSIONER OF CENTRAL EXCISE, CALCUTTA,* whereby an analogous issue was adjudicated and decided against the concerned assessee. Aggrieved by the said order dated 7.7.2005, the appellant has preferred the appeal before this Court.

5. The order passed by the Tribunal in *NICCO CORPORATION LIMITED* (supra) was appealed against in C.A. No 1118/2001 before this Court. This Court, vide its order dated 22.3.06 dismissed the appeal and held that insulated electrical cables designed for use in wind mills would not be eligible for exemption under notification no 205/88 as amended. The said judgment is now reported as *Nicco Corporation Ltd. v. Commissioner of Central Excise, Calcutta* 2006 (203) ELT 362(S.C.). During the pendency of the proceedings, the Authorities had issued a notice of demand directing the appellant to pay central excise duty and penalty amounting to Rs 1, 33, 85,208. The appellant, in compliance of the said notice, deposited a sum of Rs 66, 92,604 towards the excise duty payable by it. However, the amount of penalty has not been paid as stay has been granted against the said demand.

6. We have heard the learned counsel appearing for the concerned parties. It has been mainly submitted on behalf of the appellant that the electrical cables supplied to the manufacturers of wind mills were specifically designed for use in wind mills. They were special type of cables, without which the wind mills could not have been operated and, therefore, the revenue authorities ought to have granted exemption as stated in the notification referred to hereinabove. The learned counsel appearing for the appellant gave details as to how the electric cables were specially used for running the wind mills. He further stated that without use of the electric cables supplied by the appellant, functioning of the wind mills would not have been

possible. He, therefore, submitted that the appellant ought to have been given the benefit of the notification referred to hereinabove.

7. On the other hand, Shri H.P. Raval, learned Additional Solicitor General appearing for the respondent-authorities relied upon the judgment delivered in *Nicco Corporation Ltd. v. Commissioner of Central Excise, Calcutta* (supra) and submitted that the electric cables manufactured and supplied by the appellant were not so indispensable that without which the wind mills could not have been operated. He further submitted that for the reasons recorded in the order passed by the Tribunal, the appellant is not entitled to exemption. He further submitted that the order imposing penalty is also just and proper as the appellant deliberately did not pay excise duty payable by it. Thus, he submitted that the impugned order is just and proper and, therefore, the appeal deserves to be dismissed.

8. Two issues arise for adjudication in the present case:

I. Whether the insulated electrical cables manufactured by the appellant would be eligible for exemption under the above mentioned exemption notification.

II. Whether imposition of penalty is justified in view of the facts and circumstances of the case.

9. So far as the first issue is concerned, it is no more res integra in view of the judgment delivered by this Court in the case of *Nicco Corporation Ltd. v. Commissioner of Central Excise, Calcutta* (supra). The facts in the said case as well as in the present case are similar and, therefore, we need not consider the said issue again. In the circumstances, the first issue is decided in favour of the Revenue. It is also pertinent to note that the appellant has already paid a sum of Rs.66,92,604/- towards excise duty. As regards the second

issue about the imposition of penalty, we are of the opinion that the said order cannot be justified in the facts of the case.

10. So far as the second issue with regard to the imposition of penalty in the present case is concerned, the Commissioner, himself in his order-in-original has stated that the issue involved in the case is of interpretational nature. Keeping in mind the said factor, the Commissioner thought it fit not to impose harsh penalty and a penalty of an amount of Rs. 5 lakhs was imposed on the appellant while confirming the demand of the duty.

11. It is also evident from the said order that the Commissioner also found that except for the statement of the Excise Executive Director and Excise Clerk of the assessee company there was no other evidence pointing out any accusing finger at them in dealing with offending goods knowingly. A clear finding has been recorded by the Commissioner that it was difficult to hold that the appellant knowingly dealt with excisable goods which were cleared without payment of duty. Nor the department itself took it as a formal case of offence.

12. When we take into consideration the aforesaid facts and also the fact that the Commissioner himself found that it is only a case of interpretational nature, in our considered opinion, no penalty could be and is liable to be imposed on the appellant herein.

13. Therefore, in the facts and circumstances of the present case we are of the view that penalty should not have been imposed upon the appellant. Consequently, we quash the order of the Commissioner imposing penalty as also the order of the Tribunal so far as it confirms imposition of penalty upon the appellant. The appeal is allowed to the aforesaid extent leaving the parties to bear their own costs.

B.B.B. Appeal partly allowed.

P. PARTHASARATHY
v.
STATE OF KARNATAKA & ORS.
(SLP (Civil) No. 19510 of 2011)

AUGUST 24, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Karnataka Industrial Areas Development Act, 1966 – s. 28(4) – Final Notification issued under – Legality and validity of – Issuance of Notification u/s. 28 (1) to acquire land of the petitioner – No objection filed by the petitioner, whereupon Notification u/s. 28 (4) issued – Challenged by filing writ petition u/s. 28(4) – Single Judge of the High Court quashed the Notification u/s. 28(4) and directed the Land Acquisition Officer to provide opportunity to the petitioner and also to identify the land and thereafter, to proceed with the matter – Subsequent thereto, land was identified and objections of the petitioner were considered and actual portion of land required for formation of road was notified – Issuance of final notification u/s. 28 (4) – Writ Petition by the petitioner challenging the validity of the said Notification – Dismissed by the Single Judge of the High Court holding that the order of Single Judge in the earlier writ petition had become final and binding – Division Bench upheld the order – On appeal, held: Land which was sought to be acquired by the respondent was identifiable – Petitioner was given opportunity to file his objections which were considered – Land was resurveyed and thereafter, the land sought to be acquired was identified, which included the land of the petitioner – Thus, the entire pre-conditions and formalities laid down u/s. 28 were duly complied with and were adhered to and followed – Although there was some discrepancy in the description of the property proposed to be acquired, and the description given although might not have been exactly accurate, but the same did not

in any manner mislead the petitioner regarding the identity of the land which is corroborated by the fact of the detailed enquiry conducted in his presence – Petitioner was able to file a detailed and effective reply to the show cause notice issued to him – Thus, final Notification u/s. 28 (4) having been validly issued, no interference is called for.

Babu Barkya Thakur vs. State of Bombay and Ors. **AIR 1960 SC 1203 – Followed.**

Narendrajit Singh and Anr. vs. The State of U.P. and Anr. **(1970) 1 SCC 125: 1970 (3) SCR 278;** *Madhya Pradesh Housing Board vs. Mohd. Shafi and Ors.* **(1992) 2 SCC 168: 1992 (1) SCR 657;** *Om Prakash Sharma and Ors. vs. M.P. Audyogik Kendra Vikas Nigam and Ors.* **(2005) 10 SCC 306 – Distinguished.**

State of Karnataka and Anr. Vs. All India Manufacturers Association and Anr. **(2006) 4 SCC 683: 2006 (1) Suppl. SCR 86 – Cited .**

Case Law Reference:

2006 (1) Suppl. SCR 86	**Cited.**	**Para 13**
1970 (3) SCR 278	**Distinguished.**	**Para 20**
1992 (1) SCR 657	**Distinguished.**	**Para 21**
(2005) 10 SCC 306	**Distinguished.**	**Para 22**
AIR 1960 SC 1203	**Followed**	**Para 17**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 19510 of 2011.

From the Judgment & Order dated 15.6.2011 of the High Court of Karnataka, Bangalore in Writ Petition No. 3527 of 2009.

P.P. Rao, K.G. Sadashivaiah, Kashi Vishweshwar, A.

Sumathi, Satish Kumar, Anjali Chauhan, S. Nanda Kumar for the Petitioner.

Dushyant A. Dave, K.T. Anantharaman, R.V.S. Naik, Guru Raj Deshpande, Vasudevan Raghavan, Anitha Shenoy, Sandeep Patil for the Respondents.

The following order of the Court was delivered

O R D E R

1. This special leave petition is directed against the judgment and order dated 15.6.2011 passed by the Division Bench of the Karnataka High Court affirming the judgment and order passed by the learned Single Judge of the same High Court.

2. By the aforesaid order, the High Court where the legality and validity of the final notification dated 6.2.09 issued under sub-section (4) of Section 28 of the Karnataka Industrial Areas Development Act, 1966 (hereinafter referred to as the 'Act') was challenged upheld the validity and legality of the aforesaid notification issued by the respondent/State exercising the powers vested in it under sub-section (4) of Section 28 of the Act.

3. The petitioner herein is the owner of survey no. 154/10 measuring about 2 acres at Kengeri village, Kengeri Hobli, Bangalore South taluk. The land of the petitioner was the subject matter of the notification issued by the State of Karnataka. The notification was issued under Section 28(1) of the Act. The petitioner, however, did not file any objection whereupon a final notification under Section 28(4) of the Act was issued, which, however, was challenged before the learned Single Judge of the Karnataka High Court by filing a writ petition, which was registered and numbered as W.P. No. 24867 of 2005.

4. The learned Single Judge by judgment and order dated

13.01.2009 allowed the said writ petition filed by the petitioner herein and quashed the final notification issued and also the consequential corrigendum. The learned Single Judge also gave a liberty to the respondents to identify the land which they propose to acquire. It was also held therein by the learned Single Judge that the petitioner as also the respondent no. 4 would take the proceeding before the High Court as the notice in the matter of identification of the land in question and file their objections within a period of four weeks. Subsequent thereto, a notice was issued to the petitioner by the Board on 6.2.2009. In the said notice, the Board informed the petitioner that the land described in the notice is required for the development of the Karnataka Industrial Development Board and that the Government of Karnataka had issued a notification under sub-section (1) of Section 28 of the Act by notification dated 19.12.1998. The petitioner was further informed that he may show cause as to why the land should not be acquired and that such a notice is being given to the petitioner pursuant to the order passed by the High Court in the aforesaid writ petition. A description of the land was also given in the said notice. The petitioner as against the same submitted a reply contending, *inter alia*, that the land of the petitioner could not and would not come within the aforesaid acquisition and, therefore, his name shown in the preliminary notification dated 19.12.1998 be deleted. He further stated in the said reply filed that the plan prepared for road including the peripherial road junction, approved by the competent authority clearly indicate that the land in question is not at all required or proposed to be acquired and that being the state of affairs, acquisition of any portion of the said land bearing survey no. 154 cannot be sustained either in facts or in law and the same is liable to be dropped from acquisition.

5. After the receipt of the aforesaid objection filed by the petitioner, an enquiry was conducted by the Special Land Acquisition Officer. A report was also prepared, which is placed on record. It appears the petitioner was represented by his

counsel in the said enquiry proceedings. The concerned officer considered the records and then ordered that notices be issued to all concerned persons including the petitioner notifying them that a survey would be conducted to measure the land and that the petitioner should be present in the aforesaid survey to be made to show their respective lands.

6. It is also disclosed from the record that as per the date fixed i.e. on 18.4.2009, the concerned officers visited the spot and on that day, the concerned persons including the petitioner and others were present. In the said survey, the previous phoded numbers were cancelled and thereafter the mahazar was drawn in the presence of the parties and they were also given sketch copies with available records in terms of their requests. The officer, thereafter, heard the arguments and after referring to the order of the Karnataka High Court dated 13.01.2009 it was held that the land measuring 2.33 acres is required for the project. Thereafter the said Land Acquisition Officer passed an order that the land bearing survey no. 154/10 of Kengeri village, Kengeri Hobli, Bangalore South taluk is required for the proposed reasons of acquisition and that the same is suitable and required as per the joint measurement and schedule and, therefore, the said land measuring 2.33 acres was ordered to be acquired. Consequent thereupon a notification under Section 28(4) was issued whereby the land of the petitioner was acquired by putting the name of the petitioner in the schedule annexed to the said notification.

7. The validity of the aforesaid notification was challenged by filing a writ petition in the Karnataka High Court. The learned Single Judge who heard the writ petition, after hearing the counsel appearing for the parties, dismissed the writ petition by his order dated 11.9.2009 holding that the order of the learned Single Judge in the earlier writ petition no. 24867/2005 directing the Land Acquisition Officer to provide opportunity to the petitioner and also to identify the land and thereafter to proceed with the matter having become final and binding and since subsequent to the said order, the land having been

identified and his objections having been considered and the actual portion of the land required for formation of the road having been notified, there could be no further grievance of the petitioner. Consequently, the writ petition filed by the petitioner was dismissed.

8. Being aggrieved by the said order, a writ appeal was filed before the High Court, which is the impugned judgment and order. By the said judgment, the Division Bench of the High Court dismissed the appeal holding that any defect in the preliminary notification would not prove fatal to the acquisition proceedings. It was also held that though survey number was not challenged, a fresh inquiry was held to identify the land whereupon the land was identified and thereafter order was passed followed by final declaration that the land of the petitioner is required for the project. Consequently, the appeal was also dismissed and the present petition was filed on which we have heard the learned counsel appearing for the parties.

9. Mr. P.P. Rao, learned senior counsel appearing for the petitioner has submitted that the land was not identifiable as although the extent of land was mentioned in the notification but the boundaries that were given were incorrect and erroneous and, therefore, the notification issued by the respondent State under sub-section (4) of Section 28 of the Act is liable to be quashed.

10. In support of the aforesaid contention, the learned counsel has relied upon the decisions of this Court titled *Narendrajit Singh & Anr. Vs. The State of U.P. and Anr.* reported in (1970) 1 SCC 125, *Madhya Pradesh Housing Board Vs. Mohd. Shafi and Others* reported in (1992) 2 SCC 168 and *Om Prakash Sharma and Others Vs. M.P. Audyogik Kendra Vikas Nigam and Others* reported in (2005) 10 SCC 306.

11. Mr. Dushyant Dave, learned senior counsel appearing for the respondent no. 5 and Ms. Shenoy, learned counsel

appearing for the State have refuted the aforesaid submissions of the counsel appearing for the petitioner and submitted that the land which was sought to be acquired by the respondent was identifiable all along. It is also submitted that the petitioner was given opportunity to file his objections, which were considered, and even the land was re-surveyed in order to identify the exact location and area of the land in terms of the order passed by the learned Single Judge and thereafter upon proper identification and verification of the land, the notification under sub-section (4) of Section 28 of the Act having been validly issued, there could be no interference in the present case.

12. In the light of the aforesaid submissions of the counsel appearing for the respondents, we propose to dispose of this special leave petition by giving our reasons thereof.

13. The project that we are concerned with was also the subject matter of appeal filed in this Court in the case of *State of Karnataka and Anr. Vs. All India Manufacturers Association and Anr.* reported in (2006) 4 SCC 683. In paragraph 77 of the said judgment, it was held by this Court that the concerned project is an integrated infrastructure development project and is not merely a highway project. It was also held that the project which is styled, conceived and implemented is the Bangalore-Mysore Infrastructure Corridor Project which conceived of the development of roads between Bangalore and Mysore. There are several interchanges in and around the periphery of the city of the Bangalore together with numerous developmental infrastructure activities along with the highway at several points. It is, therefore, needless to reiterate that the project is a very important project and the land which is sought to be acquired is proposed to be a part of the peripheral road being a part of the aforesaid developmental infrastructure.

14. The issue that arises for our consideration is whether there was any inaccuracy with regard to the description of the boundaries of the land which is sought to be acquired by the

respondents. In fact, in the earlier round of litigation wherein validity of sub-section (1) of Section 28 was not challenged, what was done was to quash the notification issued under sub-section (4) of Section 28, which was in fact under challenge. Even thereafter and pursuant to the orders of the High Court which had become final and binding, a re-survey was done after going through the objection filed by the petitioner. In the said re-survey where the petitioner was also personally present, the land proposed to be taken and acquired was identified, sketch map was prepared and thereafter only the final notification under sub-section (4) of Section 28 was issued.

15. That the petitioner could file his objection and he was fully heard and was also given an opportunity regarding identification of the land indicates that the petitioner had ample opportunity to place his case, which was considered but decided against him. In our considered opinion full opportunity having been given to the petitioner to place his case and to oppose the acquisition process, there could be no further grievance of the petitioner in that regard.

16. We are also of the opinion that no prejudice is caused to the petitioner in any manner for the land was re-surveyed and thereafter the land sought to be acquired was identified, which included the land of the petitioner and, therefore, the entire pre-conditions and formalities as laid down under Section 28 of the Act were duly complied with and were adhered to and followed and, therefore, there cannot be any further cause of grievance for the petitioner.

17. In this connection, we may appropriately refer to a decision of the Constitution Bench of this Court in *Babu Barkya Thakur Vs. State of Bombay and Others,* reported in AIR 1960 SC 1203. In paragraph 12 of the said judgment, the Supreme Court has held that the purpose of the notification under Section 4 is to carry on a preliminary investigation with a view to finding out after necessary survey and taking of levels and if necessary digging or boring into the sub-soil whether the land was

adapted for the purpose for which it was sought to be acquired. It was further held in that decision that it is only under Section 6 that a firm declaration has to be made by the Government that the land with proper description and area so as to identifiable is needed for a public purpose or for a company. The aforesaid observation was made after holding that what was a mere proposal under Section 4 becomes a subject matter of a definite proceeding for acquisition on issuance of notification under Section 6 of the Act.

18. We feel that the law laid down in the said decision applies in full force to this case also. In the present case also there were some errors and mistakes in the notification issued under sub-section (1) of Section 28 of the Act but the same did not, in any manner, prevent the petitioner from submitting an effective objection and also from getting an opportunity of effective hearing for him. A re-survey was done in his presence and, therefore, the purpose for which the provision of sub-section (1), (2) and (3) have been enacted, have been fully carried out in the present case.

19. We are, therefore, of the considered opinion that although there was some discrepancy in the description of the property proposed to be acquired and the description given although might not have been exactly accurate, but the same did not in any manner misled the petitioner regarding the identity of the land which is corroborated by the fact of the detailed enquiry which was conducted in his presence. The petitioner was also able to file a detailed and effective reply to the show cause notice issued to him.

20. The decisions which are relied upon by the learned counsel appearing for the petitioner are clearly distinguishable on facts. So far the decision in case of *Narendrajit Singh & Anr. Vs. The State of U.P. and Anr.* reported in (1970) 1 SCC 125 (supra) is concerned, in the said case we find that this Court interfered with the declaration because there was no particulars given in the notification. In the said case, there was

no mention of any locality at all and in that context, this Court interfered with the proposed acquisition.

21. So far the next case, namely, *Madhya Pradesh Housing Board Vs. Mohd. Shafi and Others* reported in (1992) 2 SCC 168 (supra) is concerned, in that case also details and particulars of the land were not given and a wrong public purpose was mentioned and in that view of the matter, this Court interfered with the acquisition proceeding.

22. As regards the case of *Om Prakash Sharma and Others Vs. M.P. Audyogik Kendra Vikas Nigam and Others* reported in (2005) 10 SCC 306 (supra) which was relied upon by the counsel for the petitioner is concerned, in that case neither any survey number was given nor any khasra number was given. Even the name of the persons were not mentioned and in that context the declaration was quashed with a liberty by way of giving a fresh opportunity for initiation of a fresh acquisition proceeding.

23. The aforesaid cases are clearly distinguishable on facts and, therefore, they have no application in the facts and circumstances of the present case.

24. Considering the entire facts and circumstances of the case, we are of the considered opinion that the learned Single Judge as also the learned Division Bench of the Karnataka High Court did not commit any mistake or error in dismissing the writ petition.

25. We find no infirmity in the impugned judgment and order passed by the Division Bench. The petition has no merit and is dismissed, but leaving the parties to bear their own costs.

26. Since we have dismissed this petition, any interim order passed by the High Court shall also stand vacated by this order.

N.J. SLP dismissed.

SPL. LAND ACQUISITION OFFICER
v.
MAHARANI BISWAL AND ORS.
(Civil Appeal No. 2672 of 2004)

AUGUST 24, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Land Acquisition Act, 1894:

Compensation – Determination of – Land measuring Ac.4.98 situated in village Lodhani in the District of Dhenkanal notified for acquisition – Land acquisition officer fixed compensation at Rs. 3100 – Reference court enhanced compensation to Rs. 10,000 per acre – High Court further enhanced compensation amount to Rs. 75,000 per acre – On appeal, held: Reference Court discussed entire evidence including the deposition of witnesses and on appreciation thereof came to a definite finding that the acquired land on the date of issuance of the notification u/s.4 could not be valued and assessed at more than Rs. 10,000/- per acre – Said amount was just and fair compensation for the land acquired – High Court failed to indicate as to how the said findings were unreasonable and unjustified and proceeded on wrong notion that the sale deeds of tiny pieces of land could be determining factor as the land acquired in the instant case was Ac. 4.98 decimals as against the sale deeds relied upon by which not even 1 decimal of land was sold – Considering the entire facts and circumstances of the case, judgment passed by the High Court set aside – Matter remitted to High Court for consideration afresh.

Land measuring AC.4.98 situated in village Lodhani in the district of Dhenkanal was notified for acquisition on 18.2.1987. The land acquisition officer on 2.3.1988

granted compensation for the acquired land @ Rs. 3100 (Taila land) and Rs. 5490 (Sarad land) per acre. Dissatisfied with the compensation amount, the land owners filed reference applications. The reference court determined the compensation @ Rs. 10,000 per acre. The claimants and the land acquisition officer both filed appeals before the High Court. The High Court enhanced the compensation amount to Rs.75,000 per acre. The instant appeal was filed by the land acquisition officer challenging the order of the High Court.

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

HELD: 1. The entire burden was placed on respondents to prove and establish that they were entitled to more than Rs. 3,100/- per acre which was determined by the Land Acquisition Officer. In order to prove the said fact, the respondents examined four witnesses and relied upon five sale deeds which were exhibited as Ext. 3 dated 14.9.1988, Ext. 4 dated 15.4.1985, Ext. 5 dated 25.5.1984, Ext. 6 dated 15.7.1985, whereas the respondents also relied on Ext. 7 to show the location of G.P. Office and Grain Gola Office. The respondents also filed on record a map as Ext. 8 which disclosed that a road runs in between the acquired land. However, there was no evidence to show that the said road, which ran in between the acquired land was a national highway. No such documentary evidence was placed on record to prove the said fact. The notification under Section 4 was issued on 18.2.1987 and, therefore, market value as existing near about the said date and near about the same land was to be determined and assessed. The Reference Court very elaborately and minutely discussed the entire evidence on record including the deposition of the witnesses and on appreciation thereof came to a definite finding and conclusion that the acquired land on the date

of issuance of the notification under Section 4 cannot be valued and assessed at more than Rs. 10,000/- per acre. Consequently, the said amount was determined by the Reference Court as just and fair compensation for the land acquired. As against the said findings giving cogent reasons, the High Court failed to indicate as to how the said findings were unreasonable and unjustified fixing the compensation of the land at Rs. 10,000/- per acre. It was necessary for the High Court to give reasons for its disagreement with the findings of the Reference Court but nothing of that nature was done by the High Court and the High Court arrived at an abrupt decision raising the compensation to Rs. 75,000/- per acre. [Para 10, 11] [614-G-H; 615-A-G]

2. Since the High Court did not consider the oral evidence and also did not properly analyse the documentary evidence available on record, the judgment and order passed by the High Court cannot be sustained and has to be interfered with. This is also because of the fact that the High Court proceeded on a wrong notion that the sale deeds of tiny pieces of land could be the determining factor as the land acquired in the instant case was Ac. 4.98 decimals as against the sale deeds by which not even 1 decimal of land was sold. There was total misreading of the evidence on record and also misinterpretation of the legal proposition settled by this Court. [Para 13] [617-B-C]

3. Considering the entire facts and circumstances of the case, the judgment and order passed by the High Court is set aside. The High Court should discharge its duty and responsibility of appreciating the entire evidence on record as it is the last court of appeal in view of the provisions of Section 54 of the Act and thereafter give a proper finding on the basis of both, oral and documentary evidence by taking notice of the observations made herein and thereafter decide all the

issues that are raised before it by the parties. [Para 14] [617-D-F]

Navanath and Others v. State of Maharashtra **(2009) 14 SCC 480: 2009 (6) SCR 632 – relied on.**

Case Law Reference:

2009 (6) SCR 632	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2672 of 2004.

From the Judgment & Order dated 04.10.2001 of the High Court of Orissa at Cuttack in First Appeal No. 369 of 1990.

Suresh Chandra Tripathy for the Appellant.

Janaranjan Das, Swetaketu Mishra, P.P. Nayak for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. The present appeal is filed against the judgment and order dated 04.10.2001 passed by the High Court of Orissa whereby the High Court, vide a common judgment, dismissed First Appeal No. 428 of 1990 filed by the Special Land Acquisition Officer and partly allowed First Appeal No. 369 of 1990 filed by the Respondents herein.

2. The issue that falls for consideration in the present appeal is whether the assessment and determination of compensation awarded to the respondents for acquisition of their land and increasing it from Rs. 10,000/- to Rs. 75,000/- per acre is on the higher side and is a proper reflection of the market price of the land.

3. The facts leading to the filing of the present case are that Land measuring Ac. 4.98 decimals appertaining to Plot Nos. 6588/6861, 6567, 6576, 6565, 6561 to 6564, 6581, 5873,

6566 and 6560 under Khata No. 88 situated in village Lodhani under Parajang Police Station in the District of Dhenkanal was notified to be acquired for Parajang Distributory as per Revenue Department declaration No. 9420 dated 18.02.1987. The Land Acquisition Officer vide order dated 02.03.1988 granted compensation for the acquired land at the rate of Rs. 3100/- (Taila Land) and Rs. 5490/- (Sarad Land) per acre. The owner-claimants received the compensation so determined under protest and moved the Ld. Subordinate Judge by L.A. Misc. No. 37/88 under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as "**the Act**") against the order of the Land Acquisition Officer dated 02.03.1988.

4. The Ld. Subordinate Judge, after receiving evidence, by an order dated 06.09.1990, determined the compensation of the acquired land at the rate of Rs. 10,000/- per acre.

5. Aggrieved by the aforesaid order of the Ld. Subordinate Judge dated 06.09.1990, the claimants filed First Appeal No. 369 of 1990 and the Land Acquisition Officer filed First Appeal No. 428 of 1990 before the High Court of Orissa. The High Court vide order dated 04.10.2001, by a common judgment, dismissed First Appeal No. 428 of 1990 filed by the Land Acquisition Officer and partly allowed First Appeal No. 369 of 1990 filed by the claimants and thereby enhanced the compensation of the said land from Rs. 10,000/- per acre to Rs. 75,000/- per acre.

6. Aggrieved by the aforesaid order dated 04.10.2001, the Land Acquisition Officer has filed this appeal, upon which, we heard the learned counsel appearing for the parties.

7. The learned counsel appearing for the appellant drew our attention to the impugned judgment and order passed by the High Court and by making reference to the same, the counsel submitted that despite clear findings recorded by the Reference Court determining compensation of the land acquired at Rs. 10,000/- per acre on proper appreciation of the

documentary as also of oral evidence on record, it was not justified for the High Court to enhance the compensation to Rs. 75,000/- per acre without properly appreciating the documents on record.

8. He also submitted that the High Court relied upon the sale deeds by which very small pieces of land were sold and transferred. He, therefore, submitted that the price at which such small pieces of lands were sold did not reflect the correct market value. Moreover, he submitted that the land was not much developed as there were hardly four or five houses in the vicinity. He drew our attention to the evidence led before the court to substantiate his claim. He also submitted that expenses were required to be incurred by the Government to make the acquired land fit for the purpose for which it was being acquired. It was submitted that in that regard, deduction was required to be made as certain lands were going to be lost for which deduction was called for as has been repeatedly held by this Court, but that was not done by the High Court in the present case and, therefore, the judgment and order is required to be set aside and quashed.

9. Counsel appearing for the respondents however, refuted the aforesaid submissions while submitting that the aforesaid sale deeds relate to lands, which are located near the acquired land and so they were the best guide to determine the compensation and, therefore, the High Court was justified in relying on the said sale deeds and arriving at a just and fair compensation.

10. In order to appreciate the aforesaid contentions of the counsel appearing for the parties, we have ourselves scrutinized the records. The entire burden is placed on respondent to prove and establish that they are entitled to more than Rs. 3,100/- per acre which was determined by the Land Acquisition Officer. In order to prove the said fact, the respondent examined four witnesses and relied upon five sale deeds which were exhibited as Ext. 3 which is dated

14.9.1988, Ext. 4 dated 15.4.1985, Ext. 5 dated 25.5.1984, Ext. 6 dated 15.7.1985, whereas the Respondents' claimants also relied on Ext. 7 to show the location of G.P. Office and Grain Gola Office. The respondents also filed on record a map as Ext. 8 which discloses that a road runs in between the acquired land. However, there is no evidence to show that the aforesaid road, which runs in between the acquired land is a national highway. No such documentary evidence was placed on record to prove the said fact. The notification under Section 4 in the present case was issued on 18.2.1987 and, therefore, market value as existing near about the said date and near about the same land is to be determined and assessed. The Reference Court has very elaborately and minutely discussed the entire evidence on record including the deposition of the witnesses and on appreciation thereof has come to a definite finding and conclusion that the acquired land on the date of issuance of the notification under Section 4 cannot be valued and assessed at more than Rs. 10,000/- per acre. Consequently, the said amount was determined by the Reference Court as just and fair compensation for the land acquired.

11. As against the aforesaid findings giving cogent reasons, the High Court, failed to indicate as to how the aforesaid findings are unreasonable and unjustified fixing the compensation of the land at Rs. 10,000/- per acre. The High Court enhanced the compensation to Rs. 75,000/- per acre without any appreciation of the evidence on record and also without considering the findings of the learned Reference Court and ultimately rejecting the same. It was necessary for the High Court to give reasons for its disagreement with the findings of the Reference Court but nothing of that nature was done by the High Court and the High Court arrived at an abrupt decision raising the compensation to Rs. 75,000/- per acre.

12. In this regard, we may refer to the judgment of this Court in the case of *Navanath and Others Vs. State of Maharashtra* reported in (2009) 14 SCC 480, in which this Court while discarding the findings of the High Court, which

were found to be based on surmises and conjecture, restored to the findings of the Reference Court which were based on detailed examination of materials brought on record held thus:-

> "31. ……..The Reference Judge had taken into consideration the evidences adduced on behalf of both the parties not only with regard to the classification of the land but also the number of trees, their age, the quality, etc. We may notice that the learned Reference Judge determined the question in regard to the classification of land on the basis of the evidences adduced before it by individual landowners; by way of example, having regard to the fact that the claimants had failed to prove that the land had any irrigational facility, the learned Reference Judge classified the lands as jirayat lands. If the State was aggrieved thereby, it was bound to show that the findings arrived at by the Reference Court is not sustainable having regard to the materials brought on record.
>
> 32. The finding of fact arrived at by the learned Reference Judge on the basis of the materials brought on record, in our opinion, could not have been interfered with by the High Court on the surmises and conjectures……."

The Court further observed: -

> "46. ……..A court of law must base its decision on appreciation of evidence brought on record by applying the correct legal principles. Surmises and conjectures alone cannot form the basis of a judgment."

With regard to computation of the amount of compensation this Court held as follows: -

> "44. Indisputably, for the purpose of computation of amount of compensation a large number of factors have to be taken into consideration, namely, nature and quality of land, whether irrigated or unirrigated, facilities for irrigation like existence of well, etc. presence of fruit-bearing trees, the

location of the land, closeness to any road or highway, the evenness thereof whether there exists any building or structure."

13. Since the High Court has not considered the oral evidence and also not properly analysed the documentary evidence available on record, the judgment and order passed by the High Court cannot be sustained and has to be interfered with. This is also because of the fact that the High Court proceeded on a wrong notion that the sale deeds of tiny pieces of land could be the determining factor as the land acquired in the present case is Ac. 4.98 decimals as against the sale deeds by which not even 1 decimal of land was sold. There is total misreading of the evidence on record and also misinterpretation of the legal proposition settled by this Court.

14. Considering the entire facts and circumstances of the case, we set aside the judgment and order passed by the High Court and we are of the considered opinion that the High Court should discharge its duty and responsibility of appreciating the entire evidence on record as it is the last court of appeal in view of the provisions of Section 54 of the Act. The High Court shall appreciate the entire evidence on record and thereafter give a proper finding on the basis of both, oral and documentary evidence by taking notice of the observations made herein and thereafter decide all the issues that are raised before it by the parties.

15. We also desire that this case requires early disposal by the High Court and, therefore, we direct the parties to appear before the High Court on 15th September, 2011 for obtaining the dates in the appeal.

16. With the above observations and directions, this appeal is disposed of as allowed but leaving the parties to bear their own costs.

D.G. Appeal disposed of.

CHAKAS
v.
STATE OF PUNJAB & ORS.
(Civil Appeal No. 7258 of 2011)

AUGUST 24, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

LAND ACQUISITION ACT, 1894:

s.23 – Compensation for the land acquired – Computation of – Base price – Comparable sale deed – Held: Market value has to be assessed as at the time of s.4 notification – Appropriate sale deed would be Ext.P8 as it is touching the issuance of s.4 notification and is for more than 20 bighas of land – Further, tax department granted a clearance certificate with regard to it – It is a genuine and bona fide transaction – As per this sale deed the base price of the land acquired is fixed at Rs. 4,08,000/- per acre.

s.23 – Market value of land acquired – Deductions – Held: The land was reserved for industrial purposes and 80-85 industries are already located in the adjoining area – The bulk of the land has been given to the allottee-beneficiary for setting up its own industry and other infrastructure thereon – Thus, the land likely to be used towards the roads, sewage and other such facilities would be minimum as most of the vacant land would be utilized by the allottee for its own benefits – Therefore, a deduction of 10% from the base price would be reasonable – Reference court directed to calculate the amount of compensation accordingly and pay the same to the appellants and all such other land owners whose lands have been acquired – Appeal – Benefit extended to similarly situated non-appellants also.

The State Government-respondent No. 1 in CA No.

7258 of 2011, for the purposes of setting up of an Industrial Focal Point, issued a notification u/s 4 of the Land Acquisition Act, 1894 on 13.11.1992 for acquiring 550.03 acres of lands of four villages. The Land Acquisition Officer pronounced the award fixing different rates for the lands of four villages. However, the reference court held that the land owners of all the four villages were entitled to receive compensation at a uniform rate of Rs. 1.5 lakhs per acre. The Single Judge of the High Court enhanced the compensation to Rs.2.75 lakhs per acre. Both the land owners and the beneficiary-respondent no. 3, filed the appeals.

The question for consideration before the court was: what would be proper, adequate, just and reasonable compensation to be awarded to the land owners for the land acquired by the respondent State?

Allowing the appeals filed by the land owners and dismissing those filed by the beneficiary, the Court

HELD: 1.1 From the evidence of P.W 31, Patwari of Halqa of all the four villages, it is clearly made out that all these villages are adjoining each other and form a compact block. He has further admitted that more than 80 to 85 industries near and adjoining the acquired land are already running and doing their business since long. The area acquired has been reserved for industrial purposes. He has further deposed that if the land had not been acquired, many factories would have sprung up in the acquired land. His evidence is corroborated by other government officials, who had appeared before the reference court. It is also not in dispute that the said land is situated on the Ambala-Chandigarh Highway. From the evidence adduced by respondent Nos. 1 and 2, it cannot be disputed that it was a valuable land for the land owners and it had great potential. Obviously, in 1992, the

market value of the same, at the time of issuance of notification u/s 4 of the Act, would be much more than what has been awarded to them by the impugned judgment. [para 12-13] [626-B-F]

1.2 The appellant, to prove his case with regard to market value of the land, had produced many sale deeds, but the most appropriate sale deed touching the issuance of notification u/s 4 is Ext.P.8. The said land is with regard to the land almost abutting the acquired land. The total area of the land so purchased was 20 Bighas and 8 biswas. Before execution of the sale deed, an Agreement to Sell dated 30.10.1992 (Ext. P.45) was executed between the vendor and the vendee which was very close to the s.4 notification dated 13.11.1992 in the instant case. The said land is almost abutting the acquired land. As required under the law, permission was sought from the Income Tax Department which granted a Clearance Certificate (Ext. P.44). It can safely be assumed to be a genuine and bona-fide transaction between two parties, who had nothing to do with the acquisition of land of the appellant. The whole transaction executed under the Sale deed (Ext. P.8) fully proves and establishes the case of the appellant. As per this sale deed, the base price of the land would come to Rs. 4,08,000/- per acre. Therefore, the correct base price of the land acquired would be Rs. 4,08,000/- per acre. [para 14-16] [626-G-H; 627-C-H; 628-A]

Shri Rani M. Vijayalakshmamma Rao Bahadur Vs. Collector of Madras **(1969) 1 MLJ (SC) 45; and** *General Manager, Oil and Natural Gas Corporation Ltd. Vs. Rameshbhai Jivanbhai Patel and Anr.* **2008 (11) SCR 927 = (2008) 14 SCC 745 - relied on.**

2.1 The reference court committed a grave error in deducting 50% of the value assessed by it, towards

development charges and further reduced the said amount for the reasons not assigned by him. The single Judge has enhanced the amount of compensation but committed an error in fixing the base price as 2,75,000/- per acre for the acquired land, applying the doctrine of reasonable cut to the average price worked out by him at Rs.3,42,527/- per acre. This Court does not approve of the reasonings adopted either by the reference court or by the High Court. How much amount is to be deducted from the base price would depend on various factors. [para 19] [630-F-G; 631-A]

2.2 In the case in hand, the bulk of the land that is almost 525 acres has been given to respondent No.3, the Corporation for setting up its own industry and other infrastructure thereon. Thus, the lands likely to be used towards roads, sewage and other such facilities would be minimum as most of the vacant land would be utilised by respondent No. 3 for its own benefits. Needless to say, once the industry is set up, it would be for the financial benefit and gain of respondent No.3 year after year. Thus, looking to the matter from all angles, respondent No. 3-Corporation would be a great beneficiary at the cost of depriving the appellant-land owner of his sole livelihood of agriculture. [paras 20 and 21] [631-B-C]

2.3 Therefore, it is neither desirable nor proper to deduct more than 10% of the amount from the base price fixed by this Court at Rs. 4,08,000/-. On the amount, so arrived at, the appellant would be entitled for statutory benefits as mandated under the amended provisions of the Act. [paras 22 and 24] [631-D; 633-C-D]

Atma Singh (D) through Lrs. and Ors. Vs. State of Haryana and Another. **2007 (12) SCR 1120 = (2008) 2 SCC 568 - relied on.**

3. The reference court is directed to recalculate the

amount of compensation to be awarded to the appellants and all such other land owners whose lands have been acquired, in the light of the direction as contained in this judgment and to pay them the remainder amount accordingly. [para 25] [633-E]

Case Law Reference:

(1969) 1 MLJ (SC) 45	**relied on**	**para 17**
2008 (11) SCR 927	**relied on**	**para 18**
2007 (12) SCR 1120	**relied on**	**para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7258 of 2011.

From the Judgment & Order dated 03.05.2006 of the High Court of Punjab & Haryana at Chandigarh in R.F.A. No. 148 of 2000.

WITH

C.A. Nos. 7259, 7260, 7261, 7262, 7263, 7264, 7265, 7266, 7267, 7268, 7269, 7270, 7271, 7272, 7273-7304, 7305, 7306-7315, 7316, 7317, 7318-7322 of 2011.

L. Nageswara Rao, Navin Chawla, Gaurav Kaushi, Tushar Singh, Gagan Gupta, Pradeep Gupta, Dr. Rajeev B. Masodkar, A.K. Shagi, Parinav Gupta, K.K. Mohan for the Appellant.

Neeraj Kr. Jain, Anil Grover, AAG, Kuldip Singh, Ajay Pal, Sanjay Singh, Umang Shankar, Ugra Shankar Prasad, Kamal Mohan Gupta, Pawan Sharma (for B. Vijayalakshmi Menon) for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. Question as to what would be proper, adequate, just and reasonable compensation to be awarded to the appellant for

the land acquired by the respondent State, has once again cropped up for our consideration in this and the connected appeals.

3. In this appeal, the land owner, whose land has been acquired by the State of Punjab is before us for enhancement of compensation awarded to him by the High Court and the beneficiary respondent No. 3 M/s. Nahar Industries Infrastructure Corporation Ltd. (hereinafter shall be referred to as 'the Corporation') has preferred separate appeals for reduction of the compensation awarded to the appellant by the High Court. Since both set of appeals arise out of the common judgment and order pronounced by the learned Single Judge in Regular First Appeal No. 1072 of 1999 in the High Court of Punjab and Haryana at Chandigarh on 03.05.2006, they have been heard analogously and are being disposed of by this common judgment and order.

4. It may be noted that for the sake of brevity and convenience, facts of appeal arising out of SLP(C) No.1578 of 2007 have been taken into account.

5. Short facts, shorn of unnecessary details are mentioned hereinbelow:

Respondent No. 1 – State of Punjab, for the purposes of setting up of an Industrial Focal Point in Tehsil Rajpura District Patiala issued a notification on 13.11.1992 under Section 4 of the Land Acquisition Act (hereinafter shall be referred to as 'the Act') for acquiring 550.03 acres in villages Lalru, Jalalpur, Lehli, and Hassanpur of the aforesaid Tehsil and District. The public purpose mentioned in the same was for Industrial Focal Point. Subsequently, by issuance of another notification under Section 6 of the Act, on 08.04.1993, the aforesaid land was declared to have been acquired. Thereafter, the Land Acquisition Collector started the process of computing the amount of compensation to be awarded to the land owners. The Land Acquisition Officer pronounced his award on 12.9.1994 fixing

different rates per acre for the lands of four villages. The appellant and other land owners feeling highly dissatisfied with the amount of compensation so assessed by the Land Acquisition Officer, preferred references under Section 18 of the Act to the Civil Court at Patiala.

6. The matter was accordingly referred to the Additional District Judge, Patiala for working out the amount of compensation to be awarded to the appellant and other such similarly situated appellants. Both the parties led evidence before the Reference Court. On the basis of the evidence so adduced by the parties, the Reference Court was pleased to assess the value of the entire acquired land in four villages at a uniform rate and consequently held that the land owners were entitled to receive compensation of Rs. 1.5 lakh per acre, besides the individual claims made by land owners with regard to super structure, trees and other facilities available in their respective lands were also taken into consideration. The land owners were also held entitled for the statutory benefits as per the amended provisions of the Act.

7. Still not being satisfied with the amount of compensation so awarded to them, the land owners preferred appeals before the High Court under Section 54 of the Act, whereas the beneficiary respondent No. 3 herein the Corporation also preferred appeals purportedly, for reduction of the compensation awarded to the appellant. The Learned Single Judge heard the matters together and disposed of by the common judgment and order, which is being impugned, once again by both sides on a variety of grounds.

8. We have accordingly heard Mr. L. Nageswara Rao, Senior Advocate ably assisted by M/s Navin Chawla, Gaurav Kaushik, Tushar Singh praying for further enhancement of compensation and Mr. Anil Grover, AAG, Punjab with Mr. Kuldip Singh and Mr. Neeraj Kumar Jain, Senior Advocate with Mr. Sanjay Singh Advocate for the respondent Corporation at length and perused the records.

9. Certain dates material for deciding the said appeal are mentioned hereinbelow:

1.	Notification under Section 4 of the Section	Issued on 13.11.1992	Fro acquisition of 550.03 acres of land
2.	Notification under Section 6 of the Section	Issued on 08.04.1993	
3.	Award of Land Acquisition Officer	Passed on 12.09.1994	
4.	Award of the Reference Court	Dated 07.12.1998	Amount of compensation at Rs. 1.50 lakhs per acre.
5.	Judgment and order of the High Court	Pronounced on 03.05.2006	fixing the rate of compensation at Rs. 2.75 lakhs per acre.

10. Shri L. Nageswara Rao, Senior Advocate appearing for the appellant contended before us that the High Court committed a grave error in computation of the base price on the strength of the average price worked out from the sale deeds Exh. P.1, P.2, P.3, P.8, and P.15 and further committed another grave error in deducting amounts from the same. According to him, in the process, the amount of compensation awarded is much lower than what should have been awarded. On the other hand, learned counsel for respondent Mr. Anil Grover, AAG, Punjab and Mr. Neeraj Kumar Jain, Senior Advocate appearing for respondent No.3 submitted that the appellant has only been able to prove the market value of the land from the sale deed at Rs. 2.85 lacs per acre. He further contended that there was no mistake committed by the Court in taking out the average price for working out the amount of compensation to be awarded to the appellant.

11. Learned counsel for respondent No. 3 Mr. Neeraj Kumar Jain strongly contended before us that the Corporation has preferred appeals for deduction of the amount, primarily on the ground that more deductions should have been made

than what was allowed by the High Court and in any event no case has been made out for further enhancement of amount of compensation, which is already exorbitant and higher.

12. First of all, we would like to deal with the location and potentiality of the acquired land. From the evidence of P.W 31 Charanjit Singh, Patwari of Halqa of all the four villages, it is clearly made out that all these villages are adjoining each other and form a compact block. He has further admitted that more than 80 to 85 industries near and adjoining the acquired land are already running and doing their business since long. The area acquired has been reserved for industrial purposes. He has further deposed that if the land had not been acquired, many factories would have sprung up in the acquired land. The details of the industries which are already running in vicinity have been given vividly by him. It is also not in dispute that the said land is situated on the Ambala-Chandigarh Highway.

13. The evidence of other government officials, who had appeared before the Reference Court, reflects that the land acquired have great Industrial potential as more than 80-85 big industries have already set up their factories in the close vicinity to the acquired land. They have admitted that the acquired land is situated on the main Ambala-Chandigarh Highway. From the evidence adduced by respondent Nos. 1 and 2, it cannot be disputed that it was a valuable land for the land owners and it had great potential. Obviously, in 1992, the market value of the same, at the time of issuance of notification under Section 4 of the Act, would be much more than what has been awarded to them vide the impugned judgment.

14. However, the question which still remains for consideration is, on what basis, should the amount of compensation is to be worked out. The appellant to prove his case with regard to market value of the land had produced many sale deeds but only relevant following five sale deeds are taken into consideration:

Exhibit No.	Dated of sale deed	Price paid	Price per acre
P.1	16.08.1990	1,20,000	3,02,157
P.2	16.08.1990	1,50,000	3,51,219
P.3	16.08.1990	1,50,000	3,51,219
P.8	20.04.1993	17,34,000	4,08,000
P.15	04.06.1990	9,75,000	2,99,041

15. The appellant had also examined the vendors of the aforesaid sale deeds to show the genuineness and correctness of the same. The most appropriate sale deed touching the issuance of notification under Section 4 is Exh. P.8. The base price of the land per acre according to this comes to Rs. 4,08,000/-. The total area of the land so purchased was 20 Bighas and 8 biswas. Before execution of the sale deed, an Agreement to Sell dated 30.10.1992 (Exh. P.45) was executed between the vendor and vendee. As required under the law, permission was sought from the Income Tax Department which granted a Clearance Certificate Exh. P.44.

16. It is also pertinent to mention here that the land so sold covered under (Exh.P.8) sale deed neither belonged to any of the land owners nor they had any interest whatsoever in the said deed. Thus, it can safely be assumed that it was a genuine and bona-fide transaction between two parties, who had nothing to do with the acquisition of land of the appellant. It was not executed for the purposes of creating evidence as Agreement to sell (Exh. P.45) is dated 30.11.1992, before the issuance of Notification under Section 4 of the Act. On the said date, it could not have been imagined that the adjoining land is going to be acquired shortly. The said land is almost abutting the acquired land. It is also manifest that the Agreement dated 13.10.1992 is very close to the notification issued on 13.11.1992 under Section 4 of Act. The whole transaction executed under the Sale deed Exh. P.8 fully proves and establishes the case of the appellant. As per this sale deed, the base price of the land

would come to Rs. 4,08,000/- per acre. According to us, the correct base price would be Rs. 4,08,000/- per acre.

17. It is profitable to refer to the following judgment of this Court on this issue. (1969) 1 MLJ (SC) 45 *Shri Rani M. Vijayalakshmamma Rao Bahadur Vs. Collector of Madras*. Relevant para 2 is reproduced hereinbelow:

> "It seems to us that there is substance in the first contention of Mr. Ram Reddy. After all when land is being compulsorily taken away from a person he is entitled to say that he should be given the highest value which similar land in the locality is shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. It is not disputed that the transaction represented by Ex Rule 19 was a few months prior to the notification under Section 4, that it was a bona fide transaction and that it was entered into between a willing purchaser and a willing seller. The land comprised in the sale deed is 11 grounds and was sold at Rs. 1951 per ground. The land covered by Rule 27 was also sold before the notification but after the land comprised in Ex. Rule 19 was sold. It is true that this land was sold at Rs. 1096 per ground. This, however, is apparently because of two circumstances. One is that betterment levy at Rs.500/- per ground had to be paid by the vendee and the other that the land comprised in it is very much more extensive, that is about 93 grounds or so. Whatever that may be, it seems to us to be only fair that where sale deeds pertaining to different transactions are relied on behalf of the Government, that representing the highest value should be preferred to the rest unless there are strong circumstances justifying a different course. In any case we see no reason why an average of two sale deeds should have been taken in this case."

18. The said judgment has been considered by this Court reported in (2008) 14 SCC 745 *General Manager, Oil and*

Natural Gas Corporation Ltd. Vs. Rameshbhai Jivanbhai Patel and Anr. wherein the Division Bench has considered this aspect of the matter succinctly in para 13, 14 and 15 reproduced hereinbelow:

> 13) Primarily, the increase in land prices depends on four factors: situation of the land, nature of development in surrounding area, availability of land for development in the area, and the demand for land in the area. In rural areas, unless there is any prospect of development in the vicinity, increase in prices would be slow, steady and gradual, without any sudden spurts or jumps. On the other hand, in urban or semi-urban areas, where the development is faster, where the demand for land is high and where there is construction activity all around, the escalation in market price is at a much higher rate, as compared to rural areas. In some pockets in big cities, due to rapid development and high demand for land, the escalations in prices have touched even 30% to 50% or more per year, during the nineties.
>
> 14) On the other extreme, in remote rural areas where there was no chance of any development and hardly any buyers, the prices stagnated for years or rose marginally at a nominal rate of 1% or 2% per annum. There is thus a significant difference in increases in market value of lands in urban/semi-urban areas and increases in market value of lands in the rural areas. Therefore, if the increase in market value in urban/semi-urban areas is about 10% to 15% per annum, the corresponding increases in rural areas would at best be only around half of it, that is, about 5% to 7.5% per annum. This rule of thump refers to the general trend in the nineties, to be adopted in the absence of clear and specific evidence relating to increase in prices. Where there are special reasons for applying a higher rate of increase, or any specific evidence relating to the actual increase in prices, then the increase to be applied would depend upon the same.
>
> 15) Normally, recourse is taken to the mode of determining the market value by providing appropriate escalation over the proved market value of nearby lands in previous years (as evidenced by sale transactions or acquisitions), where there is no evidence of any contemporaneous sale transactions or acquisitions of comparable lands in the neighbourhood. The said method is reasonably safe where the relied-on sale transactions/ acquisitions precede the subject acquisition by only a few years, that is, up to four to five years. Beyond that it may be unsafe, even if it relates to a neighbouring land. What may be a reliable standard if the gap is of only a few years, may become unsafe and unreliable standard where the gap is larger. For example, for determining the market value of a land acquired in 1992, adopting the annual increase method with reference to a sale or acquisition in 1970 or 1980 may have many pitfalls. This is because, over the course of years, the "rate" of annual increase may itself undergo drastic change apart from the likelihood of occurrence of varying periods of stagnation in prices or sudden spurts in prices affecting the very standard of increase."

19. The Reference Court committed a grave error in deducting 50% of the value assessed by him, towards development charges and further reduced the said amount for the reasons not assigned by him. The learned Single Judge vide the impugned judgment has enhanced the amount of compensation but committed an error in fixing the base price as 2,75,000/- per acre for the acquired land, applying the doctrine of reasonable cut to the average price worked out by him at Rs.3,42,527/- per acre. We do not approve of the reasonings adopted either by the reference Court or by the High Court. How much amount is to be deducted from the base price

would depend on various factors.

20. As mentioned hereinabove, in the case in hand the bulk of the land that is almost 525 acres has been given to respondent No.3, the Corporation for setting up its own industry and other infrastructure thereon. Thus, the lands likely to be used towards roads, sewage and other such facilities would be minimum as most of the vacant land would be utilised by respondent No. 3 for its own benefits.

21. Needless to say, once the industry is set up, it would be for the financial benefit and gain of respondent No.3 year after year. Thus, looking to the matter from all angles, respondent No. 3 – Corporation would be a great beneficiary at the cost of depriving the appellant - land owner of his sole livelihood of agriculture.

22. Therefore, it is neither desirable nor proper to deduct more than 10% of the amount in the base price fixed by us at Rs. 4,08,000/-. We accordingly do so.

23. The question with regard to the deduction to be made also stands settled by this Court in *Atma Singh (dead) through Lrs. and Ors. Vs. State of Haryana and Another.* (2008) 2 SCC 568. The relevant portion thereof are reproduced herein below:

> "14) The reasons given for the principle that price fetched for small pots cannot form safe basis for valuation of large tracts of land, according to cases referred to above, are that substantial area is used for development of sites like laying out roads, drains, sewers, water and electricity lines and other civic amenities. Expenses are also incurred in providing these basic amenities. That apart it takes considerable period in carving out the roads making sewers and drains and waiting for the purchasers. Meanwhile the invested money is blocked up and the return on the investment flows after a considerable period of time. In order to make up for the area of land which is used in providing civic amenities and the waiting period during which the capital of the entrepreneur gets locked up a

deduction from 20% onward, depending upon the facts of each case, is made.

15) The question to be considered is whether in the present case those factors exist which warrant a deduction by way of allowance from the price exhibited by the exemplars of small plots which have been filed by the parties. The land has not been acquired for a housing colony or government office or an institution. The land has been acquired for setting up a sugar factory. The factory would produce goods worth many crores in a year. A sugar factory apart from producing sugar also produces many by-products in the same process. One of the by-products is molasses, which is produced in huge quantity. Earlier, it had no utility and its disposal used to be a big problem. But now molasses is used for production of alcohol and ethanol which yield lot of revenue. Another by-product begasse is now use for generation of power and press mud is utilized in manure. Therefore, the profit from a sugar factory is substantial. Moreover, it is not confined to one year but will accrue every year so long as the factory runs. A housing board does not run on business lines. Once plots are carved out after acquisition of land and are sold to public, there is no scope or earning any money in future. An industry established on acquired land, if run efficiently, earns money or makes profit every year. The return from the land acquired for the purpose of housing colony, or offices, or institution cannot even remotely be compared with the land which has been acquired for the purpose of setting up a factory or industry. After all the factory cannot be set up without land and if such land is giving substantial return, there is no justification for making any deduction from the price exhibited by the exemplars even if they are of small plots. It is possible that a part of the acquired land might be used for construction of residential colony for the staff working in the factory. Nevertheless, where the remaining part of the acquired land is contributing to

production of goods yielding good profit, it would not be proper to make a deduction in the price of land shown by the exemplars of small plots as the reasons for doing so assigned in various decisions of this court are not applicable in the case under consideration."

24. In the light of the aforesaid contention and taking cue from the settled position of law decided by this Court in the aforesaid matters, we are of the firm opinion that the base price has to be fixed @ Rs. 4,08,000/- per acre. Keeping in mind that more than 525 acres has been given to respondent No. 3 – Corporation, which in turn has set up its factory, a deduction of 10% on the aforesaid amount would be reasonable. Needless to say on the aforesaid amount, the appellant would be entitled for statutory benefits as mandated under the amended provisions of the Act. This appeal and the connected appeals filed by land owners are hereby allowed and the appeals filed by respondent No.3 are dismissed.

25. The Reference Court is hereby directed to recalculate the amount of compensation to be awarded to the appellants and all such other land owners whose lands have been acquired in the light of the direction as contained hereinabove and to pay them the remainder amount within a period of 2 months from the date of communication of this order.

26. For the foregoing reasons, this and the connected appeals preferred by land owners are hereby allowed and those filed by the Corporation are dismissed with costs throughout. Counsel's fee quantified at Rs. 10,000/- in each Appeal.

R.P. Appeals disposed of.

MANOHAR LAL (D) BY LRS.
v.
UGRASEN (D) BY LRS. & ORS.
(Review Petition (Civil) No. 1292 of 2010)
IN
(Civil Appeal No. 973 of 2007)

AUGUST 24, 2011

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

Land Acquisition Act, 1894 – ss. 4 and 6 – Land Acquisition – Land policy by State Government that the person aggrieved to be allotted the developed land in residential area to the extent of 40% of the land acquired subject to fulfillment of certain conditions – Allotment of land in pursuance thereto not accepted by land owner – Land owner filed an application seeking cancellation of allotment, and allotment of land of his choice at another place – Fresh allotment made also not acceptable to him nor did he deposit the amount required – Thereafter, land owner allotted the land as per the direction of the Chief Minister in the commercial area – Said allotment quashed by Supreme Court – Review petition – Held: There is no ground to entertain review petition - Land Policy did not provide the allotment of land of the choice of the tenure-holder – Allotment could be made only in residential area – Applicant did not comply with the allotment letters rather approached the Chief Minister, who was not the competent Authority – Chief Minister passed the allotment letter himself mentioning the plot numbers of the land in the commercial area as if he was the Authority himself which is not permissible in law – Chief Minister could not take upon himself task of the authority – It tantamounts to transgression/ usurpation of competence – While deciding a representation/petition, an authority or court may issue direction to the person concerned to consider the grievance – However, it is not permissible to

pass the order by the superior authority/court itself – Thus, review petition is dismissed.

The State Government framed a land policy to the effect that the person aggrieved shall be allotted the developed land in residential area to the extent of 40% of the area of the acquired land provided the applicant fulfils the conditions stipulated therein. The predecessor-in-interest of the appellants was allotted land in pursuance to the land policy but he did not deposit any amount. He filed an application seeking allotment of another land cancelling the said allotment. A fresh allotment was made but he did not accept the same and did not deposit any amount as required under the Scheme. He approached the Chief Minister for the allotment of the land and was allotted the land on the direction of the Chief Minister in the commercial area. This Court cancelled the allotment. Therefore, the appellants filed the instant Review Petition.

Dismissing the Review Petition, the Court

HELD: 1.1 The land Policy did not provide the allotment of land of the choice of the tenure-holder. It was not permissible for any Authority to make the allotment in commercial area, as allotment could be made only in residential area. The applicant did not comply with the allotment letters dated 25.12.1975 or 25.1.1978 rather he had been making attempts to get the land of his choice in commercial area and, consequently, succeeded by getting a patently and latently illegal allotment by the blessings of the then Chief Minister who had no competence to make allotment of land under the law. [Para 12] [642-D-E]

1.2 It cannot be said that a person who does not get relief from the Statutory Authority, has a right to make representation before the Government; as in the instant

case, Government of Uttar Pradesh was a revisional Authority which could entertain the revision against the order of appellate Authority. In an appropriate case, the Court may issue appropriate directions to redress the grievance of person aggrieved but even the court cannot direct a person to decide the representation unless the person so directed is a Competent Authority under the Statute, for the reason that the authority may grant relief, which otherwise the authority has no competence to grant taking shelter under the order of the court. Even authority may grant undeserving relief in pursuance of order passed by the court though the case may be undeserving or time barred and under the bonafide impression that the Authority was bound to grant the relief. Authority may also grant the relief while deciding the representation on account of collusion/connivance between persons making the representation and the authority deciding the representation. [Para 13] [642-F-H; 643-A-B]

A.P.S.R.T.C. and Ors. v. G. Srinivas Reddy and Ors. **AIR 2006 SC 1465: 2006 (2) SCR 494;** *Employees State Insurance Corporation v. All India ITDC Employees Union and Ors.* **(2006) 4 SCC 257: 2006 (3) SCR 361 – relied on.**

1.3 The Chief Minister passed the allotment letter himself mentioning the plot numbers of the land, as if he was the Authority himself which is impermissible in law. The Chief Minister could not take upon himself task of the authority. It tantamounts to transgression/ usurpation of competence. While deciding a representation/petition, an authority or court may issue direction to the person concerned to consider the grievance. However, it is not permissible to pass the order by the superior authority/ court itself. [Para 14] [643-C-E]

G. Veerappa Pillai v. Raman and Raman Ltd. **AIR 1952 SC 192:1952 SCR 583;** *Life Insurance Corporation of India*

v. Mrs. Asha Ramchandra Ambekar and Anr. **AIR 1994 SC 2148:1994 (2) SCR 163;** *H.P. Public Service Commission v. Mukesh Thakur and Anr.* **AIR 2010 SC 2620: 2010 (7) SCR 189 – relied on.**

Manohar Lal (Dead) by Lrs. v. Ugrasen (Dead) by Lrs. and Ors. **AIR 2010 SC 2210: 2010 (7) SCR 346 – referred to.**

Case Law Reference:

2010 (7) SCR 346	**Referred to**	**Para 1**
2006 (2) SCR 494	**Relied on**	**Para 13**
2006 (3) SCR 361	**Relied on**	**Para 13**
1952 SCR 583	**Relied on**	**Para 14**
1994 (2) SCR 163	**Relied on**	**Para 14**
2010 (7) SCR 189	**Relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 973 of 2007.

From the Judgment & Order dated 22.07.2003 of the High Court of Allahabad in CMWP No. 6644 of 1989.

Jayanth Bhushan, Shailendra Paul, Rahul Mangla, Arvind Kumar Gupta for the Appellants.

Reena Singh, Devesh Kumar, Dr. Vipin Gupta for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. The review petition has been filed against the judgment and order dated 3.6.2010 passed by this Court in Civil Appeal No. 973 of 2007. This Court has disposed of the said civil appeal by a detailed judgment in

Manohar Lal (Dead) by Lrs. v. Ugrasen (Dead) by Lrs. & Ors., AIR 2010 SC 2210.

2. While deciding the appeal this Court proceeded on the following facts:

A. Land belonging to the predecessor-in-interest of the applicants, (hereinafter called `Shri Manohar Lal'), alongwith a huge area of land belonging to a very large number of persons, stood notified under Section 4 of Land Acquisition Act, 1894 (hereinafter called as `Act ') on 13.8.1962. Declarations under Section 6 of the Act in respect of the same were made on 24.5.1965 and 13.1.1969 alongwith Notification under Section 17(1) of the Act invoking the urgency clause. Possession of the lands was taken in pursuance thereof and award was made under Section 11 of the Act on 11.5.1970, so far as the land of Shri Manohar Lal was concerned.

B. The Government of Uttar Pradesh had framed the land policy dated 30/31.7.1963 to the effect that person aggrieved shall be allotted the developed land in residential area to the extent of 40% of the area of the land acquired provided the applicant fulfils the other conditions, namely, apply in writing within a period of one month from the date of acquisition; deposit the amount of compensation so received, if any, and other development charges within a period of one month after the allotment.

C. Shri Manohar Lal claimed to have filed an application on 22.6.1969. Land was allotted to him in year 1975, which was not accepted by him. The allottee did not comply with any of the terms of allotment rather asked to cancel the allotment and allot him the land of his choice at another place. Shri Manohar Lal was allotted the land vide order dated 27.12.1979 as per the direction of the Hon'ble Chief Minister in the commercial area.

2. This Court quashed the said allotment dated

27.12.1979 on grounds, inter-alia, that Shri Manohar Lal did not deposit the amount required under the Scheme within the stipulated period, when he was allotted the land by Ghaziabad Development Authority (hereinafter called as `Authority'), rather he had been asking another land of his choice, and therefore, the earlier allotment was cancelled. He kept quite for years together and, subsequently, approached the Hon'ble Chief Minister of the State of Uttar Pradesh who was not a competent Authority under the Act, therefore, the order of allotment made by him was not enforceable. The land allotted to Shri Manohar Lal was in commercial area and not meant for residential use, which was contrary to the terms of land Policy.

3. The review application has been filed primarily on the ground that certain affidavits were filed by the Authority during the hearing of the appeal and the applicants did not have sufficient opportunity to rebut the same or under the prevailing circumstances, could not file the reply in rebuttal and some relevant documents were also not made part of the record. In view thereof, this Court vide orders dated 26.8.2010 and 29.10.2010, directed the parties to produce the allotment letter in favour of Shri Manohar Lal issued in year 1975 and the letter of non-acceptance by him, and further to furnish information as how many persons whose land were acquired in pursuance of the same Notification under Section 4 of the Act were granted the benefit of the land Scheme.

4. Both the parties submitted their affidavits in response to the aforesaid orders. The applicants have submitted that they were not in possession of the letter of allotment made by the Authority in favour of Shri Manohar Lal in year 1975 or his letter of refusal of acceptance of the same. However, they have submitted that the allotment of the land was made vide letter dated 22.12.1975 in favour of Shri Manohar Lal which was very far away from his land, which had been acquired. Thus, he declined to accept the offer and, subsequently, he was not allotted the land. Thus, he approached the Hon'ble Chief Minister for justice.

5. On the other hand, the Authority produced orders to show that Shri Manohar Lal was allotted land vide letter dated 22.12.1975, however, he did not deposit any amount as required under the said allotment letter. Shri Manohar Lal vide letter dated 21.1.1976 refused to accept the said allotment rather asked for cancellation of the same. He approached the Hon'ble Chief Minister of Uttar Pradesh and got the letter of allotment of land directly in commercial area, which was not permissible under the Scheme. There is a letter dated 12.5.1978 on record to the effect that the change of land sought by Shri Manohar Lal vide application dated 3.5.1978 was not possible and, thus, he should deposit the development charges etc., within a period of 15 days, and in case of failure, it would be presumed that he was no more interested in allotment of land and the offer so made would stand cancelled.

6. The letter dated 22.12.1975 reveals that Shri Manohar Lal was allotted the land measuring 6568.29 sq.mtrs., and for that the estimated development cost was Rs.2,50,448.90 which was subjected to variation and he was asked to deposit 20 per cent of the development charges amounting to Rs. 50089.78 through bank draft within a period of one month and deposit the remaining amount in eight equal instalments.

7. Letter dated 21.1.1976 sent by Shri Manohar Lal in response of the letter of allotment dated 22.12.1975 reveals that the land so offered was not acceptable to him as he wanted the land of his choice in plot nos. 1 to 44, L-Block, Sector 3, Nehru Nagar. Thus, he asked the Authority to cancel the allotment dated 22.12.1975 and allot him the aforesaid land of his choice. It appears that Shri Manohar Lal had been pursuing his demand of alternative land without ensuring compliance of the terms incorporated in the allotment letter dated 22.12.1975. However, while considering his application for allotment of other land, the Authority vide letter dated 25.1.1978 made allotment of alternative land in Nehru Nagar (West) having equal area and vide said letter he was asked to complete the other formalities

for execution of the agreement after depositing the due amount within a period of one month from the said date. However, the allotment made by the Authority vide letter dated 25.1.1978 was also not acceptable to him. Shri Manohar Lal made an application dated 3.5.1978 to allot him the land of his choice, which stood rejected by the Authority vide order dated 12.5.1978.

8. After expiry of more than a year, Shri Manohar Lal approached the State Government stating that his land had been acquired in year 1969 for residential use and he had not been allotted the land under the land Policy. Thus, justice be done to him. While considering his representation, the Secretary, Urban Development, vide letter dated 14.6.1979 asked the Authority as to why the land had not been made available to Shri Manohar Lal. After seeking clarification, Hon'ble the Chief Minister issued directions to the Authority to make the allotment of land in plot nos. 1 to 44 as sought by Shri Manohar Lal, immediately. In pursuance thereof, letter dated 12.11.1979 was issued by the Deputy Secretary, State Government, Housing Section to the Authority to make the allotment of plot nos. 1 to 44, L- Block, Sector – 3, Nehru Nagar and, in pursuance thereof, the allotment was made to him.

9. The matter came under litigation when opposite party Shri Ugrasen raised certain objections in respect of land allotted to Shri Manohar Lal. In spite of the matter pending in the High Court, wherein the interim order directing the Authority not to allot the said land in favour of anybody had been passed, lease deed dated 28.3.1989 was executed by the Authority in favour of Shri Manohar Lal.

10. It is in this backdrop, we have to examine as to whether the judgment and order sought to be reviewed, requires reconsideration.

11. Though a large number of persons had been displaced but it appears that only 3-4 families had been allotted the land

in pursuance of the land Policy including Shri Manohar Lal and his brothers and the admitted facts remained that in spite of the allotment of the land in his favour under the land Policy on 22.12.1975, Shri Manohar Lal did not deposit any amount, rather vide application dated 21.1.1976 asked for allotment of another land cancelling the said allotment. Fresh allotment was made vide letter dated 25.1.1978 which was also not acceptable to him and he did not deposit any amount or made any attempt to get the lease deed executed rather approached the Hon'ble Chief Minister, who was not the competent Authority under the law for allotment of the land.

12. The land Policy did not provide the allotment of land of the choice of the tenure-holder. It was not permissible for any Authority to make the allotment in commercial area, as allotment could be made only in residential area. Shri Manohar Lal – applicant did not comply with the allotment letters dated 25.12.1975 or 25.1.1978 rather he had been making attempts to get the land of his choice in commercial area and, consequently, succeeded by getting a patently and latently illegal allotment by the blessings of the then Hon'ble Chief Minister who had no competence to make allotment of land under the law.

13. We do not find any force in the submission made by Shri Jayant Bhushan, learned counsel for applicants, that a person who does not get relief from the Statutory Authority, has a right to make representation before the Government; as in the instant case, Government of Uttar Pradesh was a revisional Authority which could entertain the revision against the order of appellate Authority. In an appropriate case, the Court may issue appropriate directions to redress the grievance of person aggrieved but even the court cannot direct a person to decide the representation unless the person so directed is a Competent Authority under the Statute, for the reason that the authority may grant relief, which otherwise the authority has no competence to grant taking shelter under the order of the court. Even authority

may grant undeserving relief in pursuance of order passed by the court though the case may be undeserving or time barred and under the bonafide impression that the Authority was bound to grant the relief. Authority may also grant the relief while deciding the representation on account of collusion/connivance between persons making the representation and the authority deciding the representation. (Vide: *A.P.S.R.T.C. & Ors. v. G. Srinivas Reddy & Ors.,* AIR 2006 SC 1465; and *Employees State Insurance Corporation v. All India ITDC Employees Union & Ors.,* (2006) 4 SCC 257).

14. The Hon'ble Chief Minister passed the allotment letter himself mentioning the plot numbers of the land, as it was the Authority himself which is impermissible in law. The Chief Minister could not take upon himself task of the authority. It tantamounts to transgression/ usurpation of competence. While deciding a representation/petition, an authority or court may issue direction to the person concerned to consider the grievance. However, it is not permissible to pass the order by the superior authority/court itself. (Vide: *G. Veerappa Pillai v. Raman and Raman Ltd.,* AIR 1952 SC 192*; Life Insurance Corporation of India v. Mrs. Asha Ramchandra Ambekar & Anr.,* AIR 1994 SC 2148; and *H.P. Public Service Commission v. Mukesh Thakur & Anr.,* AIR 2010 SC 2620).

In view the above, we do not find any good ground to entertain the review application. It is, accordingly, dismissed.

N.J. Petition dismissed.

KANDARPA SARMA

v.

RAJESWAR DAS AND ORS.

(Civil Appeal No.7401 of 2011)

AUGUST 25, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Service law:

Appointment – Post of Gaonburah – State issued an advertisement for filling the post of Gaonburah – Appellant, respondent no.1 and others submitted their candidature – Report along with other records submitted by circle officer regarding suitability of the candidates considered by Selection Committee – Appellant found suitable and appointed as Gaonburah – Respondent no.1 challenged the order of appointment of appellant – Deputy Commissioner set aside the order of the appointment of the appellant and also issued direction to appoint respondent no.1 as the Gaonburah – Second appellate authority affirmed the order of Deputy Commissioner – Writ petition by appellant – Single Judge allowed the writ petition – Division Bench of the High Court set aside the order of the Single Judge and also restored the order of the second appellate authority directing appointment of respondent no.1 – On appeal, held: Post of Gaonburah is an executive post in the sense that he works under the supervision of the Moujadar – He holds a civil post, and, therefore, is entitled to protection under Art.311 of the Constitution – In that view of the matter, there has to be some service conditions governing his service – A Government Servant who is usually appointed to a civil post has to have minimum age requirement for appointment and there is always a maximum age on completion of which he stands retired from the government service – However, Executive

Instructions relating to appointment of Gaonburah showed that no such terms and conditions of service were envisaged and laid down – A government servant cannot be appointed unless he fulfills a minimum age criteria – He should not also be allowed to continue to work as Gaonburah in perpetuity – State Government to frame such service conditions of the Gaonburahs preferably within a period of three months – Also contents of the Executive instructions relating to appointment of Gaonburah require updating and further amendments to be in tune with the present day requirement, which shall be done simultaneously with the above exercise.

Appointment – Post of Gaonburah – Whether the respondent no. 1 entitled to get a preferential treatment for appointment as a Gaonburah on the ground that he was the nephew of an earlier Gaonburah – Held: Executive instruction provided that in the matter of appointment of Gaonburah, certain factors to be taken into consideration are: the claim of the family of the Gaonburah; the views of the Moujadar (3) the suitability of the person for post – The selection committee considered the suitability of the candidates by allotting 80 marks in all – Selection committee allotted 10 marks for the claims of the family of Gaonburah; for the views of the Moujadar, another 10 marks were allotted and the rest 60 marks were allotted for consideration of the suitability of the person for the post – A joint family could be considered to be a family only when they are sharing a common residence and common mess – To give an extended meaning to mean any 'nephew' would also be inappropriate for the word nephew is a very vague expression for it could include not only nephew being the son from the own brother but it could also be nephew being the son not only from the sister but being son of even from the cousin brothers or sisters – It is difficult to give such a wide meaning to the expression 'family' – It is, therefore, appropriate that the State Government while laying down the criteria identifies the members of the family who could be entitled to some preferential consideration in the

matter of such appointment to the post of Gaonburah.

State of Assam and another v. Nahar Chutia and another ***1974 Assam Law Reports 163;*** *State of Assam and Others v. Kanak Chandra Dutta* **AIR 1967 SC 884: 1967 SCR 679 – referred to.**

Case Law Reference:

1974 Assam Law Reports 163	**referred to**	**Para 8**
1967 SCR 679	**referred to**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7401 of 2011.

From the Judgment & Order dated 17.11.2006 of the Gauhati High Court in Writ Appeal No. 228 of 2004.

P.K. Goswami, Parthiv K. Goswami, Rajiv Mehta, S. Hariharan for the Appellant.

Pravir Choudhary, Navnit Kumar Deepitka Ghetowar, (for Corporate Law Group) for the Respondents.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal is directed against the judgment and order passed by the Gauhati High Court on 17.11.2006 allowing the appeal filed by the respondent no. 1 whereby the learned Division Bench set aside the judgment and order passed by the learned Single Judge allowing the writ petition filed by the appellant herein.

3. The respondent State issued an advertisement for filling up the post of Gaonburah of Tikka Garia Gaon, Mouza: Sariha

in the District of Barpeta. The appellant as also respondent no. 1 along with others submitted their candidature as against the aforesaid advertisement which was issued on 11.11.1998 by the Sub-Divisional Office, Balaji Sub Division. After submission of the applications by the various candidates, the circle officer submitted a report along with other records regarding suitability of the candidates which was considered by the Selection Committee consisting of the Sub-Divisional Officer Balaji Sub Division,, the Circle Officer and the Election Officer. The said selection committee considered the records and found the appellant as the most suitable candidate and appointed him as the Gaonburah.

4. Being aggrieved by the said order of appointment issued by the Sub-Divisional Officer, respondent no. 1 filed an appeal in terms of paragraph 162(B) of the Executive Instructions which was entertained. The aforesaid appeal was heard by the Additional Deputy Commissioner and upon consideration he set aside the order of appointment of the appellant and also issued a direction to appoint respondent no. 1 as the Gaonburah in place of the appellant. The said decision of the First Appellate Authority was challenged by the appellant herein in Second Appeal as provided for under paragraph 162(C) of the Executive Instructions.

5. The aforesaid Second Appeal was dismissed consequent upon which the appellant herein filed a Writ Petition before the High Court which was registered as Writ Petition (C) No. 8019/2001. The learned Single Judge by a judgment and order dated 11.5.2004 allowed the writ petition and directed that the appellant be allowed to continue as Gaonburah of Tikka Garia Gaon, Mouza: Sariha in the District of Barpeta.

6. Being aggrieved by the aforesaid judgment and order passed by the learned Single Judge, respondent no. 1 filed an appeal before the Division Bench of the Gauhati High Court which was registered as Writ Appeal No. 228 of 2004. The

Division Bench, after hearing the counsel appearing for the parties on 15.11.2006 allowed the appeal by its judgment and order dated 17.11.2006 whereby the Division Bench not only set aside the judgment and order of the learned Single Judge but it also restored the order passed by the Second Appellate Authority directing appointment of respondent no. 1 as Gaonburah. By virtue of the aforesaid order, respondent no. 1 assumed charge of the office and he, as of today, continues to hold the post of Gaonburah.

7. Being aggrieved by the aforesaid order passed by the Division Bench, the appellant herein filed the present appeal on which we have heard the learned counsel appearing for the parties.

8. Mr. P.K. Goswami, learned senior counsel appearing for the appellant has submitted before us that the Division Bench committed manifest error in holding that the expression 'family' used in the Executive Instructions should receive an extended meaning so as to include 'nephew' within the expression 'family'. He has also submitted before us that the selection committee after taking into consideration all the factors found the appellant as the best candidate for the post and the said decision being based on records should not have been interfered with by the Appellate Authority as also by the Division Bench of the High Court on extraneous consideration and also by wrongly reading the documents particularly when the learned Single Judge has upheld the aforesaid order of the selection committee. In support of his contention, he has relied upon the decisions of Constitution Bench of this Court in *State of Assam and another Vs. Nahar Chutia and another* reported in 1974 Assam Law Reports 163 as also in *State of Assam and Others Vs. Kanak Chandra Dutta* reported in AIR 1967 SC 884. He has also drawn our attention to the Executive Instructions which are part of the Assam Land Revenue Regulation by referring to paragraph 162 of the said instructions as also paragraph 163.

9. It was also brought to our notice that in terms of the ratio of the decisions of the aforesaid two cases decided by the Constitution Bench of this Court, the status of Gaonburah in Assam is that he holds a Civil post under the State of Assam and he is entitled to the protection as provided for under Article 311 of the Constitution of India. Consequently, the State has the power and also the jurisdiction to select and appoint a Gaonburah and also to dismiss him. He has also pointed out to us the settled position that Gaonburah works under the supervision of Moujadar who is also a State government servant as held in the aforesaid Constitution Bench decision of this Court.

10. Mr. Pravir Choudhary appearing for the respondent no. 1, however, has submitted that the judgment and order passed by the High Court is justified as in the context of the expression 'family' used in the Executive Instructions. According to him, the said expression should receive a wider and extensive interpretation so as to include a nephew. He has also submitted that respondent no. 1 was working with and helping and assisting the earlier Gaonburah for a very long time and, therefore, he has sound experience in the working and functioning of the Gaonburah and, so he was the best candidate and the High Court was justified in directing for his appointment to the aforesaid post.

11. The State is also represented by the counsel who has submitted that the impugned judgment and order should not have been interfered with for the reasons that the decision of the selection committee should have been preferred as the selection committee had the privilege of looking into all the records and also had the privilege of interviewing the candidates.

12. Having heard the learned counsel appearing for the parties and having gone through the connected records, we propose to dispose of this appeal by giving our reasons thereof.

13. The post of Gaonburah is an executive post in the sense that he works under the supervision of the Moujadar. He holds a civil post and, therefore, is entitled to the protection as provided for under Article 311 of the Constitution of India. In that view of the matter, there has to be some service conditions governing his service. A Government Servant who is usually appointed to a civil post has to have minimum age requirement for appointment and there is always a maximum age on completion of which he stands retired from the government service. He has other service conditions also prescribed for his service and status. However, on going through the Executive Instructions, we do not find any such terms and conditions of service envisaged and laid down which would govern his service condition. A government servant cannot be appointed unless he fulfills a minimum age criteria. He should not also be allowed to continue to work as Gaonburah in perpetuity. There has to be some age limit or duration of period for his service on completion of which he should stand relieved. The other service conditions like the reasons for removal of the Gaonburah are also required to be clearly stated by the State Government either in the executive instruction or by framing a separate set of rules. Since all these fall within the domain of the State Government, we request and leave it to the State Government to frame such service conditions of the Gaonburahs as expeditiously as possible preferably within a period of three months from today keeping in view the observation made hereinbefore. We also feel that the contents of the Executive instructions relating to appointment of Gaonburah requires updating and further amendments to be in tune with the present day requirement, which shall be done simultaneously with the aforesaid exercise.

14. The next question that arises for our consideration is whether the respondent no. 1 herein is entitled to get a preferential treatment for appointment as a Gaonburah on the ground that he was the nephew of an earlier Gaonburah. The executive instruction in para 162 provides that in the matter of

appointment of Gaonburah, certain factors are to be taken into consideration which are (1)claim of the family of the Gaonburah (2) the views of the Maujadar (3) the suitability of the person for the post.

15. On going through the records, we find that the selection committee considered the suitability of the candidates by allotting 80 marks in all. For the factors stated above, the selection committee had allotted 10 marks for the claims of the family of Gaonburah and for the views of the Moujadar, another 10 marks were allotted by the selection committee and it appears that the rest 60 marks were allotted for consideration of the suitability of the person for the post.

16. For the scheme of compassionate appointment in government service, the expression 'family' in the natural course, includes the family of the deceased, namely, his son, daughter and widow. The surviving dependents in the family are considered for such appointment on compassionate grounds. The said expression 'family' in those cases is always restricted to the aforesaid members, namely, son, daughter or widow. This expression also has come to be used in various ceiling Acts in the Assam Fixation of Ceiling on Land Holdings Act, 1956. The expression 'family' has been defined to mean a family consisting of any one or more or all of the following namely (1) husband, (2) wife, (3) minor children, and also includes a joint family. In the explanation thereto, joint family has been defined to mean a family of which the members are descendents from a common ancestor and have a common mess, and shall include wife or husband, as the case may be, but shall exclude married daughters, married sons and their children.

17. A joint family could be considered to be a family only when they are sharing a common residence and common mess. To give an extended meaning to mean any 'nephew' would also be inappropriate for the word nephew is a very

vague expression for it could include not only nephew being the son from the own brother but it could also be nephew being the son not only from the sister but being son of even from the cousin brothers or sisters. It is difficult to give such a wide meaning to the expression 'family'. It is, therefore, appropriate that the State Government also while laying down the criteria identifies the members of the family who could be entitled to some preferential consideration in the matter of such appointment to the post of Gaonburah. The State Government should also therefore frame proper guidelines laying down the conditions as stated hereinbefore.

18. Now, coming to the facts of the present case, we find that the Circle Officer submitted a report on consideration of all the materials on record that the appellant should be considered for appointment to the post of Gaonburah as he satisfies all the requirements and because he is the best candidate. The selection committee considered the records and thereafter selected the appellant herein despite being aware of the fact that the recommendation of the Moujadar is for another candidate neither being the appellant nor being respondent no. 1 and also being aware of the fact that respondent no. 1 was related to the earlier Gaonburah. The said selection was made keeping in view the mandate of executive instructions. The executive instructions which lay down the criteria for selection have force in law as they were made part of the Assam Land Revenue Regulation. They also have a binding force having been issued in exercise of constitutional powers conferred under Article 162 of the constitution of India.

19. Pursuant to the aforesaid selection made by the selection committee which had considered all the factors and also the criteria laid down for the purpose, the appellant was appointed to the said post which came to be set aside by the Appellate Authority which order was confirmed by the Second Appellate Authority. Having gone through the records, we find that the First Appellate Authority has set aside the appointment

of the selection committee and the order passed by the Sub-Divisional Officer on the ground that respondent no. 1 is entitled to a preferential treatment, he being the nephew of the earlier Gaonburah. We have found that the aforesaid view taken by the Deputy Commissioner was incorrect and without jurisdiction and, therefore, the aforesaid findings which are also rendered by the Division Bench and also by the First Appellate Authority and Second Appellate Authority have to be set aside which we hereby do.

20. In our considered opinion, the entire matter of appointment to the post of Gaonburah in the present case has to be considered afresh in accordance with law de novo taking into consideration the relevant factors only and in the light of the observations made hereinbefore. Therefore, while setting aside the orders of the Division bench of the High Court and also of the learned Single Judge, we remit back the matter to the selection committee who shall consider the records and take a final decision regarding the appointment of Gaonburah as expeditiously as possible preferably within a period of four months from the date of receipt of a copy of this order. The State Government shall make the entire records available to the concerned selection committee so as to enable them to take a conscious and informed decision. It would be also appropriate that the State Government would also take a decision regarding updating the administrative instructions in this regard and also laying down the service conditions of the Gaonburah in terms of this order. It would be appropriate that these decisions are also taken within three months so that the selection committee may be in a position to consider the said criterion which are laid down by the State afresh in terms of this order.

21. Since the selection committee has been directed to complete the entire process of fresh selection and appointment within four months from the date of receipt of the copy of this order, respondent no. 1 would continue to hold the post till the

order of appointment is issued by the sub-Divisional Officer in accordance with law within a period of four months. The said continuation would be only as a stop gap arrangement so that the working of Gaonburah is not affected in any manner. He shall in no case be allowed to continue beyond a period of four months. We make it clear that respondent no. 1 will not claim any equity also to hold the post beyond four months and also beyond the terms as mentioned herein.

22. The appeal is allowed to the aforesaid extent leaving the parties to bear their own costs.

23. I.A. is also disposed of in terms of the aforesaid order.

D.G. Appeal allowed.

GURDEEP SINGH

v.

STATE OF PUNJAB AND ORS.

(Criminal Appeal No. 1085 of 2003)

AUGUST 25, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860: ss.304B, 498A – Allegation of dowry death against appellant-husband, his brothers, parents and sisters – Allegation that all the accused administered poison to the victim-deceased which resulted in her death – Trial court held the appellant and his parents guilty, however, acquitted his brothers and sisters – High Court upheld the conviction of appellant and ordered acquittal of his parents – On appeal, held: The evidence with respect to the appellant was almost identical with that of the six accused who were acquitted of the same charge – Allegation of poisoning was not substantiated as no poisonous substance was found in the report of FSL – Mere fact that the victim was a young woman would not lead to inference that she had died an unnatural death – Likewise, the evidence of demand for dowry or goods soon before death was also lacking – Indisputably, in order to attract s.304B, it is imperative on the part of the prosecution to establish that the cruelty or harassment has been meted out to the deceased 'soon before her death'– It must undergo the test known as 'proximity test'— Evidence clearly failed the proximity test – Courts below drew a presumption against the accused primarily on the plea that they had not informed the parents of the deceased that she had died and had hurriedly cremated her dead body – Evidence of the brother and the father of the victim in the Court was that they had received no information about the death – However, in their statements recorded u/s.161, Cr.P.C. they had stated that they were present when the cremation took place – In order to explain this contradiction both these witnesses disowned their s.161

statements and testified that they had not made any statement to the police – These statements were, however, falsified by the evidence of the police officer concerned, who deposed that the police statements were recorded by him as per the dictates of the two witnesses – Conviction liable to be set aside – Appellant acquitted – Evidence Act, 1872 – s.113B.

Suresh Kumar Singh v. State of Uttar Pradesh **(2009) 17 SCC 243: 2009 (7) SCR 1068 – relied on.**

Case Law Reference:

2009 (7) SCR 1068 relied on Para 5

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1085 of 2003.

From the Judgment and Order dated 21.05.2002 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 667-SB of 2000.

Sudhir Walia and Abhishek Atrey for the Appellant.

Kuldip Singh, R.K. Pandey, H.S. Sandhu, K.K. Pandey and Mohit Mudgal for the Respondents.

The following order of the Court was delivered

O R D E R

1. This appeal arises out of the following facts:

1.1 The appellant Gurdeep Singh was the husband of the deceased Rajender Kaur. The couple had got married on the 14th of October, 1989 and it is the case of the prosecution that a substantial amount of money far beyond the means of the bride's family had been spent at that time though the appellant, his parents, sisters and other relatives remained dissatisfied. It appears that the demands for dowry continued unabated and

about one year before the death the appellant demanded a sum of `25,000/- for the purchase of a motorcycle, and this amount was indeed handed over to the appellant but was utilised for purchasing a plot instead. It is further the prosecution story that despite having received the aforesaid amount, the deceased continued to suffer at the hands of her husband and his relatives and that despite the efforts of a panchayat in the matter no suitable result followed. It is further the prosecution story that the appellant and his relatives administered poison to Rajinder Kaur on the 27th July, 1995 which caused her death and that three days thereafter information was received by Gurdev Singh P.W. 2, her brother, and Satnam Singh, P.W. 3 her father on which they alongwith others rushed to the matrimonial home of Rajinder Kaur but found that the dead body had been hurriedly cremated. Gurdev Singh P.W.2 thereupon gave an application Exhibit PB to the Station House Officer, Police Station, Gidderbaha and on its basis a daily diary entry was recorded and after a preliminary probe, a First Information Report for offences punishable under Section 304B and 498A IPC was registered on the 8th August, 1995. After investigation, Gurdeep Singh, the appellant herein, his brothers, Harbhajan Singh and Daljit Singh, parents, Jit Singh and Satnam Kaur, and sisters Darshan Kaur and Daljit Kaur were brought to trial for the aforesaid offences. The trial court vide its judgment dated 15th July, 2000, found the charge under Section 304B proved against the appellant, Jit Singh and Satnam Kaur and the three were, accordingly, sentenced to undergo rigorous imprisonment for ten years. The trial court, however, gave the benefit of doubt to Harbhajan Singh, Daljit Singh, Darshan Kaur and Daljit Kaur and acquitted them of the charge. The matter was thereafter taken in appeal by the convicted accused, and the High Court, has, by the impugned judgment dismissed the appeal of Gurdeep Singh and allowed the appeal of Jit Singh and Satnam Kaur. The solitary appellant now before us is Gurdeep Singh.

2. Mr. Sudhir Walia, the learned counsel for the appellant has raised several arguments before us during the course of

the hearing. He has first pointed out that the presumption under Section 113B of the Indian Evidence Act could be drawn with respect to a dowry death only if the ingredients of Section 304B of the Indian Penal Code were spelt out and in the light of the uncertain evidence that had come on record, more particularly, as there was no evidence of an unnatural death or demands being made for dowry or other articles soon before the death, the said provision was inapplicable. It has also been pointed out that the prosecution story that `25,000/- had been spent to buy a plot was on the face of it wrong in the light of the documentary evidence proved by D.W. 2 Ram Chand, an employee of the bank who deposed to the effect that a sum of `93,000/- had been withdrawn from the bank on the 27th of July, 1994, and the statement of DW 4- Pushpinder Singh, Junior Assistant, Tehsil Office, Gidderbaha from the Sub-Registrar's office who deposed that a sale deed for a plot priced at `54,000/- had been executed and as such the facts indicated that the entire amount for the sale had come from the account of Gurdeep Singh the appellant herein. He has, accordingly, pointed out that there was no evidence with respect to any demand being made soon before the death. The learned counsel has also placed reliance on a judgment of this Court in *Suresh Kumar Singh v. State of Uttar Pradesh* (2009) 17 SCC 243. He has, in addition, argued that the prosecution story that P.W. 2, P.W. 3 and other relatives had not been called to attend the cremation was in clear contradiction vis-á-vis their statements recorded under Section 161 Cr.P.C. and the evidence in Court and that this contradiction had been pointed out during the course of the cross examination. In the alternative, it has been submitted that assuming for a moment that no statements of P.Ws. 2 and 3 under Section 161 Cr.P.C. had been recorded, as deposed by them in their evidence, the prosecution would still not gain any advantage as a statement recorded in Court for the first time would have very limited evidentiary value.

3. Mr. Kuldip Singh, learned counsel for the State has,

however, supported the judgment of the trial court and the High Court and has submitted that as the deceased was a young woman,a presumption had to be drawn that she had died an unnatural death and as such the provisions of Section 113B of the Evidence Act would be applicable to the facts of the case.

4. We have heard the learned counsel very carefully and have gone through the record.

5. We first find that the evidence with respect to the appellant Gurdeep Singh is almost identical with that of the six accused who have been acquitted of the same charge – two by the High Court and four by the trial court and he appears to have been singled out as being the husband. We first take up the argument relating to Section 304B and the presumption drawn under Section 113B. A bare reading of Section 304B pre-supposes several factors for its applicability, they being:- (i) death should be of burns or bodily injury or has occurred otherwise than under normal circumstances: (ii) within seven years of the marriage; and (iii) that soon before her death she had been subjected to cruelty or harrassment by her husband or her relatives. This Court in *Suresh Kumar Singh's* case supra has held that even if one of the ingredients is not made out, the presumption under Section 113B of the Evidence Act would not be available to the prosecution and the onus would not shift to the defence.

6. We find in the present case that there is no evidence of unnatural death. It is the prosecution story that the deceased had been poisoned. It has, however, come in the evidence, and in particular, in the report of the Forensic Science Laboratory dated 21st August, 1995, that on an analysis of the bones and ashes no poisonous substance had been found to be present. In this view of the matter, the mere fact that the deceased happened to be a young woman would not lead to the inference that she had died an unnatural death. Likewise, we find that the evidence of demand for dowry or goods soon before death is also lacking. Admittedly, the only evidence of any demand was

of Rs. 25,000/- made one year prior to the incident and as per the defence evidence of D.W. 2 and D.W. 4, the money for the execution of the sale deed had been taken out from the bank a day earlier. In the light of these two factors it has been held in paragraph 25 of the above cited case as under:

> Indisputably, in order to attract Section 304B, it is imperative on the part of the prosecution to establish that the cruelty or harassment has been meted out to the deceased `soon before her death'. There cannot be any doubt or dispute that it is a flexible term. Its application would depend upon the factual matrix obtaining in a particular case. No fixed period can be indicated therefor. It, however, must undergo the test known as `proximity test'. What, however, is necessary for the prosecution is to bring on record that the dowry demand was not too late and not too stale before the death of the victim."

7. We, therefore, find that evidence clearly fails the proximity test as laid down in the aforesaid judgment.

8. The courts below have, however, drawn a presumption against the accused primarily on the plea that they had not informed the parents of the deceased that she had died and had hurriedly cremated her dead body. We further see from the evidence of P.Ws. 2 and 3 that in their statements recorded in Court they did say that they had received no information about the death on which they had been confronted with their statements recorded under Section 161 of the Cr.P.C. in which they had stated that they had indeed been present when the cremation had taken place. In order to explain this contradiction both these witnesses disowned their 161 statements and testified that they had not made any statement to the police. These statements are, however, falsified by the evidence of P.W. 4 ASI Gurmel Singh, the police officer concerned, who deposed that the police statements had been recorded by him as per the dictates of the two witnesses. In the alternative, even assuming that no statements of P.Ws. 2 and 3 had been

recorded under Section 161 Cr.P.C. this factor destroys the substratum of the prosecution story in a far greater measure as it must then be taken that their statements were being recorded for the first time in Court which would rob them of much of their evidentiary value. In this case, we find that the two witnesses are none other than the brother and the father of the deceased.

9. We are, therefore, of the opinion that as a result of the cumulative discussion above, the appellant has to succeed. We, accordingly, allow this appeal, set aside the judgments of the courts below insofar as he is concerned and order his acquittal. Bail bonds stand discharged.

D.G. Appeal allowed.

STATE OF RAJASTHAN & ORS.
v.
SANYAM LODHA
(Civil Appeal No.7333 of 2011)

AUGUST 25, 2011

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

RAJASTHAN CHIEF MINISTER'S RELIEF FUND RULES, 1999:

Rule 5 r/w r. 4 – Chief Minister's Relief Fund –Writ petition alleging arbitrary and discriminatory disbursement of relief to minor victims of rape , and seeking direction that monetary relief of Rs. 5 lakhs be granted to each of such victim – Allowed by High Court – High Court further substituting r. 5 – Held – The Relief Fund Rules are not delegated legislation, but are norms/guidelines issued in exercise of executive power of State under Article 162 of the Constitution and were not under challenge in the writ petition – Therefore, High Court ought not to have modified or read down r. 5 — Relief Fund Rules do not create any right in any victim to claim monetary relief nor do they provide any scheme for grant of compensation to rape victims – Grant of relief amount thereunder is purely ex gratia at the discretion of the Chief Minister and may depend upon several circumstances – There are detailed guidelines and checks and balances in regard to disbursement of the Relief Fund with a residuary discretionary power with the Chief Minister — The payment made to a victim from Relief Fund cannot form the basis for issuing a direction to pay similar amounts to other victims of rape – Nor can it be held that failure to give uniform ex gratia relief is arbitrary or unconstitutional – However, it may be appropriate to include a sub-category relating to rape victims under category (i) or (iii) of r. 4 – Administrative Law – Norms/ guidelines—Modification suggested – Constitution of India,

1950 – Articles 14 and 162 – Delegated legislation.

ADMINISTRATIVE LAW:

Prime Minister's/Chief Minister's Relief Fund — Nature and purpose of – Explained.

High Office theory/Doctrine of Office of Trust – Residuary discretionary power vested in Prime Minister/Chief Minister to sanction financial assistance from the Relief Fund – The Relief Funds placed at the disposal of the holders of high office like Prime Minister or Chief Ministers of States are to provide timely assistance to victims of natural calamities, disasters, and traumatic experiences, or to provide medical or financial aid to persons in distress and needy, among other purposes – The purposes for which such Relief Funds could be utilized are clearly laid down, subject to the residuary discretion vested in the Prime Minister/Chief Minister to grant relief in unforeseen circumstances – The Prime Minister/ Chief Minister is given the discretion to choose the recipient of the relief, the quantum of the relief, and the timing of grant of such relief – Unless such discretion is given, in extraordinary circumstances not contemplated in the guidelines, the Relief Fund may not serve its purpose – When discretion is vested in a high public functionary, it is assumed that the power will be exercised by applying reasonable standards to achieve the purpose for which the discretion is vested.

Prime Minister's/Chief Minister's Relief Fund – Exercise of discretion in disbursement of monetary relief under – Judicial review of – Held: Whenever the discretion is exercised for making a payment from out of the Relief Fund, the court will assume that it was done in public interest and for public good, for just and proper reasons – Consequently, where anyone challenges the exercise of the discretion, he should establish prima facie that the exercise of discretion was arbitrary, mala fide or by way of nepotism to favour

undeserving candidates with ulterior motives – Where such a prima facie case is made out, the court may require the authority to produce material to satisfy itself that the discretion has been used for good and valid reasons, depending upon the facts and circumstances of the case – But in general, the discretion will not be open to question – Judicial review.

The respondent, a legislator and social activist, filed a writ petition before the High Court stating that disbursement of relief under the Chief Minister's Relief Fund (Relief Fund) in terms of the Rajasthan Chief Minister's Relief Fund Rules, 1999 (the Relief Fund Rules) was arbitrary and discriminatory inasmuch as during the period January 2004 to August, 2004, out of 392 cases relating to rape of minor girls, 377 did not get any relief from the Relief Fund, 13 were granted relief ranging from Rs. 10,000 to Rs. 50,000/-, one was given Rs. 3,95,000/- and another Rs. 5,00,000/-. It was, therefore, prayed that a direction be given to the State Government to give monetary relief of Rs. 5 lakhs to each of the rape victims in the State; that it be declared that failure to give monetary relief or to give a uniform help to all victims of rape from the Relief Fund was illegal, arbitrary and unconstitutional; and that a direction be given to the Chief Minister to adopt a fair and non-discriminatory policy in regard to disbursement of the Relief Fund to similarly situated persons, in particular, minor victims of rape. The High Court allowed the writ petition holding that all minor victims of rape were required to be treated equally, and directed that Rule 5 of the Relief Fund Rules should be read as substituted by it. Aggrieved, the State Government filed the appeal.

The questions for consideration before the Court were: (i) whether the High Court could have substituted Rule 5 of the Relief Fund Rules; (ii) whether the High Court was justified in holding that all victims should be

"treated equally" while granting relief under the Chief Minister's Relief Fund; and (iii) whether a rule could be interfered merely on the ground that it vests unguided discretion?

Allowing the appeal, the Court

HELD:

Re: Question (i)

1.1 Rule (5) which has been modified by the High Court in its final order, is a part of Rajasthan Chief Minister Relief Fund Rules, 1999 which is not a delegated legislation. Though described as 'Rules', the Relief Fund Rules are norms/guidelines issued in exercise of the executive power of the State under Article 162 of the Constitution of India. The Relief Fund rules were not under challenge in the writ petition. All that the PIL petitioner (respondent) wanted was that all victims of a particular category should be treated equally and that if some monetary relief was granted from Chief Minister's Relief Fund to some victims belonging to a particular category, similar relief should be granted to all victims in that category. As there was no challenge to the Relief Fund Rules, the State was not called upon to satisfy the High Court about the validity of the Relief Fund Rules. Similar Rules are in force in almost all the States in India. [para 9] [675-B-D]

1.2. It is true that any provision of an enactment, a rule forming part of executive instructions can be read down so as to erase the obnoxious or unconstitutional element in it or to bring it in conformity with the object of such enactment. But, such an occasion did not arise in the instant case as there was no challenge to the validity of r. 5 and the parties were not at issue on the validity of the said rule. Therefore, the High Court ought not to have

modified or read down the said Rule. [para 10] [675-E-H; 676-A]

Re : Question No. (ii)

2.1 The illustrative comparison with reference to s. 376(2)(f) IPC, by the High Court, to hold that all victims of rape should be treated equally and identically in granting monetary relief, is inappropriate and made on an assumption which has no basis, by adopting a logic which is defective. Firstly, the provisions relating to punishment for offences under criminal law have no bearing upon grant of ex-gratia monetary benefit to some of the victims. Secondly, the assumption that all cases of rape involving victims under twelve years are liable to be punished identically under IPC is not correct. The sentence may vary for any period between life and ten years, depending upon the circumstances of the case. The amount of fine may also vary depending upon the circumstances and in addition, the financial position of the victim and the offender. Section 376 gives discretion to the court in regard to imposition of sentence, depending upon the facts of each case, so long as the limits prescribed are not breached.Further, ss. 357 and 357-A Cr.P.C. also do not provide that the compensation should be an identical amount. Besides, in civil proceedings, the victim may also sue the offender for compensation and there also the quantum may depend upon the facts of each case. Therefore, the assumption that no distinction is made in regard to either punishment under IPC where the victim is under twelve years of age, and the inference that the monetary relief awarded under the Relief Fund should be identical for all victims of rape under the age of twelve years, are illogical and cannot be accepted. [para 12-14] [676-F-H; 677-A-H; 678-A-B]

2.2 The Relief Fund Rules do not create any right in any victim to demand or claim monetary relief under the

fund. Nor do the Rules provide any scheme for grant of compensation to victims of rape or other unfortunate circumstances. The need to treat equally and the need to avoid discrimination arise where the claimants/ beneficiaries have a legal right to claim relief and the government or authority has a corresponding legal obligation. However, that is also subject to the principles relating to reasonable classification. But where the payment is ex-gratia, by way of discretionary relief, grant of relief may depend upon several circumstances. Having regard to the scheme of the Relief Fund Rules, grant and disbursal of relief amount thereunder is purely *ex gratia*, at the discretion of the Chief Minister. The authority at his discretion, may or may not grant any relief at all under Relief Fund Rules, depending upon the facts and circumstance of the case. [para 15-16] [678-C-D; 679-G-H; 680-A-C]

Re : Question No.(iii)

3.1 The Relief Funds placed at the disposal of the holders of high office like Prime Minister or Chief Ministers of States are to provide timely assistance to victims of natural calamities, disasters, and traumatic experiences, or to provide medical or financial aid to persons in distress and needy, among other purposes. Special circumstances may warrant emergent financial assistance. It is also possible that the existing laws may not provide for grant of relief in some circumstances to needy victims. It is in such circumstances, the Relief Funds are necessary and useful. These Relief Funds are different from secret funds. The inflow into the Relief Fund and the disbursals therefrom are fully accounted. The Relief Funds are regularly audited. The purposes for which such Relief Funds could be utilized are clearly laid down, subject to the residuary discretion vested in the Prime Minister/Chief Minister to grant relief in unforeseen circumstances. The Prime Minister/ Chief Minister is given

the discretion to choose the recipient of the relief, the quantum of the relief, and the timing of grant of such relief. Unless such discretion is given, in extraordinary circumstances not contemplated in the guidelines, the Relief Fund in the hands of the Chief Minister may not serve its purpose. When discretion is vested in a high public functionary, it is assumed that the power will be exercised by applying reasonable standards to achieve the purpose for which the discretion is vested. [para 17-18] [679-D-H; 680-F-H; 681-A]

B.P. Singhal v. Union of India **(2010) 6 SCC 331 – relied on.**

3.2 Whenever the discretion is exercised for making a payment from out of the Relief Fund, the court will assume that it was done in public interest and for public good, for just and proper reasons. Consequently, where anyone challenges the exercise of the discretion, he should establish prima facie that the exercise of discretion was arbitrary, mala fide or by way of nepotism to favour undeserving candidates with ulterior motives. Where such a prima facie case is made out, the court may require the authority to produce material to satisfy itself that the discretion has been used for good and valid reasons, depending upon the facts and circumstances of the case. But in general, the discretion will not be open to question. [para 20] [681-F-H; 682-A]

3.3 However, the Relief Fund Rules do not confer absolute unguided discretion on the Chief Minister. Rule 4 enumerates the six major heads of purposes for which the relief amount from the fund could be sanctioned. Each of the six purposes is further divided into detailed sub-heads. There are, thus, detailed guidelines as to the purposes for which the Relief Fund is to be used. There are checks and balances in regard to the expenditure/ withdrawals from the said fund, which is subject to audit

by the local fund audit department. Besides, Rule 5 vests a residuary discretionary power upon the Chief Minister to sanction financial assistance from the Relief Fund, upto any limit in any matter to anyone. This is because it is not possible to foresee every possible situation or contingency where relief should be or could be given. The discretion under Rule 5 is intended to be exercised in rare and extraordinary circumstances. However, the six specified purposes and their sub-heads enumerated in the Relief Fund Rules for grant of relief do not specifically include victims of ghastly/heinous crimes. It may be appropriate to include a sub-category relating to such victims under category (i) or (iii) of Rule (4) of the Relief Fund Rules. [para 21 and 24] [682-B-E; 683-H; 684-A]

3.4 As the Relief Fund is expected to be utilized for various purposes, it may not be proper or advisable to grant huge amounts in one or two cases, thereby denying the benefit of the Fund to other needy persons who are also the victims of catastrophes. The amount granted should, therefore, be reasonable, to meet the immediate need of coming out of the trauma/catastrophe. When there are no guidelines or when it is difficult to limit the discretion in a high functionary by guidelines, the authority should be careful in exercising discretionary power, so as to ensure that it does not give room for nepotism, favoritism or discrimination. The disbursement or payment to undeserving cases can be questioned. But the mere fact that, in the instant matter, in two cases of rape involving extreme viciousness and depravity, high compensation has been granted having regard to the gravity of the offence and the surrounding circumstances, that by itself is not sufficient to interfere with the discretion of the Chief Minister. Nor is it possible to hold that failure to give uniform ex-gratia relief is arbitrary or unconstitutional. [para 22-23] [682-F-H; 683-A-C-G]

4. The impugned order of the High Court is set aside and the PIL filed by the respondent in the High Court is dismissed. [para 25] [684-C]

Case Law Reference:

(2010) 6 SCC 331 relied on para 19

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7333 of 2011.

From the Judgment & Order dated 18.12.2007 of the High Court of Rajasthan, Bench at Jaipur in D.B. Civil Writ Petition No. 9944 of 2005.

Dr. Manish Singhvi, AAG, D.K. Devesh, Milind Kumar for the Appellants.

Colin Gonsalves, Divya Jyoti, Jyoti Mendiratta for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN J. 1. Delay condoned. Leave granted.

2. This appeal arises from a decision of the Rajasthan High Court in a public interest litigation filed by a Legislator and social activist complaining of arbitrary and discriminatory disbursement of relief under the Chief Minister's Relief Fund (for short 'Relief fund') under the Rajasthan Chief Minister's Relief Fund Rules, 1999 (for short, 'the Relief Fund Rules'). The respondent alleged that during the period January 2004 to August, 2005, challans/chargesheets were filed in 392 cases relating to rape of minor girls; that out of them, 377 minor girls, did not get any relief or assistance from the Relief Fund, 13 were granted relief ranging from Rs.10,000 to 50,000, one victim (minor 'K') was given Rs.3,95,000 on 11.8.2004 and another victim (minor 'S') was given Rs.5,00,000 on 25.6.2005.

3. The appellant submitted that minor girls, that too victims of rape, belong to a weak and vulnerable group who are seldom in a position to seek relief personally; and that if the Chief Minister was of the view that monetary relief should be granted to such victims of heinous and depraved crimes, all similar victims of rape should be given monetary relief. According to him if there were 392 victims of rape, they should all be similarly treated and if some are given relief, others also should be given similar relief. It is contended that when discretion vested in the Chief Minister in respect of the Relief Fund is exercised in a manner that 377 victims are ignored and 13 are paid amounts varying from Rs.10,000 to 50,000 and two victims alone are paid Rs.3,95,000 and Rs.5,00,000, it leads to inferences of arbitrariness and discrimination.

4. The appellant does not have any grievance about payment of Rs.5,00,000 or Rs.3,95,000 to two of the victims. It is also not his complaint that the said two victims were undeserving. His grievance is the other way around. According to him if two of the victims were paid relief amounts in the range of Rs.3,95,000 and Rs.5,00,000, there was no justification for not paying any amount to 377 victims, or for paying amounts which were comparatively very small (that is Rs.10,000 to 50,000) in the case of thirteen victims. He contended that like other governmental resources or funds, the distribution or monetary relief under the Relief Fund should be equitable, non-discriminatory and non-arbitrary. He submitted that paying very high amounts in only one or two cases merely because of media focus on those cases or because the case had become caste-sensitive or because it was politically expedient, while ignoring other similar cases, was neither warranted nor justified. He also contended that disbursement of monetary relief to the victims cannot be in the absolute discretion or according to the whims and fancies of the Chief Minister and grant of monetary relief under the Relief Fund should not become distribution of government largesse to a favoured few. The respondent therefore filed a writ petition (impleading the appellants, namely

the State of Rajasthan, Home Ministry of the State and Secretary to the Chief Minister, as the respondents), seeking the following reliefs :

(i) a direction to the appellants to give to all rape victims, who had not been granted any monetary relief or who had been granted a negligibly small relief, monetary relief of Rs.5 lakhs as in the case of 'minor K';

(ii) for a declaration that failure to give monetary relief, or failure to give a uniform monetary help, to all victims of rape from the Relief Fund is illegal, arbitrary and unconstitutional; and

(iii) for deprecation of the misuse or discriminatory utilization of the Chief Minister's Relief Fund with a direction to the Chief Minister to adopt a fair and non discriminatory policy in regard to disbursement of amounts from the Relief Fund to similarly situated persons, in particular minor victims of rape.

5. The appellants resisted the writ petition contending that disbursement of funds from the Chief Minister's Relief Fund is in implementation of the policy of the state government to place at the disposal of the Chief Minister of the State, some funds for granting relief to the needy and deserving, including victims of calamities, disasters and traumatic incidents. It was submitted that the discretion has been vested with the Chief Minister who is the highest executive functionary in the State, to ensure proper utilization of the fund, that vesting of such discretion to grant some relief to victims of disasters, accidents and gruesome incidents, could not be subjected to any rigid guidelines, and that the discretion and power to grant relief from the said fund is exercised by the Chief Minister in appropriate and deserving cases in public interest. It is contended that exercise of discretion in granting monetary benefit under such a Relief Fund by a high functionary cannot be subjected to principles of equality and non discrimination.

6. The High Court allowed the writ petition by order dated 18.12.2007. It was of the view that all minor victims of rape required to be treated equally for the purpose of grant of relief by the Chief Minister under the Relief Fund. Consequently, the Division Bench directed that Rule 5 of the Relief Fund Rules 1999 should be read (prospectively) as under :

> "This fund shall be under Hon'ble the Chief Minister so that he/she may utilize the fund equally and without discrimination for grant of financial help."

The said order is challenged by the appellants in this appeal by special leave. On the contentions urged in this appeal, the following questions arise for consideration :

(i) Whether the High Court could have substituted Rule 5 of the Relief Fund Rules?

(ii) Whether the court was justified in holding that all victims should be "treated equally" while granting relief under the Chief Minister's Relief Fund.

(iii) Whether a rule could be interfered merely on the ground it vests unguided discretion?

The Rules relating to Chief Minister's Relief Fund

7. The Chief Minister's Relief Fund was originally constituted in October 1968. Subsequently the fund was governed by the Rajasthan Chief Minister's Famine and Relief Fund Rules 1979 (for short 'Relief Fund Rules'). Subsequently by merging six different funds, namely Chief Minister's Famine & Flood Relief Fund, Hospital Development Fund, General Assistance Fund, Security Service Welfare Fund, Child Welfare Fund and Development Fund, the Governor constituted a single fund known as 'Rajasthan Chief Minister's Relief Fund' governed by the Rajasthan Chief Minister's Relief Fund Rules, 1999.

7.1) Rule 4 provides that the annual income (by way of interest) from the said fund should be spent for the following purposes: (i) Famine, flood and accident relief (ii) hospital development and medical assistance; (iii) general assistance; (iv) security services welfare assistance, (v) child welfare relief and (vi) development of the state, in the proportion of 50%, 25%, 10%, 5%, 5% and 5% respectively.

7.2) Rule 5 of the Relief Fund Rules reads thus: "This fund would be under the control of Hon'ble Chief Minister and he would be able to sanction financial assistance upto any limit in any manner from this fund." This rules has been substituted by a differently worded rule, by the High Court (extracted above).

7.3) Rule 4 and the note under Rule 5 provide that the provisions of Rules 4 and 5 were only norms and shall not be considered as barriers for exercise of discretion by the Chief Minister and reiterate that only the interest earned on the fund should be spent every year.

7.4) Rule 7 provides that the Secretary to the Chief Minister would be authorized, under the overall control and superintendence of the Chief Secretary, for the functioning, capital investment and for drawing money from accounts of the fund. Rule 8 provides that the accounts of the fund will be maintained in the Chief Minister's office and audited by the Auditor, Local Fund Audit Department. Rule 10 provides that the Chief Minister would have the right to relax the current provisions of the fund and sanction assistance. Rule 11 provides that the rules could be amended by the consent of the Chief Minister if so required.

Re: Question (i)

8. The appellants contend that Rule 5 of the Relief Fund Rules were not under challenge in the writ petition and the High Court was not called upon to consider the validity of the said Rule; and that therefore the High Court was not justified in

substituting Rule (5) with a new rule, by virtually exercising legislative functions.

9. Rule (5) which has been modified by the High Court in its final order, as noticed above is a part of Rajasthan Chief Minister Relief Fund Rules, 1999. The Relief Fund Rules is not a delegated legislation. Though described as 'Rules', the Relief Fund Rules are norms/guidelines issued in exercise of the executive power of the State under Article 162 of the Constitution of India. The Relief Fund rules were not under challenge in the writ petition. In fact there was not even a reference to the Relief Fund Rules in the writ petition. All that the PIL petitioner (respondent herein) wanted was that all victims of a particular category should be treated equally and that if some monetary relief was granted from Chief Minister's Relief Fund, to some victims belonging to a particular category, similar relief should be granted to all victims in that category. As there was no challenge to the Relief Fund Rules, the State was not called upon to satisfy the High Court about the validity of the Relief Fund Rules. Similar Rules are in force in almost all the States in India.

10. The learned counsel for the respondent submitted that the High Court has not declared Rule (5) to be invalid, but has merely read it down, to save it from being declared as unconstitutional and such reading down is permissible in law. It is true that any provision of an enactment can be read down so as to erase the obnoxious or unconstitutional element in it or to bring it in conformity with the object of such enactment. Similarly a rule forming part of executive instructions can also be read down to save it from invalidity or to bring it in conformity with the avowed policy of the government. When courts find a rule to be defective or violative of the constitutional or statutory provision, they tend to save the rule, wherever possible and practical, by reading it down by a benevolent interpretation, rather than declare it as unconstitutional or invalid. But such an occasion did not arise in this case as there was no challenge

to the validity of Rule 5 and the parties were not at issue on the validity of the said rule.

11. We are therefore of the view that in the absence of any challenge to the Relief Fund Rules and an opportunity to the state government to defend the validity of Rule 5, the High Court ought not to have modified or read down the said Rule.

Re : Question No. (ii)

12. We may next consider whether there was any justification for the decision of the High Court amending Rule 5. The High Court held that out of 392 cases of rape where challans were filed between January 2004 to 25th July, 2005 relief had been given to only 15 victims and other 377 were not given any relief. Even among the 15 who were given relief, 13 were given relief in the range of Rs.10,000 to Rs.50,000 and in two cases disproportionately high amounts, that is Rs.5 lakhs in one case and Rs.3.95 lakhs in the other, were awarded. According to the High Court, all victims under twelve years of age are to be treated equally. The High Court held that section 376(2)(f) of the Indian Penal Code ('Code' for short) provided for the same punishment in regard to all rapes where the victim is under twelve years of age, irrespective of the age of the victim. It therefore held that when the Penal Code did not make any distinction in regard to victims of rape under twelve years, there can be no discrimination in granting monetary relief to such victims. Consequently, it directed the monetary relief from the Chief Minister's Relief Fund to be utilized equally to benefit the victims of rape, without any discrimination. The illustrative comparison with reference to section 376(2)(5) of the Code, by the High Court, to hold that all victims of rape should be treated equally and identically in granting monetary relief, is inappropriate and made on an assumption which has no basis, by adopting a logic which is defective.

13. The provisions relating to punishment for offences under criminal law have no bearing upon grant of ex-gratia

monetary benefit to some of the victims. Secondly, the assumption that all cases of rape involving victims under twelve years are liable to be punished identically under the Code, is not correct. Section 376(2)(f) no doubt refers to rape of girl/child under the age of twelve years as one category, for award of a more severe punishment, but does not provide for a fixed quantum of punishment. The said section provides that a person who commits rape on a woman when she is under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable for fine. The term of ten years imprisonment mentioned in section 376(2) is the minimum punishment in regard to cases falling under section 376(2)(f). The gravity and perversity of the crime, the need to keep the perpetrator out of circulation, the social impact, chances of correcting the offender, among other facts and circumstances, will have a bearing upon the sentence. The sentence may vary for any period between life and ten years. The amount of fine may also vary depending upon the aforesaid circumstances and in addition, the financial position of the victim and the offender. Section 376 gives discretion to the Court in regard to imposition of sentence, depending upon the facts of each case, so long as the limits prescribed are not breached. Therefore the assumption that no distinction is made in regard to either punishment under the Code where the victim is under twelve years of age, and therefore, all such victims should get an equal amount as monetary relief, is erroneous.

14. Section 357 of the Code of Criminal Procedure ('Cr.P.C.' for short) provides for a direction to pay compensation to the victim, from out of the fine. It does not provide that the compensation awarded should be a uniform fixed amount. Section 357A of Cr.P.C. (introduced with effect from 31.12.2009) requires every state government in co-ordination with the central government, to prepare a scheme for providing funds for the purpose of payment of compensation to the victims who require rehabilitation (or who have suffered

loss or injury as a result of the crime). This section also does not provide that the compensation should be an identical amount. The victim may also sue the offender for compensation in a civil proceedings. There also the quantum may depend upon the facts of each case. Therefore the inference that the monetary relief awarded under the Relief Fund should be identical for all victims of rape under the age of twelve years, is illogical and cannot be accepted.

15. Having regard to the scheme of the Relief Fund Rules, grant and disbursal of relief amount under the said Relief Fund Rules is purely ex gratia, at the discretion of the Chief Minister. The Relief Fund Rules do not create any right in any victim to demand or claim monetary relief under the fund. Nor do the Rules provide any scheme for grant of compensation to victims of rape or other unfortunate circumstances. Having regard to the nature and scheme of the Relief Fund and the purposes for which the Relief Fund is intended, it may not be possible to provide relief from the Relief Fund, for all the affected persons of a particular category. Monetary relief under the Relief Fund Rules may be granted or restricted in exceptional cases where the victims of offences, have been subjected to shocking trauma and cruelty. Naturally any public outcry or media focus may lead to identifying or choosing the victim, for the purpose of grant of relief. Other victims who are not chosen will have to take recourse to the ordinary remedies available in law. It is not possible to hold that if one victim of a particular category is given a particular monetary relief under the Relief Fund Rules, every victim in that category should be granted relief or that all victims should be granted identical relief.

16. The need to treat equally and the need to avoid discrimination arise where the claimants/beneficiaries have a legal right to claim relief and the government or authority has a corresponding legal obligation. But that is also subject to the principles relating to reasonable classification. But where the payment is ex-gratia, by way of discretionary relief, grant of

relief may depend upon several circumstances. The authority vested with the discretion may take note of any of the several relevant factors, including the age of the victim, the shocking or gruesome nature of the incident or accident or calamity, the serious nature of the injury or resultant trauma, the need for immediate relief, the precarious financial condition of the family, the expenditure for any treatment and rehabilitation, for the purpose of extension of monetary relief. The availability of sufficient funds, the need to allocate the fund for other purposes may also play a relevant role. The authority at his discretion, may or may not grant any relief at all under Relief Fund Rules, depending upon the facts and circumstance of the case.

Re : Question No.(iii)

17. The Chief Minister is the head of the State Government, though the executive power of the State is vested in the Governor. He is in-charge of the day to day functioning of the State Government. He virtually controls the State executive and legislature. When calamities, disasters, heinous and dastardly crimes occur, and there is need to immediately respond by providing relief, regular governmental machinery may be found to slow and wanting, as they are bound down by rules, regulations and procedures. Special circumstances may warrant emergent financial assistance. It is also possible that the existing laws may not provide for grant of relief in some circumstances to needy victims. It is in such circumstances, the Chief Minister's Relief Fund is necessary and useful. Where power is vested in holders of high office like the Chief Minister to give monetary relief from such a Relief Fund, it is no doubt a power coupled with duty. Nevertheless, the authority will have the discretion to decide, where the Relief Fund Rules do not contain any specific guidelines, to whom relief should be extended, in what circumstances it should be extended and what amount should be granted by way of relief.

18. All functionaries of the State are expected to act in accordance with law, eschewing unreasonableness,

arbitrariness or discrimination. They cannot act on whims and fancies. In a democracy governed by the rule of law, no government or authority has the right to do what it pleases. Where the rule of law prevails there is nothing like unfettered discretion or unaccountable action. But this does not mean that no discretion can be vested in an authority or functionary of high standing. Nor does it mean that certain funds cannot be placed at the disposal of a high functionary for disbursal at his discretion in unforeseen circumstances. For example, we may refer to the extreme case of secret funds placed at the disposal of intelligence organizations and security organizations (to be operated by very senior officers) intended to be used in national interest and national security or crime detection relating to serious offences, either to buy information or to mount clandestine operations. Such funds should not be confused with slush funds kept for dishonest purposes. The expenditure/ disbursals from such secret funds are not subjected to normal audits nor required to be accounted for in the traditional manner. Another example is the Relief Funds placed at the disposal of the holders of high office like Prime Minister or Chief Ministers of States to provide timely assistance to victims of natural calamities, disasters, and traumatic experiences, or to provide medical or financial aid to persons in distress and needy, among other purposes. These Relief Funds are different from secret funds. The inflow into the Relief Fund and the disbursals therefrom are fully accounted. The Relief Funds are regularly audited. The purposes for which such Relief Funds could be utilized are clearly laid down, subject to the residuary discretion vested in the Prime Minister/Chief Minister to grant relief in unforeseen circumstances. The Prime Minister/ Chief Minister is given the discretion to choose the recipient of the relief, the quantum of the relief, and the timing of grant of such relief. Unless such discretion is given, in extraordinary circumstances not contemplated in the guidelines, the Relief Fund in the hands of the Chief Minister may be useless and meaningless. When discretion is vested in a high public functionary, it is assumed that the power will be exercised by

applying reasonable standards to achieve the purpose for which the discretion is vested.

19. A Constitution Bench of this Court in *B.P. Singhal v. Union of India* (2010) 6 SCC 331 while explaining the nature of judicial review of discretionary functions of persons holding high offices held that such authority entrusted with the discretion need not disclose or inform the cause for exercise of the discretion, but it is imperative that some cause must exist, as otherwise the authority entrusted with the discretion may act arbitrarily, whimsically or mala fide. Elucidating the said principle this Court observed:

> "The extent and depth of judicial review will depend upon and vary with reference to the matter under review. As observed by Lord Steyn in *Ex parte Daly* [2001 (3) All ER 433], in law, context is everything, and intensity of review will depend on the subject-matter of review. For example, judicial review is permissible in regard to administrative action, legislations and constitutional amendments. But the extent or scope of judicial review for one will be different from the scope of judicial review for other. Mala fides may be a ground for judicial review of administrative action but is not a ground for judicial review of legislations or constitutional amendments."

20. Whenever the discretion is exercised for making a payment from out of the Relief Fund, the Court will assume that it was done in public interest and for public good, for just and proper reasons. Consequently where anyone challenges the exercise of the discretion, he should establish prima facie that the exercise of discretion was arbitrary, mala fide or by way of nepotism to favour undeserving candidates with ulterior motives. Where such a prima facie case is made out, the Court may require the authority to produce material to satisfy itself that the discretion has been used for good and valid reasons, depending upon the facts and circumstances of the case. But

in general, the discretion will not be open to question.

21. The Relief Fund Rules does not confer absolute unguided discretion on the Chief Minister. Rule 4 as noticed above, enumerates the six major heads of purpose for which the relief amount from the fund could be sanctioned, namely, (i) persons affected by natural calamities and disasters like famine, flood and accidents, (ii) hospital development and medical assistance, (iii) general assistance (social unity, education, sports, youth creativity, etc.), (iv) benefits to ex-servicemen, (v) child welfare, and (vi) development of Rajasthan. Each of the six purposes is further divided into detailed sub-heads. There are thus detailed guidelines as to the purposes for which the Relief Fund is to be used. There are checks and balances in regard to the expenditure/withdrawals from the said fund as the fund is subject to audit by the auditor of the local fund audit department. In addition to the above, Rule 5 vests a residuary discretionary power upon the Chief Minister to sanction financial assistance from the Relief Fund, upto any limit in any matter to anyone. This is because it is not possible to foresee every possible situation or contingency where relief should be or could be given. The discretion under Rule 5 is intended to be exercised in rare and extraordinary circumstances.

Conclusion

22. As the Relief Fund is expected to be utilized for various purposes, it may not be proper or advisable to grant huge amounts in one or two cases, thereby denying the benefit of the Fund to other needy persons who are also the victims of catastrophes. The amount granted should therefore be reasonable, to meet the immediate need of coming out of the trauma/catastrophe. When there are no guidelines or when it is difficult to limit the discretion in a high functionary by guidelines, the authority should be careful in exercising discretionary power, so to ensure that it does not give room

for nepotism, favoritism or discrimination. Obviously the relief amount from the Fund cannot be given to persons who are not the victims of any disaster or catastrophe or adverse circumstances or who do not fall under any of the categories specified in the Relief Fund Rules. Relief amount cannot be granted, merely because the recipient happens to be the friend, supporter of the Chief Minister or belongs to his political party. The disbursement or payment to undeserving cases can be questioned. But the mere fact that in two cases of rape involving extreme viciousness and depravity, high compensation has been granted having regard to the gravity of the offence and the surrounding circumstances, is by itself not sufficient to interfere with the discretion of the Chief Minister.

23. In this case the grievance of the respondent is that in the case of one rape victim a sum of Rs.5 lakhs was awarded from the Chief Minister's Fund, for another victim Rs.3.95 lakhs was awarded whereas in several other cases hardly Rs.10,000 to Rs.15,000 were awarded and in several other cases nothing was awarded. The Chief Minister's Relief Fund is not a scheme for the benefit of victims of rape. There are other schemes and other provisions for granting of compensation to such victims. As noticed above, the Chief Minister's Relief Fund is intended to provide relief to victims of various calamities/disasters/accidents/incidents and serve other specified purposes. The appellants have pointed out that Rs.5 lakhs was awarded in a shocking case where victim was only a few months old. In the other case where Rs.3.95 lakhs was awarded as the victim required rehabilitation and the family of the victim was in dire circumstances. These two payments from the Relief Fund, cannot form the basis for issuing a direction to pay similar amounts to other victims of rape. Nor is it possible to hold that failure to give uniform ex-gratia relief is arbitrary or unconstitutional.

24. We may however note that the six specified purposes and their sub-heads enumerated in the Relief Fund Rules for

grant of relief do not specifically include victims of ghastly/heinous crimes. It may be appropriate to include a sub-category relating to such victims under category (i) or (iii) of Rule (4) of the Relief Fund Rules. Be that as it may.

25. We therefore allow this appeal, set aside the impugned order of the High Court and dismiss the PIL filed by the respondent in the High Court, subject to the above observations.

R.P. Appeal allowed.

BHARAT RASIKLAL ASHRA

v.

GAUTAM RASIKLAL ASHRA & ANR.

(Civil Appeal No.7334 of 2011)

AUGUST 25, 2011

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

Arbitration and Conciliation Act, 1996 – s.11 – Appointment of arbitrator – Application u/s.11 – Duty of the Chief Justice of the Supreme Court / High Court or his designate – Partnership deed dated 12-6-1988 entered between the appellant, the first respondent and their grandfather contained an arbitration agreement – Dispute between appellant and first respondent pursuant to death of their grandfather – First respondent filed application u/s.11 seeking appointment of arbitrator not with reference to the partnership deed dated 12-6-1998, but with reference to another partnership deed dated 19-5-2000 allegedly entered between the appellant and the first respondent – Appellant denied the existence of the deed dated 19-5-2000 contending that the same was forged and fraudulent and therefore there was no question of appointment of arbitrator in terms of the arbitration clause contained therein – Designate of the Chief Justice of the High Court, however, allowed the application u/s.11 and appointed an arbitrator – Whether the designate of the Chief Justice, in exercise of power u/s.11, could appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator – Held: The question whether there is arbitration agreement is a jurisdictional issue – Such issue ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator – Unless the first respondent was able to make out that there was a valid

arbitration clause as per the deed dated 19-5-2000, there could be no appointment of arbitrator u/s.11 – Since serious allegations of fraud and fabrication were made, the Court could not have proceeded to appoint an arbitrator without deciding the said issue which related to the very validity of the arbitration agreement – Order of the High Court appointing an arbitrator accordingly set aside – Matter remitted to High Court for deciding the questions whether the deed dated 19-5-2000 was forged or fabricated and whether there was a valid and enforceable arbitration agreement between the parties.

The appellant and the first respondent are brothers. A deed of partnership dated 12.6.1988 was entered amongst the appellant, the first respondent and their grandfather 'K' to carry on business, their shares being 30%, 30% and 40% respectively. The said partnership deed provided that all disputes between the partners shall be referred to arbitration.

It was the stand of the first respondent that immediately after the death of 'K', fresh partnership deeds were executed between him and the appellant on 6.9.1991 and again on 19.5.2000; and consequently the share of the appellant was reduced to 10% while the share of the first respondent stood at 90%. The first respondent sent letter to the appellant stating that several issues relating to the firm had arisen; and that it was necessary to sort out those disputes by arbitration. The first respondent therefore appointed his arbitrator and called upon the appellant to appoint his arbitrator. The appellant replied stating that he had not signed the partnership deeds dated 6.9.1991 or 19.5.2010 and the said documents were forged documents and not binding and therefore the question of appointing an arbitrator in terms of the said documents did not arise.

The first respondent thereafter filed application under

section 11 of the Arbitration and Conciliation Act, 1996 alleging that disputes had arisen between appellant and first respondent, who were the partners of the second respondent firm governed by partnership deed dated 19.5.2000; and that clause 12 thereof provided for settlement of disputes by arbitration. He therefore prayed that a sole arbitrator be appointed in terms of the arbitration agreement contained in the partnership deed dated 19.5.2000. The designate of the Chief Justice allowed the application under section 11 of the Act and appointed a sole arbitrator and left open the question whether the two subsequent partnership deeds had been executed by the appellant or not, for the decision of the arbitrator.

In the instant appeal, the appellant contended that the Chief Justice or his designate was required to decide the issue relating to the existence of an arbitration agreement before referring the dispute between the parties; and since serious questions of fraud, forgery and fabrication of documents were made out, the Chief Justice or his designate should not have appointed an arbitrator.

The question which therefore arose for consideration was "Where the arbitration agreement between the parties is denied by the respondent, whether the Chief Justice or his designate, in exercise of power under section 11 of the Act, can appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator?"

Allowing the appeal, the Court

HELD: 1. The preliminary issues that may arise for consideration in an application under section 11 of the Arbitration and Conciliation Act, 1996 can be identified

and segregated the into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide. The issues (first category) which Chief Justice/his designate will have to decide are: (a) Whether the party making the application has approached the appropriate High Court and (b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are: (a) Whether the claim is a dead (long barred) claim or a live claim and (b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are: (I)Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration) and (ii) merits or any claim involved in the arbitration. [Para 8] [695-A-H; 696-A-C]

1.2. The question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the arbitral tribunal. This is because the question whether there is arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under section 11 of the Act will not be maintainable and the Chief Justice or his designate will have no jurisdiction to appoint an arbitrator under section 11 of the Act. Only in regard to the issues shown in the

second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the arbitral tribunal. Even in regard to the issues falling under the second category, where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator. [Para 9] [696-D-H]

S.B.P. & Co. vs. Patel Engineering Ltd. **2005 (8) SCC 618: 2005 (4) Suppl. SCR 688 and** *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd*. **2009 (1) SCC 267: 2008 (13) SCR 638 – relied on.**

2. It is well settled that an arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question. If there is an arbitration agreement in regard to contract A and no arbitration agreement in regard to contract B, obviously a dispute relating to contract B cannot be referred to arbitration on the ground that contract A has an arbitration agreement. Therefore, where there is an arbitration agreement in the partnership deed dated 12.6.1988, but the dispute is raised and an appointment of arbitrator is sought not with reference to the said partnership deed, but with reference to another partnership deed dated 19.5.2000, unless the party filing the application under section 11 of the Act is able to make out that there is a valid arbitration clause as per the contract dated 19.5.2000, there can be no appointment of an arbitrator. [Paras 10, 11] [697-A-G]

3. Existence of a valid and enforceable arbitration agreement is a condition precedent before an arbitrator can be appointed under section 11 of the Act. When

serious allegations of fraud and fabrication are made, it is not possible for the Court to proceed to appoint an arbitrator without deciding the said issue which relates to the very validity of the arbitration agreement. The fact that the allegations of fraud, forgery and fabrication are likely to involve recording of evidence or involve some delay in disposal, are not grounds for refusing to consider the existence of a valid arbitration agreement. The apprehension that such contentions are likely to be raised frequently to protract the proceedings under section 11 of the Act or to delay the arbitration process, thereby defeating the purpose of section 11 of the Act is also without basis. Where agreements have been performed in part, such a contention will not be entertained. It is only in a very few cases, where an agreement which had not seen the light of the day is suddenly propounded, or where the agreement had never been acted upon or where sufficient circumstances exist to doubt the genuineness of the agreement, the Chief Justice of his designate will examine this issue. On the ground of termination, performance or frustration of the contract, arbitration agreement cannot be avoided. The legislature has entrusted the power of appointment of an arbitrator to the holders of high judicial offices like the Chief Justice or Judge of the Supreme Court/High Court, with a view that they can identify and effectively deal with false or vexatious claims made only to protract the proceedings or defeat arbitration. If a party is found to have falsely contended that the contract was forged/ fabricated, the Chief Justice or his designate may subject such part to heavy costs so that such false claims are discouraged. [Paras 12, 13] [698-B-H; 699-A]

4. The order of the High Court appointing an arbitrator is set aside and the matter is remitted to the High Court for deciding the questions whether the deed dated 19.5.2000 was forged or fabricated and whether

there was a valid and enforceable arbitration agreement between the parties. [Para 14] [699-B-C]

Case Law Reference:

2005 (4) Suppl. SCR 688	**relied on**	**Para 8**
2008 (13) SCR 638	**relied on**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7334 of 2011.

From the Judgment & Order dated 31.03.2011 of the High Court of Judicature at Bombay in Arbitration No. 160 of 2010.

L.N. Rao, Pratap Venugopal, Surekha Raman, Namrata Sood (for K.J. John & Co.) for the Appellant.

Shyam Divan, Ayaz Billawala, Mahesh Agarwal, E.C. Agrawala, Radhika Gautam for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant and first respondent are brothers. A deed of partnership dated 12.6.1988 was entered among Mr. Kanji Pitamber Ashra and his two grandsons (appellant and first respondent) to carry on the business under the name and style of M/s. Kanji Pitamber & Co., their shares being 40%, 30% and 30% respectively. Clause 10 provided that death of any partner shall not dissolve the partnership firm as to the surviving partners. Clause 11 of the said agreement provided that all disputes between the partners regarding the rights and liabilities of partners or in regard to the transactions or accounts of the partnership shall be referred to arbitration.

3. The appellant is permanent resident of United States of America. Kanji Pitamber Ashra died on 4.9.1991. According to appellant, the appellant and first respondent continued the

business of M/s. Kanji Pitamber & Co., (second respondent firm), by increasing their profit and loss ratio from 30% to 50% each. The appellant alleges that in or about 2008 he came to know that the first respondent was claiming that fresh partnership deeds were executed by the parties on 6.9.1991 and 19.5.2000. The appellant claims that he did not execute any such deeds. He claims that the firm's bankers by their letter dated 7.7.2008 have confirmed that the only partnership deed of the firm held by them was the deed dated 12.6.1988. He also claims that the first respondent, as partner of the second respondent firm had sent a letter dated 1.7.2008 to the Foreign Exchange Brokers Association of India (of which the second respondent is a member) confirming that the appellant and first respondent were the partners as per the deed dated 12.6.1988 and there was no change in the said partnership deed.

4. According to the first respondent, immediately after the death of their grandfather, a fresh partnership deed was executed on 6.9.1991 and again another deed was executed on 19.5.2000 by the appellant and first respondent; that under deed dated 6.9.1991, the share of the appellant was reduced from 50% to 25% and under the deed dated 19.5.2000, the share of the appellant was reduced from 25% to 10% with a further condition that if the appellant did not attend to the business on account of his commitments elsewhere, the entire profit and loss of the business shall belong to or borne by the first respondent. The first respondent by letter dated 19.8.2010 stated that the shares of appellant and first respondent in the firm were 10% and 90% respectively; that the appellant had abandoned his interest in the firm and showed no inclination to participate in its business; that several issues relating to the firm had arisen; and that it was necessary to sort out those disputes by arbitration. The first respondent therefore appointed his arbitrator and called upon the appellant to appoint his arbitrator. The appellant sent a reply dated 7.9.2010 stating that he had not signed the partnership deeds dated 6.9.1991 or 19.5.2010 and the said documents were forged documents

and not binding and therefore the question of appointing an arbitrator in terms of the said documents did not arise.

5. The first respondent filed an application under section 11 of the Arbitration and Conciliation Act, 1996 ('Act' for short) alleging that disputes had arisen between appellant and first respondent, who were the partners of the second respondent firm governed by partnership deed dated 19.5.2000; and that clause 12 thereof provided for settlement of disputes by arbitration. He therefore prayed that the person named in his notice dated 19.8.2010, as his arbitrator, be appointed as the sole arbitrator in terms of the arbitration agreement contained in the partnership deed dated 19.5.2000. The appellant resisted the said petition by filing detailed objections denying the existence of the partnership deeds dated 6.9.1991 and 19.5.2000. The appellant asserted that they were governed by the partnership deed dated 12.6.1988 and therefore question of appointment of arbitrator in terms of the arbitration clause contained in the alleged partnership deed dated 19.5.2000 did not arise.

6. The learned designate of the Chief Justice made an order dated 11.2.2011 for appointing a Commissioner for recording the evidence of parties as it was necessary to decide whether said two partnership deeds dated 6.9.1991 and 19.5.2000 were valid or not, before a reference could be made in terms of an arbitration clause contained in the deed dated 19.5.2000. However, when the application subsequently came up for hearing before another designate of the Chief Justice, the earlier order for recording evidence was ignored and by order dated 31.3.2011, the application under section 11 of the Act was allowed and Mr. Ketan Parekh, Advocate, was appointed as arbitrator. The learned designate held that a dispute raised by Vijayaben Kanji Ashra, grandmother of the parties, claiming a share in the second respondent firm as the legal heir of Kanji Pitamber Ashra, was the subject matter of an application under section 11 of the Act in Arbitration

Application No.161/2010 and in that petition, by consent of all parties, Mr. Ketan Parekh had already been appointed as arbitrator; and that therefore, it will be appropriate to appoint the said Mr. Ketan Parekh as the Arbitrator and leave open the question whether the two subsequent partnership deeds had been executed by the appellant or not, for the decision of the arbitrator.

7. The said order is challenged in this appeal by special leave. The appellant submitted that this Court has repeatedly held that the the Chief Justice or his designate will have to decide the issue relating to the existence of an arbitration agreement before referring the dispute between the parties; and that where serious questions of fraud, forgery and fabrication of documents have been made out, the Chief Justice or his designate should not appoint an arbitrator. Learned counsel for the appellant made it clear that if the first respondent wanted appointment of an arbitrator as per the arbitration clause contained in the partnership deed dated 12.6.1988 and wanted the disputes to be resolved in terms of the said partnership deed, the appellant would not have any objection for appointment of an arbitrator. He submitted that appellant's objection was to appoint an arbitrator under clause 12 of a forged and fabricated deed dated 19.5.2000 execution of which had been denied by him. Therefore, the following question arises for consideration in this appeal:

> "Where the arbitration agreement between the parties is denied by the respondent, whether the Chief Justice or his designate, in exercise of power under section 11 of the Act, can appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator?"

8. The question is covered by the decisions of this Court in *S.B.P. & Co. vs. Patel Engineering Ltd*. [2005 (8) SCC 618] and *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd*. [2009 (1) SCC 267]. In *S.B.P.& Co.,* a Constitution Bench of

this court held that when an application under section 11 of the Act is filed, it is for the Chief Justice or his designate to decide whether there is an arbitration agreement, as defined in the Act and whether the party who has made a request before him, is a party to such an agreement. The said decision also made it clear as to which issues could be left to the decision of the arbitrator. Following the decision in *S.B.P. & Co.,* this court in *National Insurance Co. Ltd.* held as follows :

> "17. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co*. This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
>
> 17.1) The issues (first category) which Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) *Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement*.
>
> 17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:
>
> (a) Whether the claim is a dead (long barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual

> rights and obligation or by receiving the final payment without objection.
>
> 17.3) The issues (third category) which the Chief Justice/ his designate should leave exclusively to the arbitral tribunal are :
>
> (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
>
> (ii) Merits or any claim involved in the arbitration."
>
> (emphasis supplied)

9. It is clear from the said two decisions that the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the arbitral tribunal. This is because the question whether there is arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under section 11 of the Act will not be maintainable and the Chief Justice or his designate will have no jurisdiction to appoint an arbitrator under section 11 of the Act. This Court also made it clear that only in regard to the issues shown in the second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the arbitral tribunal. Even in regard to the issues falling under the second category, this court made it clear that where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator.

10. Learned counsel for the first respondent submitted that the appellant has already agreed for the appointment of Mr. Ketan Parekh as the arbitrator in the application filed by their grandmother under section 11 of the Act, with respect to her claim for a share in the firm; and the dispute between the two brothers also being in regard to the extent of the shares in the firm, it would be proper to have it decided by the same arbitrator. Disagreeing with the said submission, learned counsel for the appellant submitted that his grandmother's claim was with reference to the partnership deed dated 12.6.1988 and as the said deed contained an arbitration agreement, he had agreed for appointment of an arbitrator. He submitted that merely because he had consented for appointment of an arbitrator in regard to the deed dated 12.6.1988, and had expressed confidence in the arbitrator, it does not mean that he should agree for arbitration even where arbitration was claimed in pursuance of a provision contained in a forged and fabricated document, which was materially different from the deed dated 12.6.1988.

11. It is well settled that an arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question. If there is an arbitration agreement in regard to contract A and no arbitration agreement in regard to contract B, obviously a dispute relating to contract B cannot be referred to arbitration on the ground that contract A has an arbitration agreement. Therefore, where there is an arbitration agreement in the partnership deed dated 12.6.1988, but the dispute is raised and an appointment of arbitrator is sought not with reference to the said partnership deed, but with reference to another partnership deed dated 19.5.2000, unless the party filing the application under section 11 of the Act is able to make out that there is a valid arbitration clause as per the contract dated 19.5.2000, there can be no appointment of an arbitrator.

12. The learned counsel for the first respondent next submitted that if the Chief Justice or his designate is required

to examine the allegations of fabrication and forgery made by a party in regard to the contract containing the arbitration agreement, before appointing an arbitrator under section 11 of the Act, the proceedings under the said section will cease to be a summary proceedings, and become cumbersome and protracted, necessitating recording of evidence, thereby defeating the object of the Act. In our considered view this apprehension has no relevance or merit. Existence of a valid and enforceable arbitration agreement is a condition precedent before an arbitrator can be appointed under section 11 of the Act. When serious allegations of fraud and fabrication are made, it is not possible for the Court to proceed to appoint an arbitrator without deciding the said issue which relates to the very validity of the arbitration agreement. Therefore the fact that the allegations of fraud, forgery and fabrication are likely to involve recording of evidence or involve some delay in disposal, are not grounds for refusing to consider the existence of a valid arbitration agreement.

13. The apprehension that such contentions are likely to be raised frequently to protract the proceedings under section 11 of the Act or to delay the arbitration process, thereby defeating the purpose of section 11 of the Act is also without basis. Where agreements have been performed in part, such a contention will not be entertained. It is only in a very few cases, where an agreement which had not seen the light of the day is suddenly propounded, or where the agreement had never been acted upon or where sufficient circumstances exist to doubt the genuineness of the agreement, the Chief Justice of his designate will examine this issue. This course has repeatedly held that on the ground of termination, performance or frustration of the contract, arbitration agreement cannot be avoided. The legislature has entrusted the power of appointment of an arbitrator to the holders of high judicial offices like the Chief Justice or Judge of the Supreme Court/High Court, with a view that they can identify and effectively deal with false or vexatious claims made only to protract the proceedings

or defeat arbitration. If a party is found to have falsely contended that the contract was forged/fabricated, the Chief Justice or his designate may subject such part to heavy costs so that such false claims are discouraged. Be that as it may.

14. We therefore allow this appeal, set aside the order of the High Court appointing an arbitrator and remit the matter to the High Court for deciding the questions whether the deed dated 19.5.2000 was forged or fabricated and whether there is a valid and enforceable arbitration agreement between the parties. Nothing stated herein shall be construed as expression of any opinion on the merits of the case.

B.B.B. Appeal allowed.

NANJEGOWDA AND ANOTHER
v.
GANGAMMA AND OTHERS
(Civil Appeal No. 2006 of 2006)

AUGUST 25, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Transfer of Property Act, 1882 – s. 53A – Part performance – When attracted – Suit for declaration and possession over property – However, defendants claiming title over the property on basis of an agreement to sale as also irrevocable power of attorney executed by their predecessor-in-title in their favour – Trial court decreed the suit – Order upheld by the High Court – On appeal, held: Agreement to sale recited that predecessor-in-title had delivered the possession of property to defendant no.3 – According to the defendants, there had been ban on registration of documents, thus, predecessor-in-title executed an irrevocable power of attorney three years later – However, the contents of the general power of attorney show that the property at that particular time was in possession of predecessor-in-title (transferor) – Had defendant no.3 got possession of the property in pursuance of the agreement to sale, there was no occasion for predecessor-in-title to recite in clear terms that he was in possession of the property – Thus, the finding recorded by the courts below that defendants did not get possession of the property after execution of the sale deed is on correct appreciation of facts and does not call for interference – Provision of s. 53A is not attracted.

'H' purchased certain property from 'R' under a registered sale deed. Plaintiffs-wife, daughter and son of 'H' filed the suit for declaration and possession of the said property against the defendants. It was the case of the

plaintiffs that 'H' had executed a power of attorney in favour of defendant nos 1 to 3 which came to an end on the death of 'H'. The defendants did not deny that 'H' had purchased the property from 'R' but claimed title over the property on basis of an agreement to sale. The defendants also contended that since there was ban on the registry of the property, 'H' executed an irrevocable power of attorney as also an affidavit of the same date. The trial court rejecting the plea of the defendants, decreed the suit. The High Court upheld the judgment and decree of the trial court.

Dismissing the appeal, the Court

HELD: 1.1 From a plain reading of Section 53A of the Transfer of Property Act, 1882, it is evident that a party can take shelter behind this provision only when the following conditions are fulfilled. They are:

(i) The contract should have been in writing signed by or on behalf of the transferor;

(ii)The transferee should have got possession of the immoveable property covered by the contract;

(iii)The transferee should have done some act in furtherance of the contract; and

(iv)The transferee has either performed his part of the contract or is willing to perform his part of the contract.

A party can take advantage of Section 53A only when it satisfies all the aforesaid conditions. All the postulates are *sine qua non* and a party cannot derive benefit by fulfilling one or more conditions. [Para 8] [706-A-D]

1.2 The agreement to sale dated 27th November, 1982 recites that 'H' had delivered the possession of property to defendant no.3. According to the defendants,

there had been ban on registration of documents, thus, 'H' executed an irrevocable power of attorney on 14th July, 1985. The contents of the general power of attorney show that the property at that particular time was in possession of 'H', the transferor. Had defendant no.3 got possession of the property in pursuance of the agreement to sale dated 27th November, 1982, there was no occasion for 'H' to recite in clear terms that he was in possession of the property. Thus, the finding recorded by the trial court as upheld by the High Court that defendants did not get possession of the property after execution of the sale deed is on correct appreciation of facts, which does not call for interference. In view of the said finding, the provision of Section 53A of the Transfer of Property Act is not attracted and defendants cannot take advantage of that. [Paras 9 and 10] [706-F-H; 707-C-D]

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

From the Judgment & Order dated 08.02.2005 of the High Court of Karnataka at Bangalore in Regular First Appeal No. 651 of 1998.

Girish Ananthamuthy (for P.P. Singh) for the Appellants.

S.N. Bhat for the Respondent.

The Judgment of the Court was delivered by

CHANDRMAULI KR.PRASAD, J. 1. Defendant No.1 Nanjegowda and his wife defendant No.3 Jayamma are before us by special leave against the judgment and decree of affirmance.

2. Plaintiff No.1 Gangamma is the wife of late Honnanna. Plaintiff no.2 Vanajakshi is the daughter of plaintiff no.1, whereas plaintiff no.3 Nagesha and defendant no.2 Manjunatha are her sons. Plaintiffs filed the suit for declaration and possession over an area measuring East to West 50 feet and

North to South 15 feet with a house built thereon measuring 15x12 feet, appertaining to survey No. 70/19, situated at Kamakshipalya,Saneguruvanahalli, Yeshwanthapur Hobli, Bangalore North Taluk in the State of Karnataka.

3. According to the plaintiffs, the property originally belonged to one Ramakrishna. He had purchased the same under a registered sale deed dated 13th December, 1978. The aforesaid Ramakrishna sold the said property to Honnanna by a registered sale deed dated 5th June, 1980. According to the plaintiffs, Honnanna executed the power of attorney in respect of the suit property in favour of defendant nos.1 and 3 which came to an end on his death on 13th July, 1986. Defendant nos.1 and 3 hereinafter referred to as the defendants (appellants herein) contested the suit. They have not denied that Honnanna had purchased the property on 5th June, 1980 from Ramakrishna. However, they claim title over the property on the basis of an agreement to sale dated 27th November, 1982. It is further case of the defendants that there being a ban on registry of the property, an irrevocable power of attorney was executed by Honnanna on 14th July, 1985 as also an affidavit of the same date.

4. On the basis of the pleadings of the party, the Trial Court framed various issues including the issue as to whether defendant nos. 1 and 3 had acquired title to the property after the death of Honnanna. The Trial Court on appraisal of evidence, came to the conclusion that defendants had failed to prove that Honnanna executed an agreement to sale in favour of defendant no.3 Jayamma. The Trial Court further held that plea of the defendants that Honnanna delivered possession of the scheduled property in the light of the agreement dated 27th November, 1982 on the date of agreement is false. In coming to the aforesaid conclusion, the Trial Court referred to the contents of the general power of attorney which indicated that Honnanna had given the general power of attorney in favour of Jayamma to manage the property. While doing so, the Trial Court observed as follows:

> "48…….what can be made from these recitals is that Honnanna was in possession of the schedule property upto the date of execution of said general power of attorney i.e. 22.7.1985. That being so, the contention of defendants 1 and 3 that Honnanna delivered portion of the schedule property referred to in the agreement of sale dated 27.11.1982 on the alleged date of agreement of sale is found to be false….."

5. In the light of the aforesaid findings, the Trial Court decreed the suit and on appeal by the defendants, the High Court had dismissed the appeal and affirmed the judgment and decree of the Trial Court.

6. Mr. Girish Ananthamurthy, learned Counsel appearing on behalf of the appellants submits that Honnanna executed an agreement to sale in favour of defendant no.3 Jayamma and she was put in possession. According to him, after the execution of the agreement to sale, the ban on the registration of the documents was not lifted and accordingly Honnanna executed an irrevocable power of attorney and sworn affidavit,acknowledging possession on 14th July, 1985. He draws our attention to the agreement to sale (Ext. D-1) dated 27th November, 1982 and the affidavit dated 14th July, 1985 (Ext. D-3) and contends that Honnanna having delivered the possession of the property, notwithstanding the fact that sale deed has not been executed and registered, defendants shall have right over the property. In this connection, our attention has been drawn to Section 53A of the Transfer of Property Act, 1882 (hereinafter referred to as the 'Act'). On this ground alone, according to the learned Counsel, the courts below ought to have dismissed the suit.

7. Mr. S.N. Bhat, learned Counsel appearing on behalf of the plaintiffs-respondents, however, contends that the plea put forth by the defendants that they were handed over the possession of the property in part performance of the Contract

is unfounded on fact and hence Section 53A of the Act is not remotely attracted. He points out that the findings recorded by the Trial Court, as affirmed by the High Court that possession was not delivered to the defendants is on appraisal of evidence which does not call for interference in this appeal.

8. We have bestowed our consideration to the rival submissions. Section 53A of the Act which is relevant for the purpose reads as follows:

> "53A. **Part performance**- Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,
>
> then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

From a plain reading of the aforesaid provision, it is evident that a party can take shelter behind this provision only when the following conditions are fulfilled. They are:

(i) The contract should have been in writing signed by or on behalf of the transferor;

(ii) The transferee should have got possession of the immoveable property covered by the contract;

(iii) The transferee should have done some act in furtherance of the contract; and

(iv) The transferee has either performed his part of the contract or is willing to perform his part of the contract.

A party can take advantage of this provision only when it satisfies all the conditions aforesaid. All the postulates are *sine qua non* and a party cannot derive benefit by fulfilling one or more conditions.

9. Bearing in mind the aforesaid principle, we, now, proceed to consider as to whether defendants have satisfied all the requirements. Had they got possession of the immoveable property covered by the contract necessary for invocation of Section 53A of the Act? Agreement to sale dated 27th November, 1982 recites that Honnanna had delivered the possession of property to defendant no.3 Jayamma. According to the defendants, there had been ban on registration of documents, hence Honnanna executed an irrevocable power of attorney on 14th July, 1985. The contents of the general power of attorney show that the property at that particular time was in possession of Honnanna, the transferor. This would be evident from the following recital in the power of attorney:

> "The vacant site as mentioned in the schedule below *which is in my possession* acquired through the registered Sale Deed dated 05.05.1980 registered in the Office of

the Sub-Registrar, Bangalore North Taluk, in Book No. 1, Volume 3236 page 210-230 No. 1363, I have hereby given the power in favour of you to look after and manage completely on my behalf as I am unable to manage for inevitable reasons."

(underlining ours)

10. Had defendant no.3 Jayamma got possession of the property in pursuance of the agreement to sale dated 27th November, 1982, there was no occasion for Honnanna to recite in clear terms that he was in possession of the property. In view of the aforesaid, we are of the opinion that the finding recorded by the Trial Court as affirmed by the High Court that defendants did not get possession of the property after execution of the sale deed is on correct appreciation of facts, which do not call for interference in this appeal. In view of this finding, in our opinion, the provision of Section 53A of the Transfer of Property Act is not attracted and defendants cannot take advantage of that.

11. In the result, we do not find any merit in this appeal which is dismissed accordingly but without any order as to the costs.

N.J. Appeal dismissed.

STATE OF MAHARASHTRA AND ORS.
v.
SUBHASH ARJUNDAS KATARIA
(Civil Appeal No.1117 of 2010)

AUGUST 26, 2011

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

*Standards of Weights and Measures Act, 1976 – s.2(b) – "Commodity in packaged form" – "Pre-packed commodity" – In *Whirlpool case, it was held that refrigerator is covered under the term "pre-packed commodity – Placing reliance upon the *Whirlpool case, the appellant-State contended that the products in question (i.e. sun glasses, watches, fixed wireless phones, electrical goods, home appliances, consumer electronics and Microwave Oven) could also be considered as "pre-packed commodity" within the meaning of the Act and the Rules – Respondent however disputed the applicability of the *Whirlpool case on grounds that the issue in that case was in the context of Central Excise Act, and that the judgment was sub silentio as the provisions of the Act were not taken into consideration in the said case – Held: Though the decision in *Whirlpool case was made in the context of the Central Excise Act, it cannot be claimed that the judgment in *Whirlpool case has no bearing on the issues in the instant appeals – Inasmuch as the said decision was rendered by a bench of three Hon'ble Judges with reference to the very same Act and Rules, the issue raised in all these appeals have to be heard by a larger Bench – Standards of Weights and Measures (Packaged Commodities) Rules, 1977 – r. 2(l).*

The question which arose in the present appeals was as to what is the true scope and correct purport of the expression "commodity in packaged form" under Section 2(b) of the Standards of Weights and Measures Act, 1976. In the main Civil Appeal, the specific question

was whether the sun glasses can be considered "pre-packed commodity" under Rule 2(l) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977. In the connected appeals, the product includes Titan watches, fixed wireless phones, sun glasses, electrical goods, home appliances, consumer electronics and Samsung Microwave Oven. The High Court allowed the writ petition filed by the respondent holding that the sun glasses, whether it be a frame or glass is not a "pre-packed commodity" within the definition of the expression "pre-packed commodity" under Rule 2(l) of the Rules. The State of Maharashtra is the appellant in all these appeals.

The appellant-State submitted that the said Rules fell for interpretation before this Court in the case of *Whirlpool wherein it was held that the refrigerator is covered under the term "pre-packed commodity". Placing reliance upon the said decision, the appellant-State submitted that sun glasses are also "pre-packed commodity" within the meaning of the Act and the Rules and that the other products also would come within the above mentioned definition and by applying the ratio in that decision prayed for setting aside the impugned order of the High Court.

The respondent, on the other hand, submitted that the Standards of Weights and Measures Act, 1976 brings in its purview not all the items which are kept in the package to protect or for other reasons but is limited to packaged commodity as defined under the Act, which are being sold by weights or measures or numbers, and which are being sold in a packed form without unpacking such packaged commodities at the time of sale and the sun glasses do not come within the ambit of definition of "commodity in packaged form" in terms of Section 2(b) of the Act nor under the purview of "pre-packed commodity" under Rule 2(l) of the Rules. It was also

highlighted that sunglasses cannot be sold in the packaged condition without opening the packaging since the customer will buy only after comparing, trying it out for size and after checking its aesthetic value, the quality of glass and vision, looks etc and therefore, the sun glasses can never be and are not sold in packaged condition. The respondent further submitted that the ratio of the judgment in *Whirlpool was not at all applicable to the instant case.

Referring the matter to larger Bench, the Court

HELD:1.1. Considering the definition of "commodity in packaged form" as in Section 2(b) of the Standards of Weights and Measures Act, 1976 and that of "pre-packed commodity" as in Rule 2(l) of the of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, the High Court observed that the expression "pre-packaged commodity" would be applicable to:- (i) commodities which are packed, and (ii) the commodity packaged has a pre-determined value and (iii) that value cannot be altered without the package sold being opened at the time of sale, or (iv) the product undergoes a modification on being opened. [Para 7] [715-F-H; 716-A]

1.2. In the case of sun glasses, whether they come in a box or not, insofar as the retailer is concerned, at the time when they are being sold to the consumer, are not in packaged form. Even if it is held that they come in a packaged form, before they are sold to the consumer by removing them from the box, the value does not alter nor does the product undergo a perceptive modification and as such the provisions, particularly, under Section 2(b) of the Act are not applicable. Further, as rightly observed by the High Court, the Explanation to the said Rule is also not attracted because the package is not opened for the purpose of testing as in the case of electric bulbs. It is

clear that the expression "pre-packed commodity" would be applicable to commodities which are packed and the commodity packaged has a pre-determined value and that value cannot be altered without the package sold being opened at the time of sale or the product undergoes a modification on being opened. The Explanation I to Rule 2(l) of the Rules is not attracted because the package is not opened for the purpose of testing as in the case of electric bulbs. The sun glasses are tested by the buyer for his suitability, and therefore, sun glasses, whether it be a frame or glass is not a pre-packed commodity within the definition of the expression "pre-packed" under Rule 2(l) of the Rules, hence, the High Court was fully justified in allowing the writ petition filed by the respondent. Similar arguments advanced relating to other products as mentioned are also acceptable. [Paras 8, 9] [716-B-H]

2. The respondent submitted that the ratio of the judgment in ****Whirlpool* **is not at all applicable to the instant cases, firstly, because the issue in that case was in context of Central Excise Act and, secondly, because none of the aspects stated were taken into consideration by this Court in the matter of ****Whirlpool.* **It was also pointed out that the judgment is *sub silentio* because the provisions of the Act, specially the provisions of Section 2(v) of the Act, were not taken into consideration in the said case. In the context of *sub silentio* reference was made to the judgment of this Court in *****Municipal Corporation of Delhi*, **which according to the respondent, is that a *sub silentio* judgment does not have a binding precedent. By pointing out the same, the respondent prayed that the case of ****Whirlpool* **requires reconsideration and, as a result, the present matter also would be required to be considered by a larger Bench. Though the decision in ****Whirlpool* **was made in the context of the Central Excise Act, it cannot be claimed

that the judgment in ****Whirlpool* **has no bearing on the issues in these appeals. Inasmuch as the said decision was rendered by a bench of three Hon'ble Judges with reference to the very same Act and Rules, the issue raised in all these appeals have to be heard by a larger Bench. [Paras 17, 18] [721-A-G]

******Whirlpool of India Ltd. v. Union of India and Ors.* **(2007) 14 SCC 468 and *****Municipal Corporation of Delhi vs. Gurnam Kaur*, **(1989) 1 SCC 101– referred to.**

Case Law Reference:

(2007) 14 SCC 468	**referred to**	**Para 10, 11, 16, 17, 18**
(1989) 1 SCC 101	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1117 of 2010.

From the Judgment & Order dated 05.05.2006 of the High Court of Judicature at Bombay in Writ Petition No. 120 of 2004.

WITH

C.A. Nos. 1118, 1120, 1121, 1122, 1123 of 2010 &

Crl. A. No. 118 of 2010.

Vijay Hansaria, U.U. Lalit, Shekhar, Naphade, K.V. Viswanathan, Chinmoy Khaladkar, Sanjay Kharde, Asha Gopalan Nair, Shivaji M. Jadhav, Amit Singh, G. Sabharwal, Aneesh Sah, Brij Kishore Sah, Pranab Kumar Mullick, Niraj Singh, Soma Mullick, Meenakshi Middha, Saneha Kalita, Kavita Wadia, Bhargava V. Desai, Rahul Nagpal, Manu Nair, Surjendu Sankar Das, Suresh A. Shroff & Co., Ravinder Narain, Ajay Aggarwal, Mallika Joshi, Amrita Chatterjee, Rajan Narain, Navin Chawla, D.K. Singh, Gaurav Kaushik, Tushar Singh, Raghu Tandon, Pradeep Shukhla, S.M. Jadhav, Amit Singh, G. Sabharwal, Aneesh Sah, Brij Kishore Sah, Sushma Suri,

Anitha Shenoy for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. The principle question which arises in these appeals is as to what is the true scope and correct purport of the expression "*commodity in packaged form*" under Section 2(b) of the Standards of Weights and Measures Act, 1976 (in short 'the Act). In Civil Appeal No. 1117 of 2010, the specific question is whether the sun glasses can be considered "*pre-packed commodity*" under Rule 2(l) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (in short 'the Rules). In the connected appeals, the product includes Titan watches, fixed wireless phones, sun glasses, electrical goods, home appliances, consumer electronics and Samsung Microwave Oven. The State of Maharashtra is the appellant in all these appeals.

2. For convenience, let us briefly state the facts in Civil Appeal No. 1117 of 2010. According to the respondent, he is engaged in the business of trading in sun glasses and has a counter on commission basis at Globus Stores, Bandra. On 17.10.2003, the Inspector of Legal Metrology/Appellant No. 2 herein visited the store and seized five Sun glasses belonging to the respondent and issued a seizure memo. At the time of search, it was explained to him that the sun glasses delivered to them were in polythene bags and some in individual openable pouches. According to them, sometimes, at the time of delivery, they are put in a pouch which is normally on display for the customers to identify for the purpose of purchase. It was also explained that the package, therefore, is only a package for protection or safety of the article. The value of sun glasses whether inside the package or outside the package does not alter if the package is opened nor does it undergo a perceptive modification on the package being opened. The testing of the sunglasses by the customer is for the purpose of determining whether he should purchase the same considering various sizes, designs, colours, aesthetic value, makes and companies

and after trying and ascertaining the suitability, quality etc.

3. It is the grievance of the respondent that in spite of proper explanation, the Inspector/Appellant No. 2 seized the sun glasses for allegedly not declaring name and address of the manufacturer/month and year of manufacturing which is in violation of provisions of the Act and the Rules. It is the claim of the respondent that by force they were compelled to write a letter to the authorities for compounding the offence and directing them to pay Rs. 3,000/- as compounding fee by order dated 30.10.2003.

4. Aggrieved by the action of the appellant, the respondent preferred Writ Petition No. 120 of 2004, inter alia, for quashing of the seizure memo dated 17.10.2003 and also for the order dated 30.10.2003 for the payment of compounding fee. By order dated 05.05.2006, the High Court, by appreciating the submissions made on behalf of the respondent, allowed the writ petition holding that the sun glasses, whether it be a frame or glass is not a "pre-packed commodity" within the definition of the expression "pre-packed commodity" under Rule 2(l) of the Rules. Aggrieved by the said order of the High Court, the appellant-State preferred the present appeal by way of special leave petition.

5. It is the stand of the respondent that the Act brings in its purview not all the items which are kept in the package to protect or for other reasons but is limited to packaged commodity as defined under the Act, which are being sold by weights or measures or numbers, and which are being sold in a packed form without unpacking such packaged commodities at the time of sale and the sun glasses do not come within the ambit of definition of "commodity in packaged form" in terms of Section 2(b) of the Act nor under the purview of "pre-packed commodity" under Rule 2(l) of the Rules. It is also highlighted that sunglasses cannot be sold in the packaged condition without opening the packaging since the customer will buy only after comparing, trying it out for size and after checking its

aesthetic value, the quality of glass and vision, looks etc and therefore, the sun glasses can never be and are not sold in packaged condition.

6. We are concerned about Section 2(b) of the Act and 2(l) of the Rules which read as under:-

"2(b) "Commodity in packaged form" means commodity packaged, whether in any bottle, tin, wrapper or otherwise, in units suitable for sale, whether wholesale or retail."

"2(l) "pre-packed commodity", means a commodity, which without the purchaser being present, is placed in a package of whatever nature, whether sealed or opened, so that the commodity contained therein has a pre-determined value and includes those commodities which could be taken out of the package for testing or examining or inspecting the commodity;

Explanation I - Where, by reason merely of the opening of a package no alteration is caused to the value, quantity, nature or characteristic of the commodity contained therein, such commodity shall be deemed, for the purposes of these rules, to be a pre-packed commodity, for example, an electric bulb or fluorescent tube is a pre-packed commodity, even though the package containing it is required to be opened for testing the commodity.

Explanation II. ……"

7. Considering the above definition, the High Court observed that the expression "*pre-packaged commodity*" would be applicable to:-

(i) commodities which are packed, and

(ii) the commodity packaged has a pre-determined value and

(iii) that value cannot be altered without the package sold being opened at the time of sale, or

(iv) the product undergoes a modification on being opened.

8. As rightly argued by Mr. Shekhar Naphade, learned senior counsel for the respondent, in the case of sun glasses, whether they come in a box or not, insofar as the retailer is concerned, at the time when they are being sold to the consumer, are not in packaged form. Even if we hold that they come in a packaged form, before they are sold to the consumer by removing them from the box, the value does not alter nor does the product undergo a perceptive modification and as such the provisions, particularly, under Section 2(b) of the Act are not applicable. Further, as rightly observed by the High Court, the explanation to the said Rule is also not attracted because the package is not opened for the purpose of testing as in the case of electric bulbs. It was asserted by the learned senior counsel for the respondent that the sun glasses are tested by the buyer for his suitability.

9. Similar arguments were advanced by the respective counsel relating to their respective products. On careful scrutiny of the provisions referred above, it is clear that the expression "*pre-packed commodity*" would be applicable to commodities which are packed and the commodity packaged has a pre-determined value and that value cannot be altered without the package sold being opened at the time of sale or the product undergoes a modification on being opened. We are also of the view that the Explanation I to Rule 2(l) of the Rules is not attracted because the package is not opened for the purpose of testing as in the case of electric bulbs. We fully agree that the sun glasses are tested by the buyer for his suitability, and therefore, sun glasses, whether it be a frame or glass is not a pre-packed commodity within the definition of the expression "*pre-packed*" under Rule 2(l) of the Rules, hence, the High Court is fully justified in quashing the notice and allowing the writ petition filed by the respondent. We also agree with the similar arguments advanced relating to other products mentioned above.

10. Learned counsel appearing for the appellant-State submitted that the very same Rules fell for interpretation before this Court in the case of *Whirlpool of India Ltd. vs. Union of India and Ors.* (2007) 14 SCC 468. Heavily relying on the said decision, the learned counsel submitted that sun glasses are "*pre-packed commodity*" within the meaning of the Act and the Rules. He also submitted that the other products also would come within the above mentioned definition and by applying the ratio in that decision prayed for setting aside the impugned order of the High Court.

11. In order to consider the stand of the State, let us consider the factual position and the ratio laid down in *Whirlpool* (supra). The short question in that matter was as to whether 'refrigerator' is a "packaged commodity" or not. The appellant-Whirlpool was engaged in manufacturing refrigerators. The Central Government issued Notification No. 9 of 2000 dated 01.03.2000 under Sections 4-A(1) and (2) of the Central Excise Act and specified the goods mentioned in Column 3 of the said notification. Entry 48 pertains to the refrigerators whereby the refrigerators invited valuation under Section 4-A of the Central Excise Act with the abatement of 40%. Sections 4-A(1) and (2) of the Central Excise Act require that any goods included in the notification shall be valued on the basis of the maximum retail price (for short "MRP") which is required to be printed on the packages of such goods. The five conditions for inclusion of the goods are:

"(i) The goods should be excisable goods;

(ii) They should be such as are sold in the package;

(iii) There should be requirement in the Act or the Rules made thereunder or any other law to declare the price of such goods relating to their retail price on the package;

(iv) The Central Government must have specified such goods by notification in the Official Gazette;

(v) The valuation of such goods would be as per the declared retail sale price on the packages less the amount of abatement."

12. The appellant felt aggrieved by the fact that the refrigerators were covered and included in the aforementioned Notification dated 01.03.2000 as, according to the appellant, the refrigerator is not such a commodity which is sold in a package. Significantly, the appellant is not aggrieved by its valuation being under Sections 4-A(1) and (2) of the Act. The only complaint that the appellant made is that the appellant should not be required to print MRP on the package of the refrigerator manufactured by it. The appellant, therefore, filed a writ petition before the High Court of Punjab and Haryana praying, inter alia, for a writ of certiorarified mandamus restraining the authorities for taking any coercive measures against the appellant or its Directors, officers, servants or agents for not declaring MRP on the refrigerators manufactured and cleared by the appellant from its factory. The Notification dated 01.03.2000 was challenged to this limited extent only. Before the High Court, the appellant pleaded that refrigerator is not such a commodity which can be termed to be a "packaged commodity" and further the provisions of the Act or the Rules made thereunder are not applicable to the refrigerator at all. It was, therefore, prayed that the notification was liable to be quashed only to the extent that it included the refrigerator and the requirement of declaring MRP on the refrigerator.

13. The respondent authorities, however, maintained that the refrigerator was in fact sold in a package of polythene cover, thermocol, hardboard cartons, etc. and thus it falls in the category of "pre-packed commodity". On that basis it was contended that since every packaged commodity was included in the Act and the Rules made thereunder, there can be no escape from printing MRP on the package. The High Court rejected the contention and dismissed the petition filed by the appellant.

14. It was vehemently contended before a three-Judge Bench by the counsel for the appellant that a 'refrigerator' is not sold in a "packaged form". It was further contended that even if it is sold in the packaged form, when it is displayed by the dealers, it is not in the packaged form and the customers can take the inspection of the refrigerator and at least for that purpose the package has to be opened and, therefore, there would be no question of the refrigerator being included in the Act or the Rules made thereunder. Rejecting the said submission as incorrect, this Court concluded as under:-

> "5. It was not disputed before the High Court and also before us that the appellant manufacturer has to sell the refrigerators which are packed in polythene cover, thermocol, etc. and placed in hardboard cartons. In fact the appellant had so pleaded before the High Court in para 3 to which a reference has been made by the High Court. Once that position is clear, then the refrigerator clearly becomes a commodity in the packaged form. The use of the term "or otherwise" in the definition would suggest that a commodity if packed in any manner in units suitable for sale, whether wholesale or retail, becomes a "commodity in packed form…"

15. After adverting to Rule 2(l) "*pre-packed commodity*" and Explanation I, their Lordships have held that refrigerator is covered under the term "*pre-packed commodity*" and concluded that:

> "6. ….Even if the package of the refrigerator is required to be opened for testing, even then the refrigerator would continue to be a "*pre-packed commodity*". There are various types of packages defined under the Rules and ultimately Rule 3 specifically suggests that the provisions of Chapter II would apply to the packages intended for "retail sale" and the expression "package" would be construed accordingly.
>
> 7. It is not disputed before us that the sale of the refrigerator is covered under the "retail sale". Once that position is clear Rule 6 would specifically include the refrigerator and would carry along with it the requirements by that Rule of printing certain information including the sale price on the package. Thus it is clear that by being sold by the manufacturer in a packaged form, the refrigerator would be covered by the provisions of the SWM Act and the SWM (PC) Rules and it would be imperative that MRP has to be printed in terms of Rule 6 which has been referred to above.
>
> 8. The High Court has also made a reference to Rule 2(l) and more particularly, the Explanation to which we have referred to earlier. In our view the reliance by the High Court on Rule 2(l) is correct. Learned counsel tried to urge that every customer would like to open the package before finalising to purchase the refrigerator. He would at least get it tested and for that purpose the package would be destroyed. That may be so but it does not change the position as rightly observed by the High Court.
>
> 9. It was tried to be suggested that MRP would be different depending upon the area in which it is being sold. That may be so, however, that cannot absolve the manufacturer from displaying the price i.e. MRP on the package in which the refrigerator is packed. Whatever be the situation, it is clear that a refrigerator is a "packaged commodity" and thus is covered under the SWM Act and the SWM (PC) Rules and, therefore, the Notification dated 1-3-2000 cannot be faulted on that ground…."

16. By heavily relying on the above dictum with reference to the very same provisions by this Court in the *Whirlpool* (supra), the appellant-State submitted that in view of substantive definition of the main section read with the Rules, the sun glasses are "pre-packed commodity" within the meaning of the Act and the Rules thereof. The appellant-State also submitted that similar analogy is to be applied for other products also.

17. Learned senior counsel appearing for the respondent vehemently submitted that the ratio of the judgment in *Whirlpool* (supra) is not at all applicable to these cases, firstly, because the issue in that case was in context of Central Excise Act and, secondly, because none of the aspects stated have been taken into consideration by this Court in the matter of *Whirlpool* (supra). It is also pointed out that the judgment is sub silentio because the provisions of the Act, specially the provisions of Section 2(v) of the Act, have not been taken into consideration in the said case. In the context of sub silentio reference is made to the judgment of this Court in *Municipal Corporation of Delhi vs. Gurnam Kaur,* (1989) 1 SCC 101, which according to the counsel for the respondent, is that a sub silentio judgment does not have a binding precedent. By pointing out the same, the counsel for the respondent prayed that the case of *Whirlpool* (supra) requires reconsideration and, as a result, the present matter also would be required to be considered by a larger Bench.

18. Though it was pointed out that the decision in *Whirlpool* (supra) was made in the context of the Central Excise Act, we have already extracted the question which fell for consideration, relevant provisions from the Act and the Rules, discussion as to the applicability, and the ultimate conclusion in para 9, namely, "whatever be the situation, it is clear that a refrigerator is a "packaged commodity" and thus is covered under the Act and the Rules." In view of the same, it cannot be claimed that the judgment in *Whirlpool* (supra) has no bearing on the issues in these appeals. Inasmuch as the said decision was rendered by a bench of three Hon'ble Judges with reference to the very same Act and Rules, we are of the view that the issue raised in all these appeals have to be heard by a larger Bench.

19. Accordingly, we direct the Registry to place all these appeals before Hon'ble the Chief Justice of India for listing before a larger Bench.

B.B.B. Matters referred to Larger Bench.

THE STATE OF MAHARASHTRA AND ORS.
v.
RAJ MARKETING & ANR.
(Civil Appeal No. 1119 of 2010)

AUGUST 26, 2011

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

Standards of Weights and Measures (Packaged Commodities) Rules, 1977 – Rule 2(x) – "Wholesale package" – Declaration to be made on every wholesale package" – Held: In order to attract violation of the Rules, the package seized must fall within the expression "wholesale package" – A package used merely for protection during conveyance or safety would not be pre-packed commodity for the purpose of the Act and the Rules – For the package to be treated as a wholesale package, the package must not be a secondary package – The secondary outer packing for transportation or for safety of the goods being transported or delivered cannot be described as a wholesale package – Standards of Weights and Measures Act, 1976.

The respondent is a firm carrying on the business of buying and selling various products. The second appellant/ Inspector of Legal Metrology visited the first respondent's godown and seized various packages of packed commodities such as Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta etc. vide seizure memo. The reason for seizure, according to him, was that on the wholesale packets, the details regarding the name and addresses of the manufacturer, cost, month, year etc. was not declared and also the retail sale price was not mentioned which was in violation of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977. A show cause notice was

issued by the appellant to the respondent for violation of Section/Rule 33 and 39 read with Rule 23(1) and 6 of the Rules. It was mentioned in the said notice that the offence was compoundable as per Section 73 of the Standards of Weights and Measures Act, 1976 and Section 65 of the Standards of Weights and Measures (Enforcement) Act, 1985. The respondents replied to the said notice and thereafter filed Writ Petition, *inter alia*, for quashing the seizure memo and notice.

The High Court allowed the writ petition by holding that the packages containing Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta are not wholesale package within the definition of the expression "wholesale package" under Rule 2(x) of the Rules. Questioning the said order of the High Court, the State filed the present appeal.

Dismissing the appeal, the Court

HELD : Rule 2(x) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 define "wholesale package" while Rule 29 of the Rules concerns "declaration to be made on every wholesale package". In order to attract violation of the said Rules, the package seized must fall within the expression "wholesale package". A package used merely for protection during conveyance or safety would not be pre-packed commodity for the purpose of the Act and the Rules. As rightly observed by the High Court that for the package to be treated as a wholesale package, the package must not be a secondary package. In that event, one has to find out whether the secondary package is only for safety, convenience or the like. As demonstrated before the High Court, the Ist respondent placed all the products before this Court i.e. both the wholesale package as well as the retail package. The Department's only contention was

that the secondary package in which the wholesale package was packed does not contain the said information. In the light of the statutory provisions and on verification of the products shown, it is clear that the secondary outer packing for transportation or for safety of the goods being transported or delivered cannot be described as a wholesale package. [Paras 7, 8 and 9] [726-D-H; 727-C-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1119 of 2010 etc.

From the Judgment & Order dated 08.12.2006 of the High Court of Judicature at Bombay in Writ Petition No. 2982 of 2006.

Vijay Hansaria, U.U. Lalit Shekhar Naphade, K.V. Viswanathan, Chinmoy Khaladkar, Snajay Kharde, Asha Gopalan Nair, Shivaji M. Jadhav, Amit Singh, G. Sabharwal, Aneesh Sah, Brij Kishore Sah, Pranab Kumar Mullick, Niraj Singh, Soma Mullick, Meenakshi Middha, Saneha Kalita, Kavita Wadia, Bhargava V. Desai, Rahul Nagpal, Manu Nair, Surjendu Sankar Das, Suresh A. Shroff & Co., Ravinder Narain, Ajay Aggarwal, Mallika Joshi, Amritha Chatterjee, Rajan Narain, Navin Chawla, D.K. Singh, Gaurav Kaushik, Tushar Singh, Raghu Tandon, Pradeep Shukhla, S.M. Jadhav, Amit Singh, G. Sabharwal, Aneesh Sah, Brij Kishore Sah, Sushma Suri, Anitha Shenoy for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal by State of Maharashtra is directed against the judgment and order dated 08.12.2006 passed by the High Court of Judicature at Bombay in Writ Petition No. 2982 of 2006 whereby the High Court allowed the writ petition of the Ist respondent herein.

2. The issue involved in this appeal is whether Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta etc. can be considered as a "*wholesale package*" within the definition of the expression "*wholesale package*" under Rule 2(x) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (hereinafter referred to as "the Rules").

3. Brief facts:

a) The respondent is a firm carrying on the business of buying and selling various products and they used to store these products in their godown at Gali No.8, Senior Tyre Compound, N.S.S. Road, Narayan Nagar, Ghatkopar (W) Mumbai.

b) On 31.10.2006, the second appellant/Inspector of Legal Metrology, Mumbai visited the first respondent's godown and seized various packages of packed commodities such as Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta etc. vide seizure memo bearing Nos. 0114769 and 0114770 dated 31.10.2006. The reason for seizure, according to him, is that on the wholesale packets, the details regarding the name and addresses of the manufacturer, cost, month, year etc. has not been declared and also the retail sale price was not mentioned which is in violation of the Rules.

c) A show cause notice dated 06.11.2006 has been issued by the appellant to the respondent for the violation of Section/ Rule 33 and 39 read with Rule 23(1) and 6 of the Rules. It was mentioned in the said notice that the offence is compoundable as per Section 73 of the Standards of Weights and Measures Act, 1976 and Section 65 of the Standards of Weights and Measures (Enforcement) Act, 1985.

d) On 18.11.2006, the respondents, vide their letter, replied to the notice dated 06.11.2006.

e) On 28.11.2006, the respondents filed Writ Petition being W.P. No. 2982 of 2006, inter alia, for quashing the seizure memo dated 31.10.2006 and notice dated 06.11.2006.

4. The High Court, by impugned order dated 08.12.2006 allowed the writ petition by holding that the packages containing Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta are not wholesale package within the definition of the expression "*wholesale package*" under Rule 2(x) of the Rules.

5. Questioning the said order of the High Court, the State filed the above appeal by way of special leave.

6. Heard Mr. Chinmoy Khaladkar, learned counsel for the appellant-State and Mr. Ravinder Narain for respondent No.1.

7. Rule 2(x) of the Rules define "*wholesale package*" to mean:

"(x) "wholesale package" means a package containing-

(i) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to a intermediary and is not intended for sale direct to a single consumer; or

(ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities; or

(iii) packages containing ten or more than ten retail packages provided that the retail packages are labeled as required under the rules."

8. Rule 29 of the Rules read as under:

"29. Declaration to be made on every wholesale package.- Every wholesale package shall bear thereon a legible, definite, plain and conspicuous declaration as to,-

(a) the name and address of the manufacturer or where the manufacturer is not the packer, of the packer;

(b) the identity of the commodity contained in the package; and

(c) the total number of retail packages contained in such

wholesale package or the net quantity in terms of standard units of weights, measures or number of the commodity contained in wholesale package:

Provided that nothing in this rule shall apply in relation to a wholesale package if a declaration similar to the declaration specified in this rule, is required to be made on such wholesale packages by or under any other law for the time being in force."

9. In order to attract violation of the Rules referred above, the package seized must fall within the expression "*wholesale package*". A package used merely for protection during conveyance or safety would not be pre-packed commodity for the purpose of the Act and the Rules. As rightly observed by the High Court that for the package to be treated as a wholesale package, the package must not be a secondary package. In that event, we have to find out whether the secondary package is only for safety, convenience or the like. As demonstrated before the High Court, the counsel appearing for the Ist respondent placed all the above-mentioned products before us i.e. both the wholesale package as well as the retail package. The Department's only contention was that the secondary package in which the wholesale package was packed does not contain the said information. In the light of the provisions which we have referred above and on verification of the products which were shown to us, we are of the view that the secondary outer packing for transportation or for safety of the goods being transported or delivered cannot be described as a wholesale package.

10. On going through the statutory provisions which we have adverted to in the earlier paras and on verification of the products which were shown to us during the course of argument, we fully agree with the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed with no order as to costs.

B.B.B. Appeal dismissed.

STATE OF PUNJAB & ORS.

v.

JAGDISH KAUR

(Civil Appeal No.2897 of 2006)

AUGUST 26, 2011

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

SERVICE LAW:

Promotion from Class-IV to Class-III posts – Requirement of typing test in Punjabi – Held: In view of circular of Government of Punjab dated 24.08.1983, requirement of the test in Punjabi typewriting at the speed of 30 w.p.m. is manifestly a criteria for promotion from Class-IV to Class-III posts – The order of High Court striking down the requirement is untenable – Since one of the employee has been promoted and the other has the order of the High Court in her favour, the latter should also be promoted and they should qualify the typing test as stated in the order – Since in case of direct recruitment to a class III post the qualification of typing in Punjabi as a requirement has been greatly relaxed, State Government advised to review the criteria for promotion from class IV to class III posts and to bring them at par with the requirements for direct recruitment to class III posts.

In the instant appeals, the State Government challenged the order of the High Court by which it struck down the requirement of typing test in Punjabi as an eligibility criterion for promotion from Class IV to Class III posts in the State Government service.

Allowing the appeals, the Court

HELD: 1.1 The High Court was in error in making the

Punjab Civil Services (General and Common Conditions of Service) Rules, 1994 ("1994 Rules"), the basis of its judgment. The 1994 Rules, which have been framed under the proviso to Article 309 of the Constitution of India, are exclusively in respect of the appointments, by direct recruitment, to class I, class II and class III services in the State Government. Even r. 15 of the said Rules, as originally framed prescribing qualification of typing test was amended by Notification dated June 23, 1999, and as a result, the qualification of typing that earlier used to be an essential requirement for appointment ceased to be a precondition and can now be acquired within a period of one year from the date of appointment failing which no annual increments would be allowed. It is, thus, clear that in case of direct recruitment to a class III post, the qualification of typing in Punjabi as a requirement for appointment has been considerably relaxed. [Paras 7 and 8] [734-F-H; 735-A-B-F-G]

1.2 However, the 1994 Rules do not deal with appointments to class IV posts nor do they provide for promotion from class IV as a mode of recruitment to class III posts. Therefore, there is no question of finding in the 1994 Rules any provision dealing with the eligibility criteria for promotion from class IV to class III posts. The High Court was, therefore, quite wrong in drawing the inference that while qualifying the typewriting test in Punjabi is a condition for direct recruitment, it was not a pre-condition for promotion. [Para 9] [735-H; 736-A-B]

1.3 The provision for promotion from class IV to class III posts was first made in the Government Circular letter No.4/17/79-IPP/1973, dated August 24, 1983. It contained a provision for a qualifying test in Punjabi typewriting. The said Government Order was amended by Circular dated October 27, 1998. The later circular increased the quota for promotion from 10% to 15% but retained the

qualification of Punjabi typewriting as prescribed in the earlier order. It is well-settled that in the absence of statutory rules on any subject, the relevant Government Orders would hold the field. [Paras 10 and 11] [736-C-G; 737-A-B]

Sant Ram Sharma Vs. State of Rajasthan & Anr. **AIR 1967 SC 1910= 1968 SCR 111;** *Ashok Kumar Shrivastava & Ors*. *Vs. Ram Lal & Ors*. **(2008) 3 SCC 148= 2008 (1) SCR 299;** *Shiba Shankar Mohapatra & Ors. Vs. State of Orissa & Ors*. **(2010) 12 SCC 471= 2009 (15) SCR 866 – relied on.**

1.4. Thus, the requirement of qualifying the test in Punjabi typewriting at the speed of 30 w.p.m. is manifestly a criterion for promotion from class IV to class III post. Therefore, the orders passed by the High Court are untenable. [Para 12] [737-D]

1.5 Following the order passed by the High Court, the respondent in C.A. No. 4134 of 2006 was promoted to a class III post on which he is working since then. The respondent in C.A. No. 2897 of 2006 though, not promoted on account of the stay order passed by this Court, had the order of the High Court in her favour for the past seven years. It is, therefore, directed that she too should be promoted to a class III post. However, the promotions given to both the respondent would be subject to their qualifying in the typewriting test in Punjabi at the speed of 30 w.p.m. within one year in the case of the respondent in C.A. No. 4134 of 2006 and within one year from her promotion, in the case of the respondent in C.A. No. 2897 of 2006, failing which they may be reverted back to their substantive posts in class IV. [Para 13] [737-E-G]

2. It is seen that in case of direct recruitment to a class III post the qualification of typing in Punjabi as a

requirement has been greatly relaxed. It may be legally permissible for the State to have different standards for direct recruitment and for recruitment by promotion, but in fairness the State would be well advised to review the criteria for promotion from class IV to class III posts and to bring them at par with the requirements for direct recruitment to class III posts. [Para 14] [738-A-B]

Case Law Reference:

1968 SCR 111	**Relied on**	**Para 11**
2008 (1) SCR 299	**Relied on**	**Para 11**
2009 (15) SCR 866	**Relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2897 of 2006.

From the Judgment & Order dated 20.02.2004 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 11758 of 2003.

WITH

C.A. No. 4134 of 2006.

H.M. Singh (for Ajay Pal) for the Appellants.

A.P. Mohanty, Sudha Gupta, Jagjit Singh Chhabra for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. These two appeals, at the instance of the State of Punjab and its officials, are directed against orders passed by the Punjab and Haryana High Court by which it knocked down the requirement of passing typing test in Punjabi at the speed of 30 words per minute (w.p.m.) as an eligibility criterion for promotion from class IV to class III posts in the State Government service.

2. Jagdish Kaur, the respondent in Civil Appeal No.2897 of 2006 was appointed as a Peon in the Government High School Vairwal, Tehsil Tarn Taran, District Amritsar, on February 21, 1978. Her appointment was made on compassionate grounds following her husband's death in harness on January 14, 1977. At the time of her appointment, she had passed matriculation examination in 3rd division. After joining the service, she passed the Senior Secondary School Examination from the Punjab School Education Board in 2nd division in the year 1992. According to her case, after passing the plus two examination, she became eligible for promotion to a class III post and she, accordingly, moved the concerned authorities for her promotion. However, getting no favourable response from them, she approached the Punjab and Haryana High Court in CWP No.11758 of 2003 seeking appropriate reliefs.

3. Harjinder Singh, respondent No.1, in Civil Appeal No.4134 of 2006, similarly joined as a Peon in the department of technical education on April 7, 1992. He was a matriculate at that time. According to his case, another person, namely, Baldev Singh, who was junior to him in class IV, was given promotion to a class III post in supersession of his claim. He too, therefore, moved the Punjab and Haryana High Court in CWP No.729 of 2004 seeking a direction to the concerned authorities to promote him to a class III post.

4. The writ petition filed by Jagdish Kaur was allowed by order passed by a Division Bench of the High Court on February 20, 2004. Later on the writ petition of Harjinder Singh came up before another Division Bench of the court and following the order passed in the case of Jagdish Kaur that too was allowed by order dated July, 1, 2005.

5. Following the order passed by the High Court, Harjinder Singh was given promotion and is working on a class III post since then. In the case of Jagdish Kaur, however, this Court stayed the operation of the impugned order of the High Court

while issuing notice on April 18, 2005. As a result she continues to work on the class IV post.

6. Before the High Court, the case of the State was that the two writ petitioners (respondents in the two appeals before this Court) could only be considered for promotion in their turn on the basis of seniority. Moreover, they were not eligible for promotion from class IV to class III posts since they had not passed the typewriting test in Punjabi with the minimum speed of 30 w.p.m. The High Court did not take any objection to denial of promotion on the basis of seniority but went on to examine the requirement of passing the typing test in Punjabi as a condition for promotion to a class III post. It came to find that the condition of qualifying in typing test in Punjabi was illegal, arbitrary and unenforceable and, consequently, held and directed as follows:-

> "Accordingly, the instant petition is allowed. The action of the authorities in requiring members of Class IV service to possess Punjabi typewriting test as a pre-condition for promotion to the post of Clerk is held to be illegal. The claim of the petitioner for promotion to the post of Clerk shall now be considered by re-determining her eligibility without insisting upon the earlier pre-condition having to pass the typewriting test in Punjabi. In case the petitioner is otherwise qualified, her claim shall be considered for promotion to the post of Clerk, without any further delay. If she is found suitable, she shall be promoted to the post of Clerk, with effect from the date, persons junior to her were promoted as such. The aforesaid exercise be carried out and completed within three months from today."

The finding of the High Court is primarily based on the provisions of the Punjab Civil Services (General and Common Conditions of Service) Rules, 1994 (in short "1994 Rules"). The High Court observed that in the statutory rules, the requirement of qualifying the typewriting test in Punjabi with a minimum speed of 30 w.p.m. was for direct recruitment to a class III post

but there was no such requirement for promotion from Class IV to class III posts. In this regard the High Court made the following observations:-

> "In the present case also, in the absence of any statutory provision to the contrary, the Punjab Civil Services (General & Common Conditions) Rules, 1994 (hereinafter referred to as the 1994 Rules), would be relevant to determine the controversy in hand. Under the 1994 Rules, the rule making authority laid down the requirement of qualifying the typewriting test in Punjabi with a minimum speed of 30 words per minute within one year of the date of the direct recruitment. *The 1994 Rules did not lay down such a pre-condition/stipulation for appointment by promotion to the post of Clerk. The inference, that is liable to be drawn from the conditions delineated under the 1994 Rules, is that while qualifying the typewriting test in Punjabi is a condition for direct recruitment, it is not a pre-condition for promotion*."
>
> (emphasis added)

The High Court, then, proceeded to observe that in the absence of any provision in the statutory rules, no such requirement could be introduced through any Government Order. Hence, it held the stand of the State Government untenable and made the directions, as noted above.

7. To us it appears that the High Court was in error in making the 1994 Rules, the basis of its judgment. We have gone through the 1994 Rules. The rules framed under the proviso to Article 309 of the Constitution of India are exclusively in respect of the appointments, by direct recruitment, to class I, class II and class III services in the State Government. Rule 15 which is in two parts lays down the eligibility for appointment to the post of Clerk; sub-rule (a) prescribes matriculation in second division or passing senior secondary part II examination from a recognized University as the minimum educational

qualification and sub-rule (b), as originally framed, made qualifying a test in Punjabi typewriting at the speed of 30 w.p.m. as the essential pre-requisite for appointment to a post of clerk in the Punjab Government. It may be noted that Rule 15 was amended by Notification dated June 23, 1999 and the amended rule reads as under.

`"15. Minimum educational qualification and other qualifications:-

(1) No person shall be appointed by direct appointment to the post of a clerk under the Punjab Government unless he is matriculate in Second Division or has passed Senior Secondary Part III Examination from recognized university or institution.

(2) The person so appointed as Clerk in terms of sub-rule (1) shall have to qualify a test in Punjabi typewriting to be conducted by the Board or by the appointing authority at the speed of thirty words per minute within a period of one year from the date of his appointment.

(3) In case the persons fails to qualify the said test within the period specified in sub-rule (2) he shall be allowed annual increment only with effect from the date he qualifies such test, but he shall not be paid any arrear for the period, for which he could not qualify the said test."

8. As a result of the amendment the qualification of typing that earlier used to be an essential requirement for appointment ceases to be a precondition and can now be acquired within a period of one year from the date of appointment failing which no annual increments would be allowed. It is, thus, clear that in case of direct recruitment to a class III post the qualification of typing in Punjabi as a requirement for appointment has been considerably relaxed.

9. The significant thing to note, however, is that the 1994 Rules do not deal with appointments to class IV posts and do

not provide for promotion from class IV as a mode of recruitment to class III posts. Hence, there is no question of finding in the 1994 Rules any provision dealing with the eligibility criteria for promotion from class IV to class III posts. The High Court was, therefore, quite wrong in drawing the inference that while qualifying the typewriting test in Punjabi is a condition for direct recruitment, it was not a pre-condition for promotion.

10. Coming now to the issue of promotion from class IV to class III posts, the provision was first made in the Government Circular letter No.4/17/79-IPP/1973, dated August 24, 1983. Paragraphs (i) and (ii) of the circular letter read as follows:-

"(i) There should be a provision for filling up 10% of Class III posts by promotion from amongst Class IV employees, who possess a minimum educational qualification of matriculation (with Punjabi) and have a minimum of 5 years' experience as such;

(ii) There should be a provision for a qualifying test in Punjabi typewriting which should be equal to the one prescribed by the Subordinate Services Selection Board for such posts and it should be made essential to pass the test before a Class IV employee is considered eligible for promotion. The test may be held by the appointing authority or any such authority to whom the powers for doing so are delegated by the appointing authority."

The aforesaid Government Order was amended by Circular dated October 27, 1998. The later circular increased the quota for promotion from 10% to 15% but retained the qualification of Punjabi typewriting as prescribed in the earlier order. Paragraph 2 of the circular letter dated October 27, 1998, reads as follows:-

"There should be provision for a qualified test of Punjabi typewriting which should be equal to the one prescribed

by the S.S.S. Board for such posts and it should be made essential to pass the test before a Class IV employee is considered eligible for promotion. The test may be held by the appointing authority or any such authority to whom the powers for doing so are delegated by the appointing authority."

11. It is well-settled that in the absence of statutory rules on any subject, the relevant Government Orders would hold the field. [See: *Sant Ram Sharma Vs State of Rajasthan & Anr.,* AIR 1967 SC 1910*, Ashok Kumar Shrivastava & Ors. Vs. Ram Lal & Ors.,* (2008) 3 SCC 148, *Shiba Shankar Mohapatra & Ors. Vs. State of Orissa & Ors.* (2010) 12 SCC 471.]

12. In light of the above, the requirement of qualifying the test in Punjabi typewriting at the speed of 30 w.p.m. is manifestly a criterion for promotion from class IV to class III post. We are, therefore, clearly of the view that the orders passed by the High Court are untenable and we are constrained to set aside those orders.

13. Coming now to the specific cases of the two respondents, it is noted above that following the order passed by the High Court, Harjinder Singh was promoted to a class III post on which he is working since then. Jagdish Kaur, though, not promoted on account of the stay order passed by this Court, had the order of the High Court (though now set aside) in her favour for the past seven years. We, accordingly, direct that she too should be promoted to a class III post. However, the promotions given to Harjinder Singh and Jagdish Kaur would be subject to their qualifying in the typewriting test in Punjabi at the speed of 30 w.p.m. within one year from today in the case of Harjinder Singh and within one year from her promotion in the case of Jagdish Kaur, failing which they may be reverted back to their substantive posts in class IV.

14. Before parting with the records of the case, however,

we must put in a caveat. It is seen above that in case of direct recruitment to a class III post the qualification of typing in Punjabi as a requirement has been greatly relaxed. It may be legally permissible for the State to have different standards for direct recruitment and for recruitment by promotion but in fairness the State would be well advised to review the criteria for promotion from class IV to class III posts and to bring them at par with the requirements for direct recruitment to class III posts.

15. In the result, the appeals are allowed subject to the observations and directions made above.

R.P. Appeals allowed.

RAGHUBIR SINGH
v.
STATE OF RAJASTHAN AND ORS.
(Criminal Appeal Nos.82-83 of 2005)

AUGUST 29, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860: s.302 – Murder on account of dispute over land – Dispute was as to who was in possession of land, the complainant party or the accused – On fateful day, complainant party started ploughing the said land – Accused party also reaching there and started ploughing – Fight ensued – Injuries sustained by both the sides – Accused 'K' attacked victim with weapon which resulted in his death – Other accused also attacked complainant party – Trial Court convicted 7 of the 9 accused including 'K' u/ss.302, 302/149, 307, 307/149 – High Court modified conviction of 'K' to s.304 Part II – Conviction of three other accused modified to s.324 and another accused to s.325 respectively – On appeal, held: Injury suffered by victim was attributed by the witnesses to accused 'K' – Medical evidence proved that the said injury was by the weapon used by accused 'K' and the extent and gravity of the injury showed that accused 'K' had the intention to cause death of the victim – Evidence also showed that the said injury was sufficient to cause death in the normal course of nature – Injuries attributed to the other three accused were simple in nature and cannot be said to have been the cause of death – Therefore, accused 'K' held guilty under s.302 for having caused the murder of the victim and the judgment of the trial court to that limited extent restored – Appeals of other accused dismissed.

Criminal law: Explanation of injuries sustained by the accused – Held: Each and every injury on an accused is not required to be explained and more particularly where all the

injuries caused to the accused are simple in nature – The facts of the case have to be assessed on the nature of probabilities – In the instant case, the injuries on the accused were not explained as the prosecution witness did not utter a single word as to how they had been suffered by them – In this view of the matter, the defence can legitimately raise a suspicion that the genesis of the incident was shrouded in mystery – Undoubtedly, there were a large number of injured witnesses, some of them grievously hurt, to support the prosecution case, but in the instant case, this fact by itself cannot preclude the accused from claiming that no case was made out against them.

Appeal against acquittal: Acquittal by High Court – Scope of interference u/Article 136 – Held: If view taken by High Court was plausible or possible, it would not be proper for the Supreme Court to interfere with an order of acquittal – Various circumstances when Supreme Court would interfere with the judgment of the High Court enumerated – Constitution of India, 1950 – Article 136.

The prosecution case was that the land on which incident took place was mortgaged to the appellant-PW-1 several years prior to the date of incident. On the fateful day, PW-1 along with the victim-deceased and others were ploughing the land when one of the accused reached that place on two tractors and also started ploughing the same land. PW-1 protested at this on which the accused attempted to run him over with their tractors. In the meanwhile, the other accused persons armed with farsis, lathis, tanchias, dantis attacked them and ran over victim with their tractors and when PW-1 attempted to intervene, he was also given blows with their weapons. The trial court convicted 7 of the 9 accused under sections 302, 302/149, 307, 307/149 IPC.

The convict accused filed appeals before the High Court. The appellant-PW-1 filed revision against the

acquittal of the two accused. The High Court held that the land on which the incident took place belonged to the Forest Department and was adjacent to the fields of the accused and the complainant party had on the fateful day gone for the first time to cultivate the said land, although patwari had advised them not to do so. It further held that the accused appeared to be in possession of the said land and finding that the complainant party had trespassed into it and had started ploughing on which a free fight ensued and persons from both the sides received injuries. The High Court concluded that in that view of the matter, the provisions of Sections 147, 148 and 149 could not be attracted and each of the accused was to be held liable and responsible for his individual act. Accordingly the conviction of the accused were modified. Conviction of accused 'K' under sections 302, 302/149, 307, 307/149 IPC was set aside instead he was convicted under Section 304 Part II, IPC. Conviction of 'A', 'S, 'M' under Sections 302, 302/149, 307, 307/149 IPC was set aside, however their conviction under Section 324, IPC was confirmed. Conviction of 'Ka' under sections 302, 302/149, 307, 307/149 IPC was set aside, however his conviction under Section 325 IPC was confirmed. Appeal of 'R' was allowed and he was acquitted. One of the accused 'RK' died during pendency of appeal and proceeding against him was dropped. The instant appeals were filed by the State as well as by PW-1.

Allowing the appeals, the Court

HELD: 1. If the view taken by the High Court was plausible or possible, it would not be proper for the Supreme Court to interfere with an order of acquittal. The Supreme Court would interfere with the judgment of the High Court in the circumstances when (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position; (ii) The High Court's

conclusion are contrary to evidence and documents on record; (iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice. (iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; (v) The Supreme Court must always give proper weight and consideration to the findings of the High Court.(vi) The Supreme Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal. These circumstances are however illustrative and not exhaustive: The interference with the order of the High Court has to be based on these parameters. In the instant case, the injuries on the accused were not explained as the prosecution witness did not utter a single word as to how they had been suffered by them. In this view of the matter, the defence can legitimately raise a suspicion that the genesis of the incident was shrouded in mystery and the prosecution had suppressed a part of the proceeding. It is true that each and every injury on an accused is not required to be explained and more particularly where all the injuries caused to the accused are simple in nature (as in the instant case) and the facts of the case have to be assessed on the nature of probabilities. The injuries in the instant case were required to be explained as there was a serious dispute as to the possession of the land in which the incident had happened, more particularly as PW-1 himself was uncertain as to the nature of the possession as per the statements on record and the Patwari had also warned the complainant party not to trespass into the land. Undoubtedly, there were a large number of injured witnesses, some of them grievously hurt, to support the prosecution case, but in the light of the finding of the High Court that there was uncertainty about the possession, this fact by itself cannot preclude the

accused from claiming that no case was made out against them. PW-3, one of the injured witnesses, had admitted in his cross examination that the quarrel took place suddenly and that the rival groups were both saying that they would sow the land. This statement was also supported by the evidence of PW-17, the investigating officer, who also admitted that as per the Patwari, the fight had taken place on the land possessed freshly and belonging to one 'G' and 'D' and that the land was under the possession of the complainant party. This statement was at variance with the evidence of the other witness particularly PW-1 as he stated that they had been in possession of the land in question for almost 20 years. There was also a doubt as to the site of the incident. The dead body and the cultivator were recovered from the house of PW-1. PW-17 admitted that no blood stained earth was lifted from the site. In the light of the facts, it would be seen that the observations of the High Court that both sides had come to do battle appeared to be justified as this was an assessment on an appreciation of the evidence which cannot be said to be palpably wrong so as to invite the intervention of this Court. The observation in *Gajanand's case that in order to bring the matter within a free fight both sides have to come armed and prepared to do battle must be applied in the present case with the result that each accused would be liable for his individual act. [Para 5] [750-E-H; 751-A-H; 753-A-H; 753-A]

Gajanand & Ors. vs. State of U.P. **AIR 1954 SC 695 – relied on.**

Bhanwar Singh & Ors. vs. State of M.P. **(2008) 16 SCC 657: 2008 (15) SCR 879 – held inapplicable.**

State of U.P. vs. Banne **(2009) 4 SCC 271 – referred to.**

2. The injury with the cultivator was injury No.1 which

was the fatal injury and was attributed by the witnesses to accused 'K'. The contention that the story that the cultivator had first been lifted and then dropped on the victim could not be believed as PW-1 did not mention this fact in his evidence although the other witnesses had done so and as such, this story was improbable. Even assuming, however, that the cultivator had not been lifted and then dropped yet injury No.1 had been caused with a cultivator was clear from the medical evidence and the extent and gravity of the injury showed that accused 'K' had the intention to cause death of the victim. It was also clear from the evidence that injury No.1 was sufficient to cause death in the normal course of nature. The injuries attributed to the other three accused were simple in nature and can, by no stretch of imagination, be said to have been the cause of death. In the light of the fact that the instant case is that of a free fight, accused 'A', 'M' and 'RK' must be made responsible for their respective injuries. 'RK', however died while the matter was in the High Court. Therefore, in so far as accused 'K' is concerned, his conviction under Section 304 Part II of the IPC even on the findings recorded by the High Court was erroneous. Accused 'K' is held guilty under Section 302 of the IPC for having caused the murder of the victim and the judgment of the trial court to that limited extent is restored. In so far the other accused were concerned, the order of the High Court is not interfered with. [Para 6] [753-H-; 754-A-F]

Case Law Reference:

AIR 1954 SC 695	**relied on**	**Para 4, 5**
2008 (15) SCR 879	**held inapplicable**	**Para 4, 5**
(2009) 4 SCC 271	**referred to**	**Para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 82-83 of 2005.

From the Judgment & Order dated 10.09.2003 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 796 of 1998 and D.B. Cr. Revision Petition No. 188 of 1999.

WITH

Crl. Appeal No. 778 of 2005.

Dr. Manish Sighvi, AAG, Anitha Shenoy, Rashmi Nandakumar, Ansar Ahmad Chaudhary, Vibha Datta Makhija, Lima Datta, VIjay Verma, Milind Kumar, Aruneshwar Gupta for the appearing parties.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. This judgment will dispose of Criminal Appeal Nos. 82-83 and 778 of 2005. The facts have been taken from Criminal Appeal No. 778 of 2005.

2. As per the prosecution story, PW Prabhu Koli and his brothers had mortgaged 5 bighas of land comprising Khasra No. 250 to PW-1 Raghuveer Singh several years earlier to the incident. At about 2 p.m. on the 7th August 1997, Raghuveer Singh alongwith Chhotey Lal, Rajendra, Munshi and Girdhari were in the process of ploughing the land when the accused, Kallu, Kamru, Taiyab and Rahmat reached that place on two tractors and also started ploughing the same land. Raghuveer Singh protested at this intrusion on which they attempted to run him over with their tractors. In the meanwhile, Asuddin, Mehboob, Mauj, Sohan Lal and Kamru armed with Farsis, Tanchias, Dantis and lathis attacked them and whereas Mauj and Asuddin inflicted blows with a Danti and Tanchia on the head of Girdhari, Kallu and Rahmat ran over him with their tractors, and when Raghuveer Singh attempted to intervene in favour of Girdhari, Asuddin, Taiyab and Kamruddin also caused blows to him with their weapons. Girdhari died on the spot whereas Chhotey Lal, Lallu, Rajendra and Munshi sustained serious injuries. Raghuveer Singh thereafter went to the Police

Station and submitted a written report at 5.30 p.m. the same afternoon and on its basis a First Information Report was drawn up. On the completion of the investigation, the accused were charged under various provisions of the Indian Penal Code, they being inter-alia Sections 302 and 302/149, 307 and 307/149. The prosecution in support of its case relied on the evidence of 17 witnesses in all, the primary witnesses being PW-1 Raghuveer Singh, the first informant, PW-2 Rajendra Kumar, PW-3 Chhotey Lal, PW-4 Munshi Ram, PW-5 Lallu Ram, PW-6, Suresh Kumar and PW-7 Than Singh. The prosecution also relied on the statement of PW-14 Dr. Sanjay Gupta, who had conducted the autopsy on the dead body and had found 5 injuries thereon and also examined five of the witnesses aforementioned i.e. Raghuveer Singh, Rajendra Kumar, Chhotey Lal, Munshi and Lallu and found several injuries on their persons, some of them grievous in nature whereas from the side of the accused Taiyab, Kallu, Rahmat, Asuddin and Kamru were found to have been injured, though with simple injuries. In their statements recorded under Section 313 of the Cr.P.C. the accused denied their involvement simplicitor. They did not lead any evidence in defence. The trial court relying on the aforesaid eye witnesses' account and the medical evidence convicted 7 of the 9 accused under Sections 302, 302/149, 307 and 307/149 etc. of the IPC and sentenced them to various terms of imprisonment under those provisions. The trial court, however, acquitted Mehboob Khan and Taiyab. The 7 accused who had been convicted by the trial court challenged their conviction by filing DB Criminal Appeal No. 796 of 1998 whereas the complainant PW Raghuveer Singh assailed the acquittal of Mehboob Khan and Taiyab Khan by filing D.B. Criminal Revision No. 188 of 1999. During the pendency of the appeal in the High Court, Rahmat passed away and the proceedings against him were disposed of as having abated. The High Court on a reconsideration of the evidence came to the conclusion that the land on which the incident had happened did not belong to Prabhu but in fact belonged to the Forest Department and was adjacent to the fields of accused Mauj

Khan and Rahmat and that the complainant party had, on the fateful day, gone for the first time to cultivate the said land, although Patwari had advised them not to do so. The court also found that the accused appeared to be in possession of the said land and finding that the complainant party had trespassed into it and had started ploughing had lodged a protest on which a free fight had ensued and persons from both sides had received injuries on which an FIR had also been registered against the complainant party by Kallu accused. The court accordingly concluded that in this view of the matter, the provisions of Sections 147, 148 and 149 could not be attracted and each of the accused was to be held liable and responsible for his individual act. The High Court accordingly examined the role of each of the accused and observed that though Kallu had been charged under Section 302 of the IPC for having caused the fatal injury on the left side of the back of Girdhari with the cultivator by running over him he did not have the intention to cause death and as such he would be liable under Section 304 Part II of the IPC. The court accordingly modified the conviction and sentence of the accused as under:

(i) "Appeal of appellant Rahmuddin is allowed and he is acquitted of the charges under Section 302/149, 447, 147,325/149,324/149 and 323/149 IPC. He is on bail, he need not surrender and his bail bonds stand discharged.

(ii) As appellant Rahmat Khan died during the pendency of the appeal, proceedings against him stand dropped.

(iii) Appeal of appellants Kallu, Asuddin, Sohan Lal, Kamruddin and Mauj Khan stands partly allowed. Conviction of appellant Kallu under Section 302,447,148,325/149,324/149 and 323/159 is set aside, instead he is convicted under Section 304 Part II IPC. As he had been in confinement for a period of more than six years, ends of justice would

be met in sentencing him to the period already undergone by him in confinement, Kallu, who is in jail, shall be set at liberty forthwith if not required in any other case.

(iv) Conviction of appellants Sohan Lal, Mauj Khan and Asuddin under Section 302/149,447,148,325/149 and 323/149 stands set aside and they are acquitted of the said charges. Their conviction under Section 324 IPC is however confirmed and they are sentenced to the period already undergone by them in confinement. Sohan Lal and Mauj Khan are on bail, they need not surrender and their bail bonds stand discharged. Appellant Asuddin, who is in jail, shall be set at liberty forthwith, if not required in any other case.

(v) Conviction of appellant Kamruddin under Sections 302/149,447,148,324/149 and 323/149 is set aside and he is acquitted of the said charges. His conviction under Section 325 IPC however stands confirmed and he is sentenced to the period already undergone by him in confinement. He is on bail, he need not surrender and his bail bonds stand discharged.

(vi) D.B.Criminal Revision No.188/1999 being devoid of merit stands dismissed.

(vii) The impugned judgment of the learned trial judge stands modified as indicated above."

3. The acquittal of Mehboob Khan and Taiyab Khan was, however, maintained on the plea that the ocular testimony was not corroborated by the medical evidence. It is in this situation the present set of appeals has been filed by the State as well as by PW-1 Raghuveer Singh.

4. We have heard Dr. Manish Singhvi, the learned

Additional Advocate General for the State of Rajasthan, Ms. Aneetha Shenoy, the learned counsel for Raghuveer Singh, as also Ms. Vibha Dutta Makhija the learned amicus for the accused respondents. The learned counsel for the appellants have raised several arguments before us. It has first been pointed out that there was ample evidence to show that the incident had happened in the field of Prabhu which had been mortgaged with Raghuveer Singh and the accused were therefore the aggressors as they had trespassed into that field and the finding of a free fight was erroneous, more particularly as the prosecution case rested on the statements of a large number of seriously injured eye witnesses. It has been emphasized that a free fight postulated that both sides had come to do battle, as held by this Court in *Gajanand & Ors. vs. State of U.P.* AIR 1954 SC 695 and *Bhanwar Singh & Ors. vs. State of M.P.* (2008) 16 SCC 657 and in the light of the fact that the accused were the aggressors the finding of the High Court was completely misplaced. It has also been submitted by the learned counsel that even assuming that there was a free fight Asuddin, Mauj Khan, Kallu and Rahmat accused were, in any case, liable for the offence under Section 302 of the IPC as they had caused injuries to the deceased Girdhari. Ms. Makhija, the learned counsel for the accused has, however, supported the judgment of the High Court and has raised a preliminary argument that the High Court's interference in such matters was required to be minimal and if the High Court had taken a view which was possible on the evidence, interference should not be made. In this connection, the learned counsel has relied on *State of U.P. vs. Banne* (2009) 4 SCC 271. She has also submitted that the witnesses had suppressed the factum of the injuries on the person of the accused, which meant that the genesis of the incident was uncertain and an adverse inference was to be drawn on the prosecution's case. On facts it has been urged that the observation of the Trial Court that the incident had happened in the field belonging to Prabhu was wrong as there was no evidence to suggest that it had been mortgaged with Raghuveer and it was for that reason that during

the course of the evidence Raghuveer Singh had claimed himself to be a lessee on the land and not a mortgagee which was a clear departure from his earlier statement. It has also been emphasized that the above submissions coupled with the fact that the dead body had not been recovered from the spot but had been found in the house of the deceased and that no plough or blood had been picked up from the place of incident clearly revealed that the incident had not happened in the field in question. It has also been submitted that the story projected by PW-1 that Kallu had first knocked Girdhari over with his tractor and then using the lift of his tractor had raised the cultivator and then dropped it on his body had not figured in his statement recorded under Section 161 of the Cr.P.C. and had come up for the first time in court and thus could not be relied upon. It has finally been submitted that PW-3 Chottey Lal, one of the injured witnesses, and the Investigating Officer PW-17 Samayadeen had admitted in their evidence that the dispute between the parties with regard to the land had resulted in a sudden fight between the two groups and as such the observation of the High Court was fully justified on the evidence.

5. We first take up Ms. Makhija's preliminary submission about the scope of interference by this Court in an appeal filed under Article 136 of the Constitution. As already indicated, the learned counsel has relied on *Banne's* case (supra). After reviewing a large number of judgments of this Court, it has been observed in paragraph 25 thereof that if the view taken by the High Court was plausible or possible, it would not be proper for the Supreme Court to interfere with an order of acquittal. It has been observed thus:

> "Following are some of the circumstances in which perhaps this Court would be justified in interfering with the judgment of the High Court, but these are illustrative not exhaustive:
>
> (i) The High Court's decision is based on totally

erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusion are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice.

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court.

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."

A perusal of the aforesaid quote in a manner reduces the scope for interference by this Court. We, therefore, have to see as to whether this Court should interfere on the basis of the parameters laid down above. It has firstly to be borne in mind that the injuries on the accused had not been explained as the prosecution witness did not utter a single word as to how they had been suffered by them. In this view of the matter, the defence can legitimately raise a suspicion that the genesis of the incident was shrouded in mystery and the prosecution had suppressed a part of the proceeding. It is true, as contended by Dr. Manish Singhvi, that each and every injury on an accused is not required to be explained and more particularly where all the injuries caused to the accused are simple in nature (as in the present case) and the facts of the case have to be assessed on the nature of probabilities. Examining the incident in the light of the above, we find that the injuries in the present

case were required to be explained as there is a serious dispute as to the possession of the land in which the incident had happened, more particularly as Raghuveer Singh himself was uncertain as to the nature of the possession as per the statements on record and the Patwari had also warned the complainant party not to trespass into the land. Undoubtedly, there are a large number of injured witnesses, some of them grievously hurt, to support the prosecution case, but in the light of the finding of the High Court that there was uncertainty about the possession, this fact by itself cannot preclude the accused from claiming that no case was made out against them. It has also to be noticed that PW-3 Chottey Lal, one of the injured witnesses, had admitted in his cross examination that the quarrel had taken place suddenly and that the rival groups were both saying that they would sow the land. This plea is also supported by the evidence of PW-17 Samaydeen, the investigating officer, who also admitted that as per the Patwari, the fight had taken place on the land possessed freshly and belonging to Gauga and Dallu and that the land was under the possession of the complainant party. This statement is at variance with the evidence of the other witness particularly PW-1 Raghuveer Singh as he stated that they had been in possession of the land in question for almost 20 years. There is also a doubt as to the site of the incident. The dead body and the cultivator were recovered from the house of PW-1, and PW-17 admitted that no blood stained earth had been lifted from the site. The judgment in *Bhanwar Singh's* case (supra) cannot be made applicable as it deals only with the scope of an offence under Section 149 of the IPC. In the light of the facts that have been enumerated above, it would be seen that the observations of the High Court that both sides had come to do battle appears to be justified as this is an assessment on an appreciation of the evidence which cannot be said to be palpably wrong so as to invite the intervention of this Court. The observation in *Gajanand's* case (supra) that in order to bring the matter within a free fight both sides have to come armed

and prepared to do battle must be applied in the present case with the result that each accused would be liable for his individual act.

6. With this background, we now go to the alternative argument made by the learned counsel for the appellants i.e. even accepting the case to be one of a free fight, the four accused respondents i.e. Kallu, Asuddin, Mauj and Rahmat ought to have been convicted under Section 302 of the IPC for having caused the murder of Girdhari. It will be seen that the allegation projected against Kallu was that he was the tractor driver who had first knocked Girdhari over, had then driven the tractor over him, lifted the cultivator and then dropped it on his person killing him instantaneously whereas the other three had also caused injuries to Girdhari with their weapons. We have gone through the evidence on this score very carefully. The injuries found on the dead body are reproduced hereinunder:

> "1. Perforating injury on back on left side L-L (toom) region deep upto peritoneal cavity size 12 x 5 cm x deep upto peritoneum also fracture of 9m 10 & 11th rib on posterior side.
>
> 2. Abrasion: 4 x 2 cm left side to the injury No.1.
>
> 3. Incised wound 5 x 1.5 cm Margins regular on right parieto frontal region transversely.
>
> 4. Incised wound 5 x 1.5 cm on center of head between both parietal bone longitudinally, margins regular.
>
> 5. Lacerated wound: 2 x 1 cm X 0.5 cm in middle of left medical side.
>
> The injuries were ante mortem in nature and cause of death was haemorrhage & shock due to injury to spleen & left kidney by injury No.1."

The injury with the cultivator is injury No.1 which is the fatal injury

and has been attributed by the witnesses to Kallu. Ms. Makhija has, however, argued that the story that the cultivator had first been lifted and then dropped on Girdhari could not be believed as Raghuveer Singh had not mentioned this fact in his evidence although the other witnesses had done so and as such, this story was improbable. Even assuming, however, that the cultivator had not been lifted and then dropped yet we find that injury No.1 had been caused with a cultivator is clear from the medical evidence and the extent and gravity of the injury shows that Kallu had the intention to cause Girdhari's death. It is also clear from the evidence that injury No.1 was sufficient to cause death in the normal course of nature. The injuries attributed to the other three accused mentioned herein above were simple in nature and can, by no stretch of imagination, be said to have been the cause of death. In the light of the fact that we are dealing with a case of a free fight, Asuddin, Mauj and Rahmat must be made responsible for their respective injuries and Rahmat had, as a matter of fact, died while the matter was in the High Court. We are, therefore, of the opinion that in so far as Kallu respondent is concerned, his conviction under Section 304 Part II of the IPC even on the findings recorded by the High Court, was erroneous. We, accordingly, allow these appeals to the extent that Kallu is held guilty under Section 302 of the IPC for having caused the murder of Girdhari and we restore the judgment of the Trial Court to this limited extent. In so far as the other accused are concerned, the appeals are dismissed.

7. The fee of the Amicus Curiae is fixed at Rs.7,000/- in each appeal.

D.G. Appeals allowed.

MD. MURTAZA & ORS.
v.
STATE OF ASSAM & ORS.
(Civil Appeal No. 7517 of 2011)

AUGUST 29, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Constitution of India, 1950 – Article 19(1)(g) and 19(6) – Appellants and other wholesale vegetable and fruit vendors engaged in selling vegetable and fruits at market in the city – Problem of traffic congestion, health and hygiene, pollution caused – Proposal to remove the appellants and others and shift them to a new market – Pursuant to the order by the High Court they had to vacate the possession of the premises – On appeal, held: Right to do business is a fundamental right guaranteed under Article 19(1)(g) but is subject to reasonable restrictions under Article 19(6) – Reasonableness of the restriction has to be determined in an objective manner and has to be seen from the point of view of the interest of the general public and not merely from the point of view of the persons upon whom the restrictions are imposed – Thus, the action of the Authorities cannot be faulted with – Shifting of the wholesale markets to the outskirts of the city or beyond was clearly reasonable – Public interest prevails over the private interest – Executive is free to recognize degrees of harm – State must be left with wide latitude in devising ways and means of social control and Regulation, and the court should not, unless compelled by the law, encroach into this field – Thus, the appellants and other wholesale traders should shift to the wholesale traders markets at the outskirts or outside the city limits.

Administrative law – Policy decision – Interference by the courts – Held: In the matters of policy, the courts have a

limited role and it should only interfere with the same when it is clearly illegal – On facts, the shifting of the wholesale markets to the outskirts of the city was not illegal – It was a salutary step for undoing a mischief – Thus, interference by the court not called for.

Friends Colony Development Committee vs. State of Orissa **AIR 2005 SC 1: 2004 (5) Suppl. SCR 818;** *Sales Tax Officer vs. Shree Durga Oil Mills* **(1998) 1 SCC 572: 1997 (6) Suppl. SCR 488;** *Hanif Quareshi v. State of Bihar* **AIR 1958 SC 731;** *State of Gujarat v. Shantilal* **AIR 1969 SC 634: 1969 (3) SCR 341;** *Laxmi Khandsari v. State of UP.* **AIR 1981 SC 873: 1981 (3) SCR 92;** *Divert v. State of Gujarat* **AIR 1986 SC 1323: 1986 SCR 479;** *State of Madras v. Row* **1952 SCR 597;** *Peerless v. Reserve Bank* **AIR 1992 SC 1033: 1992 (1) SCR 406;** *Harakchand v. Union of India* **AIR 1970 SC 1453: 1970 (1) SCR 479;** *Jyoti Pershad v. Union Territory of Delhi* **AIR 1961 SC 1602: 1962 SCR 125;** *Puthumma v. State of Kerala* **AIR 1978 SC 771: 1978 (2) SCR 537;** ***P.P.*** *Enterprises v. Union of India* **AIR 1982 SC 1016: 1982 (3) SCR 510 - referred to.**

American Federation of Labour v. American Sash and Door **Co. 335 US 538 (1949);** *New State Ice Co. v. Liebemann* **285 U.S. 262 (1932) – referred to.**

Case Law Reference:

2004 (5) Suppl. SCR 818	**Referred to**	**Para 7**
1997 (6) Suppl. SCR 488	**Referred to**	**Para 8**
AIR 1958 SC 731	**Referred to**	**Para 10, 13**
1969 (3) SCR 341	**Referred to**	**Para 10**
1981 (3) SCR 92	**Referred to**	**Para 10**
1986 SCR 479	**Referred to**	**Para 10**

1952 SCR 597	**Referred to**	**Para 10**
1992 (1) SCR 406	**Referred to**	**Para 10**
1970 (1) SCR 479	**Referred to**	**Para 10**
1962 SCR 125	**Referred to**	**Para 11**
1978 (2) SCR 537	**Referred to**	**Para 11**
1982 (3) SCR 510	**Referred to**	**Para 11**
1959 SCR 629	**Referred to**	**Para 14**
335 US 538 (1949)	**Referred to**	**Para 16**
285 U.S. 262 (1932)	**Referred to**	**Para 17**

CIVIL APPELLAE JURISDICTION : Civil Appeal No. 7517 of 2011.

From the Judgment & Order dated 28.04.2008 of the Gauhati High Court in Writ Petition (C) No. 8081 of 2005.

WITH

C.A. No. 7518 of 2011.

Jayant Bhushan, Nagendra Rai, VIjay Hansaria, Pradip K. Ghosh, Parthiv K. Goswami, S. Hariharan, Rajiv Mehta, Manish Goswami (for Map & Co.), T. Mahipal, Shantanu Sagar, Ranjan Kumar Pandey, Arun K. Sinha, Rakesh Singh, Sumit Sinha, Avijit Roy, Deepika Ghatowar (for Coporate Law Group) for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. These appeals have been filed against the impugned judgment and order dated 28.4.2008 passed by the Gauhati

High Court in Writ Petition (Civil) No. 8081 of 2005.

3. The appellants are wholesale vegetable and fruit vendors and were engaged in selling vegetables and fruits at Machkhowa market, Gauhati in the State of Assam since 1995. However, they had to vacate their respective possession of the premises in pursuance to the orders of the Gauhati High Court. Machkhowa market is situated close to the railway station and is inside the city and the land thereon has been allotted to the Department of Handloom and Textiles, Government of Assam for the purpose of construction of an administrative building. For this purpose it was proposed to remove the appellants and other wholesale vendors from the Machkhowa market, and instead a new market has been constructed at Ganeshguri. It was submitted by the appellants and others that there is not enough space in the Ganeshguri municipal market for the appellants and others. We are not referring to the various orders issued by the Gauhati High Court from time to time.

4. In one of the counter affidavits filed before us it has been stated that all parts of the city of Gauhati, including Machkhowa is very congested and hence the appellants and other wholesellers should not be allowed to do business of wholesale fruits and vegetables inside the city limits as a large number of heavy and medium goods vehicles have to enter the city to go to that wholesale market and consequently the area becomes very congested causing serious traffic problems and also hazard of health and hygiene and pollution. It is stated that the government of Assam has initiated steps to develop the fruits and vegetables wholesale market at the outskirts of Gauhati at Garchuk near the bypass on an area of 8 bighas of land and the foundation stone of the project market was laid by the Chief Minister on 25.2.2011. It has been further submitted that development work is taking place at a high speed at Garchuk.

5. We are of the opinion that the wholesale market of fruits and vegetables for supplying of these goods to Gauhati and

elsewhere should be at the outskirts or outside the city limits of Gauhati to avoid problems of traffic congestion, health and hygiene, pollution etc.

6. Citizens ordinarily do not go to wholesale markets, but they go to retail markets. Hence if the wholesale market is not situated within the city limits it will not cause any inconvenience to the public in general. On the other hand, if such wholesale market is situated within the city limits, there will be everyday hazards of traffic congestion because of hundreds of vehicles entering the city carrying goods for the wholesale markets resulting in traffic congestion, air and noise pollution etc., apart from posing health and hygiene problems. A large number of these goods will be dumped on the roads causing huge collection of waste and garbage. The rotting goods may spread diseases. They may also attract stray animals.

7. Ordinarily everywhere in the world wholesale markets are situated at the outskirts or outside the city limits. No doubt, the shifting of the shops of the wholesellers will cause some hardships to some individuals, but it is well settled that public interest prevails over the private interests. Thus, in *Friends Colony Development Committee vs. State of Orissa* AIR 2005 SC 1 (vide para 22) this Court observed :

> "The private interest stands subordinated to the public good".

8. Similarly, in *Sales Tax Officer vs. Shree Durga Oil Mills,* (1998) 1 SCC 572 (vide para 21) this Court observed:

> "Public interest must override any consideration of private loss or gain".

9. It is true that right to do business is a fundamental right guaranteed under Article 19(1)(g) of the Constitution, but this right is subject to reasonable restrictions under Article 19(6).

10. It may be mentioned that to test the reasonability of a

restriction we have to see the subject matter, extent of restriction, the mischief which it seeks to check, etc. The reasonableness of the restriction has to be determined in an objective manner and has to be seen from the point of view of the interest of the general public and not merely from the point of view of the persons upon whom the restrictions are imposed vide *Hanif Quareshi v. State of Bihar,* AIR 1958 SC 731. Moreover, the impugned action of the authorities cannot be said to be unreasonable merely because in a given case, they may operate harshly, vide *State of Gujarat v. Shantilal*, AIR 1969 SC 634 (vide Para 52). As observed by the Supreme Court in *Laxmi Khandsari v. State of UP.*, AIR 1981 SC 873; *Divert v. State of Gujarat*, AIR 1986 SC 1323; *State of Madras v. Row*, 1952 SCR 597; *Peerless v. Reserve Bank*, AIR 1992 SC 1033; and *Harakchand v. Union of India*, AIR 1970 SC 1453 etc., the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed and the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at the time etc., are the relevant considerations for determining whether the restriction is reasonable.

11. Further, as held in *Jyoti Pershad v. Union Territory of Delhi,* AIR 1961 SC 1602, the standard of reasonableness must also vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time. In adjudging the validity of the restriction the Court has necessarily to approach the question from the point of view of the social interest which the State action intends to promote, vide *Puthumma v. State of Kerala,* AIR 1978 SC 771; *P.P. Enterprises v. Union of India,* AIR 1982 SC 1016 and *Jyoti Pershad v. Union Territory of Delhi* (supra), etc.

12. Judged by these standards the impugned action of the authorities cannot be faulted on the ground of lack of reasonableness. As stated in the counter-affidavits filed in these

cases, the existing wholesale markets have become the cause of immense traffic congestion in the city, apart from causing diseases, pollution etc. Hence, shifting the wholesale markets to the outskirts of the City or beyond is clearly reasonable.

13. It must be remembered that certain matters are by their very nature such as had better be left to the administrative authorities instead of Courts themselves seeking to substitute their own views and perceptions as to what is the best solution to the problem. The present is clearly an instance where this Court should not interfere with the steps taken by the respondents to resolve a pressing problem. In matters of policy the Courts have a limited role and it should only interfere with the same when it is clearly illegal. That clearly is not the case here. The impugned action is a salutary step for undoing a mischief, which was crying out for redress for a long time, and it is not illegal.

14. As observed by the Supreme Court in *Mohd. Hanif Qureshi v. State of Bihar,* AIR 1958 SC 731, the Court must presume, that the legislature understands and correctly appreciates the need of its own people. The legislature is free to recognize degrees of harm, and may confine its restrictions to those where the need is deemed to be the clearest. In our opinion, the same principle would apply to executive action also, unless there is clear violation of a statute or a constitutional provision.

15. In our opinion, the State should not be hampered by the Court in dealing with evils at their point of pressure. All legislation, including delegated legislation (such as the kind we are examining) and executive action is essentially ad hoc. Since, social problems nowadays are extremely complicated, this inevitably entails special treatment for distinct social phenomena. If legislation or executive action is to deal with realities it must address itself to variations in society. The State must, therefore, be left with wide latitude in devising ways and

means of social control and Regulation, and the Court should not, unless compelled by the law, encroach into this field.

16. As Justice Frankfurter of the U.S. Supreme Court observed in *American Federation of Labour v. American Sash and Door Co.,* 335 US 538 (1949) :-

> "Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular Democratic Government. Most laws dealing with social and economic problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. But, even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such, an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence, rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible."

In our opinion the same principle would apply to executive action too.

17. Similarly, in his dissenting judgment in *New State Ice Co. v. Liebemann,* 285 U.S. 262 (1932), Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court observed that the government must be left free to engage in social experiments. Progress in the Social Sciences, as in the Physical Sciences, depends on "a process of trial and error" and Courts must not interfere with necessary experiments.

18. Justice Brandeis also observed :-

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation."

19. On the facts of the case, we are of the opinion that the appellants and other wholesale traders should shift to the wholesale markets at the outskirts or outside the city limits of Gauhati.

20. If the markets are not constructed yet, they will be constructed by the government, the municipalities and other authorities in consultation with the representatives of the wholesale traders of Gauhati and allotments made within a period of one year from today. For this purpose a Committee shall be set up under the Chairmanship of the concerned Secretary of Government of Assam and having members from the representatives of the Gauhati municipality and other authorities, and also representatives of the associations of wholesellers of fruits and vegetables and grains etc., as well as representatives from the electricity department, water department, telephone department, police etc. This Committee shall form a rational plan for allotment of the existing wholesale markets inside the Gauhati city to the new wholesale market (which will be constructed, if has not already been constructed).

21. All wholesellers inside Gauhati city shall be allowed to apply for allotment for adequate land for the wholesale market at the outskirts of or beyond Gauhati city. If such applications are made the same will be decided in a fair and non-arbitrary manner without any pick and choose. The entire exercise including allotments must be completed within one year from today.

22. With the observations made above, the appeals stand disposed of. No costs.

N.J. Appeals disposed of.

COMMNR. OF CENTRAL EXCISE, MEERUT-II
v.
M/S. SUNDSTRAND FORMS P. LTD.
(Civil Appeal No. 4077 of 2003)

AUGUST 30, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Excise Tariff Act, 1985:

Schedule – Heading 48.16 read with sub-heading 4816.00; and Heading 48.20 – Carbonless stationery – Classification of – Assessee manufacturing computer stationery by processing carbonless paper –Excise duty demanded on carbonless paper – Held: Carbonless paper or self-copying paper emerges at the intermediate stage, it is an intermediary product and is a well known marketable commodity – It is being bought and sold and there is a demand of such articles in the market – The Commissioner has rightly recorded the findings that the intermediary products in the instant case would fall and are classifiable under Heading 48.16 and duty payable for the said intermediary products is prescribed as 20% – Rules of Interpretation of the Schedule – r. 2(a) and 3 – Central Excise Rules, 1944 – r. 9(2) – Central Excise Act, 1944 – s. 11-A – Interpretation of Statutes – Principle of ejusdem generis.

The respondent-assessee engaged in the manufacture of computer stationery, business forms etc. (carbonless or with carbon) claimed that the said goods produced by it fell under Sub-Heading Nos. 4901.90 and 4820.00 of the Schedule to the Central Excise Tariff Act, 1985 and, therefore, chargeable to nil rate of duty. A team of Central Excise Officers visited the factory premises of the assessee and examined the manufacturing process of the carbonless stationery. It was found that the

assessee was purchasing carbonless paper in roll form, coated with chemical on backside or front side or on both sides, from the market and such carbonless paper was subjected to the process of only printing and perforation etc. for the manufacture of the stationery. Show cause notices were issued to the assessee raising demand of duty in terms of Rule 9(2) of the Central Excise Rules, 1944 read with s. 11A of the Central Excise Act, 1944, stating that the assessee was engaged in evasion of duty on carbonless paper which emerged at the intermediate stage during the course of manufacture of carbonless stationery from the plain paper. The Department classified the product as "the coated paper" at the intermediate stage under Heading 48.16. Simultaneously, proceedings were initiated against the MD and the Deputy MD of the assessee for imposing the penalty. The Commissioner confirmed the demand and imposed a penalty of Rs. 50 lakhs on the assessee. The appeal of the assessee having been allowed by the Customs, Excise and Gold (Control) Appellate Tribunal, the revenue filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 There is no dispute with regard to the fact that the carbonless paper or self-copying paper emerges at the intermediate stage and has its own life but the same could be further used in the manufacture of stationery in continuous process. There is also no dispute with regard to the fact that the carbonless paper is a well known marketable commodity as is evident from the process of manufacturing. The carbonless paper or other paper cannot be treated as the computer stationery unless it is subjected to the second stage of processing, i.e., the process of perforation, punching and fan-folding etc. Therefore, in common trade parlance the computer stationery is processed through various modes of processing. [Para 6] [770-E-G]

1.2 The opinion of the Institute of Paper Technology, Saharanpur, U.P clearly indicates that computer stationery is different from carbonless paper and self-copying paper. It was also indicated therein that carbonless papers or self-copying papers are fully coated throughout and are available in reel/sheet form. [Para 20-21] [775-A-C]

1.3 Para 2(a) of the Interpretative Rules for interpreting headings of the Schedule to the Central Excise Tariff Act provides that any reference in a heading to the goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. Para 3 thereof provides that when goods are classifiable under two or more headings, classification should be effected by relying on the heading which provides the most specific description and the same would be preferred to headings providing a more general description. [Para 22] [776-C-E]

1.4 The appropriate specific heading for the intermediary product would be Heading 48.16. The Commissioner, who has passed the order-in-original, has held that the carbonless paper/self-copying paper, which is an intermediary product, is classifiable under Headings 48.09 and 48.16 depending upon the size of the papers manufactured by the respondent-company; whereas the end product, i.e., the computer stationery, is classifiable under Heading 48.20 which attracts Nil rate of duty, the intermediary product is to be classified under Heading 48.16 and the duty payable for such intermediary goods is prescribed as 20%. He has given cogent reasons as to why the carbonless paper emerging at intermediate stage would be classifiable under heading 48.16. According to him goods covered under Headings 48.09

and 48.16 are of same kind except that in latter heading the goods, other than in roll form or in rectangular sheet with at least one side exceeding 36 cm fall and that applying the principle of *ejusdem generis*, the carbonless paper whether printed or not, which is not in roll form or in the sheet form with one side exceeding 36 cm, would be covered under sub-heading No. 4816.00. [Para 24-26] [776-A-H; 777-A]

1.5 So far as intermediary product is concerned, the Commissioner also considered the scope of marketability of the intermediary product in question. Relying on the statements made by the Director of the respondent-company itself and other relevant documents on record, the Commissioner came to a finding that the carbonless paper even in printed form could be sold or purchased although the number of the customers is restricted. He also found on appreciation of the documents on record that carbonless paper invariably emerges during the course of manufacture of computer stationery and such carbonless paper emerging at the intermediary stage is known to the market, has a distinct and very well-identified market and is capable of being marketed. [Para 27] [777-B-D]

1.6 It has been indicated from the findings of the Commissioner that the respondent company not only manufactures the end product but it also manufactures the intermediary products which are sold by them even in the roll form in the market. Invoices indicating sale by the respondent have also been placed on record and from scrutiny of the same it appears that such intermediary products were sold in roll forms only. It is also an undisputed fact in the instant case that the respondents themselves purchased intermediary products from the open market. [Para 28] [777-E-F]

1.7 The record and the description of the goods in

the headings and the rules of interpretation of the Schedule to the Central Excise Tariff Act, make it clear that although the respondent company may be registered for newspapers, etc., but it cannot be said that either the end product or the intermediary product would fall under Chapter 49, heading 49.01. A reading of Heading 48.16 with sub heading 4816.00, makes evident that it includes within its extent carbon paper, self-copying paper and other copying or transfer papers but other than those articles included in heading 48.09 which is specifically relatable to a particular size of paper and, therefore, the Commissioner has rightly recorded the findings that the intermediary products in the instant case would fall and are classifiable under heading 48.16. [Paras 31-32] [778-C-F]

1.8 In the instant case, there is enough evidence available on record to show that intermediary product in question is generally being bought and sold and there is a demand of such articles in the market as the respondents themselves have purchased it from the open market for manufacturing the end product. [Paras 35 and 38] [779-B-C; 780-B-C]

1.9 In terms of findings arrived at and on appreciation of the materials on record, this Court is of the view that the findings arrived at by the Tribunal by upsetting the findings of the Commissioner were unjustified and uncalled for. The judgment and order passed by the Tribunal is, therefore, set aside and the order dated 28.12.2000 passed by the Commissioner Central Excise restored. [Para 39] [780-D-E]

Medley Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise and Customs, Daman **(2011) 2 SCC 601: 2011 (1) SCR 741 - relied on.**

Case Law Reference:

2011 (1) SCR 741 Relied on Para 37

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4077 of 2003.

From the Judgment & Order dated 14.05.2002 of the Customs, Excise and Gold (Control) Tribunal, New Delhi in Appeal No. E/753/01-C.

P.P. Malhotra, ASG, Rachna Joshi Issar, Sonia Malhotra, Dr. Monika Gosain, B.K. Prasad, Anil Katiyar for the Appellant.

A.K. Jain, Rajesh Jain, Rajesh Kumar for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The present appeal arises out of the judgment and order dated 14.5.2002 of Customs, Excise and Gold [Control] Appellate Tribunal, New Delhi [for short "the Tribunal"] allowing the appeal filed by the Respondent-assessee and setting aside the order dated 28.12.2000 of the Commissioner, Central Excise, Meerut-II, U.P..

2. In order to decide the issues arising in the present case in proper perspective, basic facts leading to filing of the present appeal are being recapitulated hereunder.

3. Respondent is a firm engaged in the manufacture of computer stationery, business forms, etc., [carbonless or with carbon]. The respondent claims that the goods produced by them, namely, computer stationery, business forms and other allied products fall under sub-Heading Nos. 4901.90 and 4820.00 of the Schedule to the Central Excise Tariff Act, 1985 [for short "the Tariff Act"] and, therefore, the said articles are chargeable to NIL rate of duty.

4. Multi copies of computer stationery are manufactured

either by inserting carbon paper between the two sheets of paper or by chemical treatment of the paper to make itself copying [carbonless stationery].

5. The carbonless paper is a chemically treated paper used for producing impression of the writing or manuscript of the original paper on the other paper sheet. Such carbonless paper, which is a kind of copying paper is processed firstly by printing, which is done at pre-fixed places of the paper with the purpose of printing names of the buyers, logo or some other words as desired by the buyers and after the said process is over the printing paper is then passed through coating unit for applying chemical to develop the character of self-copying paper. The backside of the paper is coated to obtain top copy and front coating is done on the sheet which is to be used as bottom copy. The next step, which is the final step, is to get chemically coated copy passed through the coating unit for perforation, punching and fan-folding.

6. There is also no dispute with regard to the fact that the carbonless paper or self-copy paper emerges at the intermediate stage and has its own life but the same could be further used in the manufacture of stationery in continuous process. There is also no dispute with regard to the fact that the carbonless paper is a well known marketable commodity as is evident from the process of manufacturing. The carbonless paper or other paper cannot be treated as the computer stationery unless it is subjected to the second stage of processing, i.e., the process of perforation, punching and fan-folding etc. Therefore, in common trade parlance the computer stationery is processed through various modes of processing as indicated hereinbefore.

7. On intelligence, a team of Central Excise Officers visited the factory premises of the respondent herein at Noida and examined the manufacturing process of the carbonless stationery. It was found that the respondent-company was purchasing carbonless paper in roll form, coated with chemical

on backside or front side or on both sides, from the market and such carbonless paper was subjected to the process of only printing and perforation, etc., for the manufacture of the stationery.

8. The Commissioner, Central Excise, Meerut-II issued a show cause notice dated 30.04.1998 wherein it was alleged that the respondents were engaged in evasion of duty on carbonless paper which emerged at the intermediate stage during the course of manufacture of carbonless stationery from the plain paper. Therefore, they were asked to show cause as to why duty amounting to Rs. 49,05,335.00 which was allegedly not paid on the carbonless paper manufactured and removed from their factory during the period from 1993-94 to 1997-98 [upto 12/97] should not be recovered from them under Rule 9(2) of the Central Excise Rules, 1944 read with provisions of Section 11A(1) of the Central Excise Act, 1944 invoking extended period of 5 years and also to show cause as to why penalty and interest on the evaded duty should not be imposed upon it. The said notice proposed to charge duty on the said carbonless paper emerging at the intermediate stage under sub-heading No. 4816.00 to the Schedule to the Central Excise Tariff Act, 1985.

9. Simultaneously, proceedings were initiated against MD and Deputy MD of the respondent-company for imposing penalty upon them. Thereafter, six other show cause notices were also issued on the same issue to the respondents for raising the demand of duty in terms of Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944 and invoking penal provisions.

10. Notice issued by the Department mentioned that the respondent-company is engaged in evasion of duty on carbonless paper which emerged at the intermediate stage during the course of manufacture of carbonless stationery from the plain paper. Therefore, the Department demanded Central Excise duty at the intermediate stage when the paper is coated

to make it carbon less paper or self-copying paper. Notice alleged that the carbonless paper is a separate commodity, different from plain paper, and its user is also different from the ordinary paper. The carbonless paper emerged on subjecting certain process, i.e., application of chemicals and printing which was done to describe the name of the buyer and other details relating to which ultimately the paper was to be used for in the present case. The printing was only incidental to the carbonless paper emerging at the intermediate stage and that the printing was not in any way necessary for the manufacturing of carbonless paper which emerged at intermediate stage. According to the Department, such carbonless papers could be further used into the manufacturing of the stationery in continuous process, as it was evident from the process of manufacture and statement of the party that the process of perforation, punching and fan folding, etc., was responsible to convert carbonless paper/other paper into computer stationery.

11. The Department classified the product as "the coated paper" at the intermediate stage under Heading 48.16 of the Tariff Act which applies to carbon paper, self-copying paper and other copying or transfer papers. Notice alleged that the printing of certain words only specified the buyer but it would not in any way make them unmarketable, as the carbonless paper which emerged at the intermediate stage in the course of the manufacture of the carbonless stationery was similar to carbonless paper purchased from the market and the only difference was that in the case of the respondent the carbonless paper manufactured at their end was printed with some words relating to the buyers.

12. Thereafter, the Commissioner in its Order-In-Original dated 28.12.2000 confirmed the demand of the department and imposed penalty of Rs. 50 lakhs on the respondent-assessee.

13. Aggrieved by the same the respondent-assessee filed an appeal before the Customs, Excise and Gold [Control]

Appellate Tribunal, New Delhi which vide its order dated 14.05.2002 held that the impugned product is not classifiable under heading 48.16 as carbonless paper and allowed the appeal of the respondent.

14. Being aggrieved by the said order of the Tribunal, the Department has filed the present appeal, on which we heard learned counsel appearing for the parties, who have taken us through all the materials available in the record.

15. There are two specific issues which arise for our consideration in the present appeal and the same were also argued extensively by the counsel appearing for the parties. The first issue, relates to under which particular heading the intermediary product would fall or is it to be treated as a final or end product, under heading 4820.00 of the Schedule to the Central Excise Tariff Act. The second issue arising for our consideration is as to whether or not the intermediary product in question has a marketability prospect and capability.

16. The counsel appearing for the appellant argued that the intermediary product with which we are concerned falls under Heading No. 48.09 read with 48.16 of the Schedule to the Central Excise Tariff Act whereas according to the counsel appearing for the respondent-company the same falls under the Heading 48.20 or under sub heading 4901.90 of the Schedule.

17. In support of his contention, counsel appearing for the respondent-assessee relied upon the Circular dated 15.10.1991 issued by the Central Board of Excise and Customs, Government of India, New Delhi, which was issued in relation to classification of paper printed with a format of air line tickets or embarkation/disembarkation cards and submitted that they were under a bona fide belief in view of the said circular that no duty was attracted on the printed coated paper arising at the inter mediate stage during the continuous process of manufacture of carbonless computer stationery and that in the said circular it was clarified that formats (of airline

tickets, embarkation cards, etc.) which have ink deposited at appropriate places on the reverse side, instead of being classified under Heading 48.09 or 48.16, would be classifiable under sub-Heading 4820.00 or 4901.90 attracting nil rate of duty and that the Department is bound by its own Circular issued by the Board.

18. On the other hand, counsel appearing for the appellant vehemently argued that the said Circular has no application to the facts of the present case as the Circular neither deals with continuous carbonless computer stationery paper nor with the carbonless stationery and that it actually deals with plain continuous computer stationery.

19. It is the case of the appellant that the product manufactured by the respondent company is carbonless paper/ self-copying paper, which is coated and therefore the same should fall under Heading 48.09 for which excise duty at the rate of 20% is payable. However, heading 48.09 prescribes a particular size of paper in rolls of a width exceeding 36 cm or in rectangular (including square) sheets with at least one side exceeding 36 cm in unfolded state. Consequently, the said heading would not be applicable exactly to the product of the respondent in the present case. However, what is applicable is Heading 48.16, which reads as follows:

> "48.16 4816.00 Carbon paper, self-copy paper and other copying or transfer papers (other than those of heading No. 48.09), duplicator stencils and offset plates, of paper, whether or not put in boxes.
>
> Rate of Duty 20%"

20. The respondent, however, submitted that they manufacture Registers, account books, note books and other allied products for which Nil duty is prescribed under Heading 49.01 of the Schedule, where the description of goods is printed books, newspapers, pictures and other products of the

printing industry; manuscripts, typescripts and plans. According to the counsel appearing for the respondent the products manufactured by them should be treated falling under Heading No. 49.01. Reference was also drawn to the opinion of the Institute of Paper Technology, Saharanpur, U.P.

21. The said opinion clearly indicates that computer stationery is different from carbonless paper and self copying paper. It was also indicated therein that carbonless papers or self copying papers are fully coated throughout and are available in reel/sheet form.

22. There is a set of Interpretative Rules for interpreting headings of the Schedule to the Central Excise Tariff Act. Para 2A of the same provides that any reference in a heading to the goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. Para 3 thereof provides that when goods are classifiable under two or more headings, classification should be effected by relying on the heading which provides the most specific description and the same would be preferred to headings providing a more general description.

23. In the tariff provided under Chapter 48, there are certain notes which are relevant for the purpose of interpreting the subject matter of various headings. Note 7 thereof, provides, that paper, paperboard, cellulose wadding and webs of cellulose fibres answering to a description in two or more of the heading nos. 48.01 to 48.11 are to be classified under one of such headings which occurs last in the numerical order in the Schedule. Note 11 thereof also provides that except for the goods of Heading No. 48.14 or 48.21, paper, paperboard, cellulose wadding and articles thereof, printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall in Chapter 49.

24. Strong reliance was placed by the counsel appearing

for the respondent on the Circular dated 15th October, 1991, issued by the Central Board of Excise and Customs, Government of India, New Delhi. The said circular relates to levy of duty on paper sheets printed with format of airline tickets or embarkation/disembarkation cards and classification thereof. The said circular clarifies and relates to airline tickets. A bare glance on the aforesaid circular makes it crystal clear that the intermediary products referred to in the present appeal are not directly relatable to airlines tickets or embarkation/ disembarkation cards. Besides, the aforesaid circular deals with the end product, namely, the computer stationery which is classifiable under Heading 48.20. If the end product is classifiable under Heading 48.20 then it would be difficult to say that the intermediary product would also fall under heading 48.20. In our view, the appropriate specific heading for the intermediary product would be Heading 48.16.

25. The Commissioner of Customs, who has passed the Order-In-Original was conscious of the aforesaid fact. According to him, the carbonless paper/self copying paper, which is an intermediary product is classifiable under Headings 48.09 and 48.16 depending upon the size of the papers manufactured by the respondent company whereas the end product i.e. the computer stationery is classifiable under Heading 48.20, which attracts NIL rate of duty. According to him although the final product is not dutiable, as the same is classifiable under Heading 48.20, where NIL rate of duty is prescribed, but so far as intermediary product is concerned it is to be classifiable under Heading 48.16 and the duty payable for such intermediary goods is prescribed as 20%.

26. The Commissioner has given cogent reasons as to why the carbonless paper emerging at intermediate stage would be classifiable under heading 48.16. According to him goods covered under Headings 48.09 and 48.16 are of same kind except that in latter heading the goods, other than in roll form or in rectangular sheet with at least one side exceeding

36 cm fall and that applying the principle of ejusdem generis, the carbonless paper whether printed or not which is not in roll form or in the sheet form with one side exceeding 36 cm would be covered under sub heading No. 4816.00.

27. Having decided the aforesaid classification in the aforesaid manner, so far, intermediary product is concerned the Commissioner also considered the scope of marketability of the intermediary product in question. Relying on the statements made by the Director of the respondent-company themselves and other relevant documents on record the Commissioner came to a finding that the carbonless paper even in printed form could be sold or purchased although the number of the customers is restricted. He also found on appreciation of the documents on record that carbonless paper invariably emerges during the course of manufacture of computer stationery and such carbonless paper emerging at the intermediary stage is known to the market, has a distinct and very well-identified market and is capable of being marketed.

28. It has been indicated from the findings of the Commissioner that the respondent company not only manufactures the end product but it also manufactures the intermediary products which are sold by them even in the roll form in the market. Invoices indicating sale by the respondent have also been placed on record and from scrutiny of the same it appears that such intermediary products were sold in roll forms only. It is also an undisputed fact in the present case that the respondent themselves purchased intermediary products from the open market. But then only difference even according to them also is that such carbonless paper with coating purchased from the market is of inferior quality.

29. The Tribunal, however, while dealing with the appeal filed before it upset the aforesaid findings holding that respondent- assessee was engaged in the manufacture of printed computer stationery and not self copying paper, and

therefore, the intermediary products of the respondent cannot be classified under Heading 48.16.

30. The Tribunal also relied upon the Circular dated 15.10.1991 issued by the Central Board of Excise and Customs for coming to a finding that provided tickets, printed circulars, letters, forms etc. which are essentially printed matters requiring filing up of only minor details would be covered by sub heading 4901.90.

31. Having examined the record and the description of the goods in the headings and upon noticing rules of interpretation of the Schedule to the Central Excise Tariff Act, we are of the considered opinion that although the respondent company may be registered for newspapers, etc., but it cannot be said that either the end product or the intermediary product would fall under Chapter 49, heading 49.01. End product here is admittedly computer stationery which would specifically fall under Chapter 48, heading 48.20, sub heading 4820.00.

32. When we read heading 48.16 with sub heading 4816.00, we find that it includes within its extent carbon paper, self-copy paper and other copying or transfer papers but other than those articles included in heading 48.09 which is specifically relatable to a particular size of paper and therefore we are in agreement with the findings recorded by the Commissioner that the intermediary products in the present case would fall and are classifiable under heading 48.16.

33. The next issue that is required to be decided is as to whether the intermediary products are marketable or not.

34. Evidence in the nature of documents and statements recorded in that regard indicates that such intermediary products are available in the market and are brought and sold in the open market. The Commissioner has referred to such evidence on record and even the invoices of the respondents themselves

clearly indicate that they have sold intermediary products of the nature in question in the open market in roll forms.

35. In the present case, there is enough evidence available on record to show that not only the intermediary products in the present case are capable of being bought and sold in the market but they are in fact sold and purchased in the open market. Even the respondents have admitted that they have themselves purchased such intermediary products from the market although the products available in the market were of inferior quality. But the fact remains that there are enough people like the respondents willing to purchase such material from the market.

36. During the course of arguments reference was made to a number of decisions of this Court on the issue relating to marketability of a product.

37. We have a recent decision of this Court in the case of *Medley Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise and Customs, Daman,* reported in (2011) 2 SCC 601. This Court in the said decision has very carefully considered almost all the previous decisions of this Court on the issue of the levy/payment of Excise Duty Valuation on articles manufactured by the assessee company therein. After referring to practically all the decisions on the issue this Court in the aforesaid case held that the consistent view of this Court is that the marketability is an essential criteria for charging duty and that the test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. This Court also held that the word `Marketable' means saleable or suitable for sale and that it need not in fact be marketed but then the article should be capable of being sold to consumers, as it is without anything more. This Court further went on to hold that the essence of marketability of goods is neither in the form nor in the shape or condition in which the manufactured article is found but it is the commercial identity of the article known to the market for being bought and

sold. The Court further held that the product in question is generally not being bought or sold or has no demand in the market, would be irrelevant. The aforesaid conclusions are arrived at after considering almost all the previous decisions of this Court on the issue.

38. When we apply the ratio of the aforesaid decision of this Court in the case of *Medley Pharmaceuticals Ltd.* (supra) to the facts of the present case it becomes crystal clear that the intermediary product in question is generally being bought and sold and there is a demand of such articles in the market as the respondents themselves have purchased it from the open market for manufacturing the end product.

39. In terms of findings arrived at and on appreciation of the materials on record, we are of the view that the findings arrived at by the Tribunal by upsetting the findings of the Commissioner vide its order dated 14.05.2002 were unjustified and uncalled for. The Judgment and Order passed by the Tribunal is therefore set aside and we restore the order dated 28.12.2000 passed by the Commissioner Central Excise, Meerut-II, U.P.

40. Accordingly, the appeal is allowed but leaving the parties to bear their own costs.

R.P. Appeal allowed.

SANJOY NARAYAN EDITOR IN CHIEF HINDUSTAN & ORS.

v.

HON. HIGH COURT OF ALLAHABAD THR. R.G.

(Criminal Appeal No. 1683 of 2011)

AUGUST 30, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Media: Powers and responsibilities of – Discussed – Held: The media, be it electronic or print media, is generally called the fourth pillar of democracy – The media, in all its forms, whether electronic or print, discharges a very onerous duty of keeping the people knowledgeable and informed – The impact of media is far–reaching as it reaches not only the people physically but also influences them mentally – It creates opinions, broadcasts different points of view, brings to the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill–effects of society – However, with the huge amount of information that they process, it is the responsibility of the media to ensure that they are not providing the public with information that is factually wrong, biased or simply unverified information – The right to freedom of speech is enshrined in Article 19(1)(a) of the Constitution – However, this right is restricted by Article 19(2) in the interest of the sovereignty and integrity of India, security of the State, public order, decency and morality and also Contempt of Courts Act and defamation – The unbridled power of the media can become dangerous if check and balance is not inherent in it – This power must be carefully regulated and must reconcile with a person's fundamental right to privacy – The dignity of the courts and the people's faith in administration must not be tarnished because of biased and unverified reporting – In order to avoid such biased reporting,

one must be careful to verify the facts and do some research on the subject being reported before a publication is brought out – Constitution of India, 1950 – Article 19(1)(a) and 19(2).

Contempt of Courts Act – Article published in Hindustan Times on 20–09–2010 carried adverse information about the then Chief Justice of Allahabad High Court – Contempt proceedings against the appellants – Held: Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported – Pre–judging the issues and rushing to conclusions must be avoided – This is exactly what has happened in the present case – The newspaper report was apparently based on surmises and conjectures and not based on facts and figures – Article published in Hindustan Times on 20–09–2010 tarnished the image of the then Chief Justice of the Allahabad High Court who otherwise proved himself to be a competent and good Judge – The appellants have understood their mistake and have expressed their repentance through their advocate and also themselves by filing an unqualified apology before the Supreme Court – Apology tendered before the Allahabad High Court was not accepted only because it was felt that the same was not unqualified – Now, by filing an affidavit before Supreme Court they have tendered unconditional apology – The judiciary also must be magnanimous in accepting an apology when filed through an affidavit duly sworn, conveying remorse for such publication – Therefore, the unqualified apology submitted by the appellants is accepted and the contempt proceedings against them are dropped – Direction to appellants-contemnors to publish the apology as stated in the affidavit in the first page of Lucknow edition of Hindustan Times to be published on 01–09–2011 and also at such other place, wherever there was any such publication, in a daily issue of the newspaper at some prominent place of the newspaper.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal 1683 of 2011.

From the Judgment & Order dated 4.4.2011 of the High Court of Judicature at Allahabad in Contempt Application (Criminal) No. 20 of 2010.

A. Sharan, Ajay Singh, Amit Anand Tiwari for the Appellants.

Ravi P. Mehrotra, Vibhu Tiwari for the Respondent.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal is directed against the order dated 04.04.2011 passed by the Allahabad High Court.

3. The appellants being aggrieved by the aforesaid order had filed this appeal on which we issued notice. On service of the notice, the respondent has also entered appearance through counsel.

4. We have heard the counsel appearing for the parties. The appellants have now filed an affidavit which is on record tendering unqualified apology for the publication of article in question in Hindustan Times on 20.09.2010 out of which contempt proceedings arise.

5. The media, be it electronic or print media, is generally called the fourth pillar of democracy. The media, in all its forms, whether electronic or print, discharges a very onerous duty of keeping the people knowledgeable and informed.

6. The impact of media is far-reaching as it reaches not only the people physically but also influences them mentally. It creates opinions, broadcasts different points of view, brings to

the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill-effects of society. The media ensures that the individual actively participates in the decision-making process. The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to Information Act is the most empowering step in this direction. The role of people in a democracy and that of active debate is essential for the functioning of a vibrant democracy.

7. With this immense power, comes the burden of responsibility. With the huge amount of information that they process, it is the responsibility of the media to ensure that they are not providing the public with information that is factually wrong, biased or simply unverified information. The right to freedom of speech is enshrined in Article 19(1)(a) of the Constitution. However, this right is restricted by Article 19(2) in the interest of the sovereignty and integrity of India, security of the State, public order, decency and morality and also Contempt of Courts Act and defamation.

8. The unbridled power of the media can become dangerous if check and balance is not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's fundamental right to privacy. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Pre-judging the issues and rushing to conclusions must be avoided.

9. This is exactly what has happened in the present case. The then Chief Justice of the Allahabad High Court who has otherwise proved himself to be a competent and good Judge wherever he was posted during his career was brought under a cloud by the reporting which is the subject matter of this

petition. His image was sought to be tarnished by a newspaper report which was apparently based on surmises and conjectures and not based on facts and figures. The dignity of the courts and the people's faith in administration must not be tarnished because of biased and unverified reporting. In order to avoid such biased reporting, one must be careful to verify the facts and do some research on the subject being reported before a publication is brought out.

10. We are glad that the persons against whom contempt proceedings were initiated for a wrong and incorrect reporting about the then Chief Justice as aforesaid have understood their mistake and have expressed their repentance through their advocate and also themselves by filing an unqualified apology before us for the wrong done.

11. On going through the impugned order also we find that apology tendered before the Allahabad High Court was not accepted only because it was felt that the same was not unqualified. Now, by filing an affidavit they have tendered unconditional apology.

12. The judiciary also must be magnanimous in accepting an apology when filed through an affidavit duly sworn, conveying remorse for such publication. This indicates that they have accepted their mistake and fault. This Court has also time and again reiterated that this Court is not hypersensitive in matter relating to Contempt of Courts Act and has always shown magnanimity in accepting the apology. Therefore, we accept the aforesaid unqualified apology submitted by them and drop the proceeding.

13. With the aforesaid observations, we order for closure of the proceedings initiated against the appellants herein under the Contempt of Courts Act by keeping the affidavit filed by the appellants on record with a direction to the appellants to publish the apology as stated in the affidavit in the first page of Lucknow

edition of Hindustan Times to be published on 01.09.2011 and also at such other place, wherever there was any such publication, in a daily issue of the newspaper at some prominent place of the newspaper.

14. We appreciate the gesture of the counsel appearing for the parties and also for the fact they endorse the same view as expressed in this order.

15. The appeal is disposed of in terms of the aforesaid directions and observations.

B.B.B. Appeal disposed of.

M/S. SHIV COTEX
v.
TIRGUN AUTO PLAST P. LTD. & ORS.
(Civil Appeal No. 7532 of 2011)

AUGUST 30, 2011

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

CODE OF CIVIL PROCUDEURE, 1908:

s. 100 – Second appeal – High court deciding the second appeal without formulating a question of law – Held: The High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in s. 100 and that vitiates its decision.

O. 17 rr. 1 and 3 (a) r/w. s. 100 – Adjournments – Plaintiff failed to produce evidence on three dates – Trial court proceeded in terms of r. 3 and dismissed the suit – First appellate court dismissed the appeal – However, High Court allowed the second appeal of the plaintiff and directed the trial court to decide the suit afresh – Held: The High Court upset the concurrent judgments and decrees of the two courts on misplaced sympathy and non-existent justification observing that the stakes in the suit were very high – After the issues were framed, on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it – Plaintiff deserved no sympathy in second appeal in exercise of power u/s 100 CPC.

O.17 – r.1, proviso – Adjournments – Held: It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process – The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit – Though the court may grant more than

three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to O. 17, r. 1 should be maintained – 'Justifiable cause', means, a cause which is not only 'sufficient cause' as contemplated in sub-r. (1) of r.1 but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity – Guiding factors, indicated – Administration of justice – Adjournments.

Respondent No.2, the Punjab Financial Corporation (the Corporation), in exercise of its power u/s 29 of the State Financial Corporations Act, 1951, took over the mortgaged property of respondent no.1 company as it had failed to pay the amounts due to the Corporation. Respondent no. 1 filed a suit for declaration and mandatory injunction in the Court of Civil Judge (Junior Division), praying, *inter alia*, that the take over of its assets and all subsequent sale proceedings by the Corporation be declared illegal, null and void and that the Corporation be also directed to restore back the possession of the suit property to it. The trial court framed issues and fixed 1.11.2006 for evidence of the plaintiff. The plaintiff did not adduce any evidence even on the subsequent dates, i.e., 2.3.2007 and 10.5.2007. The trial court then proceeded under O. 17 r. 3(a), C.P.C. and dismissed the suit in post lunch session on 10.5.2007. Thereafter the Corporation sold the mortgaged property by auction to the appellant for Rs. 64.60 lac. The plaintiff filed a civil appeal in the Court of Additional District Judge. Subsequently, the application for impleadment of the appellant-auction purchaser and its partners was allowed. The appeal was dismissed. However, the second appeal filed by the plaintiff was allowed and the suit was remanded to the trial court for decision afresh. Aggrieved, the auction purchaser filed the appeal.

Allowing the appeal, the Court

HELD: 1. Firstly, the High Court, while deciding the second appeal, failed to adhere to the necessary requirement of s. 100 CPC and interfered with the concurrent judgments and decrees of the courts below without formulating any substantial question of law. The High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in s. 100 CPC and that vitiates its decision. [para 13-14] [794-D-H; 795-G-H]

Umerkhan v. *Bismillabi @ Babulal Shaikh and Ors.* **2011 (9) SCC 684 - relied on.**

2.1. Second, and equally important, the High Court upset the concurrent judgments and decrees of the two courts on misplaced sympathy and non-existent justification. The High Court observed that the stakes in the suit being very high, the plaintiff should not be non-suited on the basis of no evidence. But, it is the plaintiff alone who is to be blamed for this lapse. As a matter of fact, the trial court had given more than sufficient opportunity to the plaintiff to produce evidence in support of its case. After the issues were framed on July 19, 2006, on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it. In such circumstances, the court cannot be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit. [para 15] [796-A-F]

2.2. No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 should be maintained. 'Justifiable cause' means a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Rule 1 of Order XVII but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity. The absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. [para 16] [796-G-H; 797-A-F]

2.3. The parties to a suit – whether plaintiff or defendant – must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. In the instant case, if despite three opportunities, no evidence was let in by the plaintiff, it deserved no sympathy in second appeal in exercise of power u/s 100 CPC. There is no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in

giving the plaintiff an opportunity to produce evidence when no justification for that course existed. The judgment and order of the High Court is set aside. [para 16-17] [797-F-H; 798-A-B]

Case Law Reference:

2011 (9) SCC 684 relied on para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7532 of 2011.

From the Judgment & Order dated 20.9.2010 of the High Court of Punjab & Harayana at Chandigarh in RSA No. 1107 of 2008 (O&M).

Vinay Kumar Garg, Namrata Singh for the Appellant.

Amit Dayal, Deeksha Ladia (for Jyoti Mendiratta) for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The purchaser, who was not party to the suit but impleaded as 2nd respondent in the first appeal and was arrayed as such in the second appeal, is the appellant being aggrieved by the judgment and order of the High Court of Punjab and Haryana whereby the Single Judge of that Court allowed the second appeal preferred by the plaintiff (1st respondent) and set aside the concurrent judgment and decree of the courts below and remanded the suit to the trial court for fresh disposal after giving the plaintiff an opportunity to lead evidence.

3. In the month of May, 1991, the 1st respondent — M/s. Tirgun Auto Plast Private Limited – applied to the Punjab Financial Corporation (for short, 'Corporation') for a term loan of Rs. 47.60 lac and special capital assistance (soft loan) of

Rs. 4 lac. The term loan of Rs. 46 lac and soft loan of Rs. 4 lac was disbursed by the Corporation to the 1st respondent in the month of October, 1991 on execution of the mortgage deed. Vide this mortgage deed, the 1st respondent mortgaged its various assets in favour of the Corporation. On the 1st respondent's failure to pay the due amount along with interest, the Corporation on March 19, 1998 took over the mortgaged property comprising land, building and machinery in exercise of its power under Section 29 of the State Financial Corporations Act, 1951 (for short, '1951 Act').

4. The 1st respondent (hereinafter referred to as 'plaintiff'), on February 17, 2001, filed a suit for declaration, mandatory injunction and other reliefs against the Corporation – 2nd respondent in the Court of Civil Judge (Junior Division), Chandigarh. Inter alia, the plaintiff prayed that the takeover of its assets and all subsequent sale proceedings by the Corporation be declared illegal, null and void and inoperative; the direction be issued to the Corporation to charge interest at the rate of 12.5 per cent per annum (prevailing rate) on the loan from the date of commencement of production to the date of takeover and the Corporation be also directed to restore back the possession of the suit property to it.

5. The Corporation (sole defendant) in the suit traversed the plaintiff's claim and set up the plea that plaintiff could not pay the due amount under the loan despite repeated notices necessitating the action under Section 29 of the 1951 Act. The Corporation asserted that fair procedure was followed and no illegality was committed by it in proceeding under Section 29 of the 1951 Act. The Corporation also raised objections regarding the maintainability of the suit on the grounds of limitation and jurisdiction of the Civil Court.

6. The trial court having regard to the pleadings of the parties framed issues (six in all) on July 19, 2006. Issue no. 1 was to the following effect:

"Whether impugned action of defendant is illegal and if it is proved, whether plaintiff is entitled for decree of declaration and mandatory injunction?"

The burden to prove the above issue was kept on the plaintiff.

7. Thereafter, the suit was fixed for the evidence of the plaintiff on November 1, 2006. However, no evidence was let in on that day. The matter was then adjourned for the evidence of the plaintiff on March 2, 2007. On that day also the plaintiff did not produce evidence and the matter was adjourned to May 10, 2007. On May 10, 2007 again plaintiff did not produce any evidence. The trial court was, thus, constrained to proceed under Order XVII Rule 3(a) of the Code of Civil Procedure, 1908 (for short, 'CPC') and passed the following order :

"Matter is fixed for conclusion of the plaintiff's evidence being last opportunity. No plaintiff's witness is present and neither any cogent reason has been put forth for such failure fully knowing the fact that today is the third effective opportunity for conclusion of plaintiff's evidence. Hence, matter is ordered to be proceeded under Order 17, Rule 3(a) C.P.C. and plaintiff's evidence is deemed to be closed. Heard. To come up after lunch for orders."

8. On May 10, 2007 itself in light of the above order, the trial court dismissed the suit in its post lunch session.

9. After dismissal of the suit, the Corporation sold the mortgaged property by auction to the appellant for Rs. 64.60 lac (Sixty four lac and sixty thousand only).

10. Against the judgment and decree of the trial court passed on May 10, 2007, the plaintiff preferred civil appeal in the court of Additional District Judge, Chandigarh. In the appeal, the plaintiff made an application on December 21, 2007 for impleadment of the appellant and its partners as respondent

nos. 2 to 5. The application for impleadment was granted and the appellant and respondent nos. 3 to 5 herein were added as parties.

11. The Additional District Judge, Chandigarh after hearing the parties, dismissed the civil appeal on March 20, 2008.

12. Being not satisfied with the concurrent judgment and decree of the two courts below, the plaintiff preferred second appeal before the High Court which, as noticed above, has been allowed by the Single Judge on September 20, 2010 and the suit has been remanded to the trial court for fresh decision in accordance with law.

13. The judgment of the High Court is gravely flawed and cannot be sustained for more than one reason. In the first place, the High Court, while deciding the second appeal, failed to adhere to the necessary requirement of Section 100 CPC and interfered with the concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before the second appeal is heard and finally disposed of by the High Court. This Court has reiterated and restated the legal position time out of number that formulation of substantial question of law is a condition precedent for entertaining and deciding a second appeal. Recently, in the case of Umerkhan v. Bismillabi @ Babulal Shaikh and Ors. (Civil Appeal No. 6034 of 2011) decided by us on July 28, 2011, it has been held that the judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating the substantial question of law. The legal position with regard to second appellate jurisdiction of the High Court was stated by us thus:

"13. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High

Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position."

14. Unfortunately, the High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiates its decision.

15. Second, and equally important, the High Court upset the concurrent judgment and decree of the two courts on misplaced sympathy and non – existent justification. The High Court observed that the stakes in the suit being very high, the plaintiff should not be non-suited on the basis of no evidence. But, who is to be blamed for this lapse? It is the plaintiff alone. As a matter of fact, the trial court had given more than sufficient opportunity to the plaintiff to produce evidence in support of its case. As noticed above, after the issues were framed on July 19, 2006, on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it. What should the court do in such circumstances? Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward? It is sad, but true, that the litigants seek – and the courts grant – adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16. No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided

in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit – whether plaintiff or defendant – must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power

under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed.

17. In the result, the appeal is allowed and judgment and order of the High Court passed on September 20, 2010 is set aside. There shall be no order as to costs.

R.P. Appeal allowed.

SURENDRA PRASAD SHUKLA
v.
THE STATE OF JHARKHAND & ORS.
(Civil Appeal No. 7548 of 2011)

SEPTEMBER 01, 2011

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

Service Law – Dismissal – Appellant-Head Constable in State Police – His son along with two others arrested u/s. 392 IPC for robbing a car – Misconduct alleged against the appellant that he harboured his son in the government quarters occupied by him – Robbed car recovered from the yard in front of the government quarters – Disciplinary authority dismissed appellant from service for misconduct of negligence, indiscipline and conduct unbecoming of a police personnel – Order of dismissal upheld by the courts below – On appeal, held: No charge against the appellant-employee that he had in any way aided or abetted the offence u/s. 392 IPC or that he knew that his son had robbed the car and yet he did not inform the police – He was guilty of negligence of not having enquired from his son about the car kept in front of the government quarters occupied by him – Appellant served the government as a Constable/Head Constable for 34 years, and for such long service he earned pension – Punishment of dismissal from service so as to deprive him of his pension for the service that he had rendered for 34 years is shockingly disproportionate to the negligence proved against him – Thus, the punishment of dismissal from service is modified to compulsory retirement – Penal Code, 1860 – s.392.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7548 of 2011.

From the Judgment & Order dated 9.6.2008 of the High Court of Jharkhand at Ranchi in L.P.A. No. 176 of 2008.

Nagendra Rai, Shantanu Sagar, Smarhar Singh, Abhishek Kumar Singh, Gopi Raman, P. Agarwal, Preeti R., T. Mahipal for the Appellant.

Anil K. Jha, Chhaya Kumari 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 by way of special leave under Article 136 of the Constitution against the order dated 09.06.2008 of the Division Bench of the Jharkhand High Court in L.P.A. No. 176 of 2008 (for short 'the impugned order').

3. The facts very briefly are that the appellant was recruited as a Constable in the Bihar State Police on 07.08.1971 and he was later on promoted to the post of Head Constable (Hawaldar). On 04.07.2004, a complaint was lodged in the Muzaffarpur Sadar Police Station that three unknown persons had snatched a car, which was registered as Muzaffarpur Sadar P.S. Case No. 139 of 2004 under Section 392 of the Indian Penal Code (for short 'the I.P.C.'). The police recovered the stolen car on 13.07.2004 from the government quarters occupied by the appellant and arrested the son of the appellant, Raju Shukla @ Rajiv Shukla alongwith two others who were involved in the theft of the car. The appellant was suspended and a memo of charges was served on him on 20.07.2004 charging him with the misconduct of negligence, indiscipline, conduct unbecoming of a police personnel. It was also alleged that he had harboured the accused Raju Shukla. He was asked to submit his explanation. The appellant submitted his reply on 26.07.2004 to the Superintendent of Police, Purvi Singhbhoom, Jamshedpur (for short the 'disciplinary authority') stating inter

alia that in the evening of 12.07.2004 he had been to Tulailadugri T.O.P. for duty and he was patrolling in that area the whole night and that when he returned to his government quarters in the morning around 6:15 a.m. on 13.07.2004, he saw the police of Muzaffarpur Sadar Police Station at his government quarters, who had arrested his son alongwith two others, and had seized the stolen Matiz car. He also stated in his reply that he did not get any time to question his son and that he had no idea that his son was involved in the crime. The enquiry officer then carried out the enquiry and submitted his report holding the appellant guilty of the charges and the disciplinary authority after considering enquiry report took the view that in the circumstances it was not reasonable that the appellant should serve the police force and passed an order of dismissal against him. The appellant carried an appeal to the Deputy Inspector General, Singhbhoom, but the appeal was dismissed. Thereafter, the appellant filed a revision before the Inspector General of Police, but the same was also rejected.

4. The appellant then filed Writ Petition (s) No. 6728 of 2006 under Article 226 of the Constitution in the Jharkhand High Court challenging his dismissal from service. The learned Single Judge of the High Court dismissed the Writ Petition by order dated 30.04.2008. Aggrieved, the appellant filed L.P.A. No. 176 of 2008 and the Division Bench of the High Court dismissed the L.P.A. by the impugned order. When the Special Leave Petition was heard on 17.10.2008, this Court issued notice to the respondent to show-cause why the punishment of dismissal should not be altered to compulsory retirement. In response to the notice, respondent no.4 has appeared and filed his counter affidavit and has contended that the appellant is guilty of keeping the robbed Matiz car and giving shelter to the accused persons in his house and has not informed the matter to the higher authorities and that the conduct of the appellant has tarnished the image of the police force and that the punishment of dismissal should not be altered to compulsory retirement.

5. We have heard the learned counsel for the parties and we find that the misconduct alleged against the appellant was that he had harboured the accused Raju Shukla in the government quarters occupied by him and the stolen car was recovered from the yard in front of the government quarters. The enquiry officer has recorded a finding that the appellant was guilty of the misconduct. The disciplinary authority accepted the finding of the enquiry officer and was of the view that the appellant should not any longer serve the police force and dismissed him from service and the appellate authority and the revisional authority have agreed with the disciplinary authority. As the appellant was working as a Head Constable, it was his duty to enquire from his son about the car kept in front of the government quarters occupied by him, and by not performing this duty he was guilty of negligence. The fact that the son of the appellant, who was an accused in an offence under Section 392 IPC, and his accomplices were found in the government quarters under the occupation of the appellant and the fact that the stolen car was also recovered from the yard in front of his government quarters were sufficient to hold the appellant guilty of negligence which affected the image of the police force in the area and for such negligence the authorities were right in taking the view that the appellant should not be retained in police service.

6. The question which however arises for our decision is whether such negligence of the appellant was sufficient for the disciplinary authority to dismiss him from service. There was no charge against the appellant that he had in any way aided or abetted the offence under Section 392 IPC or that he knew that his son had stolen the car and yet he did not inform the police. The appellant, as we have held, was guilty of negligence of not having enquired from his son about the car kept in front of the government quarters occupied by him. The appellant had served the government as a Constable and thereafter as a Head Constable from 07.08.1971 till he was dismissed from service on 28.02.2005, i.e. for 34 years, and for such long

service he had earned pension. In our considered opinion, the punishment of dismissal of the appellant from service so as to deprive him of his pension for the service that he had rendered for long 34 years was shockingly disproportionate to the negligence proved against him.

7. We accordingly, allow this appeal in part and modify the punishment of dismissal from service to compulsory retirement. The L.P.A. and the Writ Petition filed by the appellant before the High Court are allowed in part. There shall be no order as to costs.

N.J. Appeal partly allowed.

NITINBHAI SAEVATILAL SHAH & ANOTHER
v.
MANUBHAI MANJIBHAI PANCHAL & ANOTHER
(Criminal Appeal No. 1703 of 2011)

SEPTEMBER 1, 2011

[J.M. PANCHAL AND H. L. GOKHALE, JJ.]

Code of Criminal Procedure, 1973:

ss. 263 and 264 read with s.326(3) and s.461 – Summary trial – Procedure in part-heard cases on transfer of the Judge/ Magistrate – HELD: In view of sub-s.(3) of s.326, sub s.(1) of s.326 which authorizes a Magistrate to act on the evidence recorded by his predecessor, does not apply to summary trials – The prohibition contained in sub s. (3) of s 326 is absolute and admits of no exception – In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it because in summary trials only substance of evidence has to be recorded – The court does not record the entire statement of witness – s.326 (3) does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor – It is well settled that no amount of consent by the parties can confer jurisdiction where there exists none, on a court of law nor can they divest a court of jurisdiction which it possesses under the law – The cardinal principle of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it – Therefore, except in regard to those cases which fall within the ambit of s. 326, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor – He has got to try the case de novo – In this view of the matter, the High Court should have ordered de novo trial – This is not a case of irregularity but want of competency – There has been no proper trial of the

case and there should be one – The impugned judgment is set aside and the matter remanded to Metropolitan Magistrate for retrial in accordance with law – Jurisdiction – Negotiable Instruments Act, 1881 – s.138.

ss. 461 and 465 –Void proceedings – Summary trial – Metropolitan Magistrate after recording evidence, transferred – His successor proceeded with the trial from the stage let in and convicted the accused – HELD: Provisions of s.461 would be applicable – The proceedings held by the Magistrate, to the extent that he is not empowered by law, would be void, and void proceedings cannot be validated u/s 465 – This defect is not a mere irregularity and the conviction of the appellants cannot, even if sustainable on the evidence, be upheld u/s 465 of the Code – Therefore, s. 465 of the Code has no application. It cannot be called in aid to make what was incompetent, competent.

On the complaint of respondent no. 1 against appellant no.2 company and its director, appellant no.1, for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881, Summary Case No. 2785 of 1998 was registered in the Court of the Metropolitan Magistrate. After the evidence was recorded by the Metropolitan Magistrate, he was transferred and was succeeded by another Metropolitan Magistrate. The appellants-accused as well as the complainant filed a pursis that they had no objection to proceed with the matter on the basis of the evidence recorded by the predecessor in office of the Metropolitan Magistrate in terms of s. 326 Cr.P.C. Accordingly, the Metropolitan Magistrate considered the evidence, heard the counsel for the parties and convicted both the appellants u/s 138 of the Act and sentenced each of them to simple imprisonment for three months with a fine of Rs. 3,000/-. The appellate court confirmed the conviction, but noticing that appellant no. 2 was a private limited company and,

thus, could not have been sentenced to imprisonment, set aside the sentence of imprisonment qua appellant no. 2 only. The High Court, in the revision petition, maintained the conviction but set aside the final order of sentence imposed upon the accused-appellants and remanded the matter to the trial court for passing an appropriate order of sentence and compensation, if any payable u/s 357 Cr. P.C. Aggrieved, the accused filed the appeal.

Disposing of the appeal, the Court

HELD: 1.1. Provision for summary trials is made in chapter XXI of the Code of Criminal Procedure, 1973. The manner in which record in summary trials is to be maintained is provided in s. 263 of the Code. Section 264 mentions that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of evidence and a judgment containing a brief statement of the reasons for the finding. Thus, the Magistrate is not expected to record full evidence which he would have been, otherwise required to record in a regular trial and his judgment should also contain a brief statement of the reasons for the finding and not elaborate reasons which otherwise he would have been required to record in regular trials. [paras 12-13] [814-G-H; 815-A-C]

1.2. Section 326 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in s. 326 is that second Magistrate need not re-hear the whole case and he can start from the stage the first Magistrate left it. However, a bare perusal of sub s. (3) of s. 326 makes it more than evident that sub s. (1) which authorizes the

Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to summary trials. The prohibition contained in sub s. (3) of s 326 of the Code is absolute and admits of no exception. Where a Magistrate is transferred from one station to another, his jurisdiction ceases in the former station when the transfer takes effect. [para 11] [814-C-F]

1.3. The mandatory language in which s.326 (3) is couched, leaves no manner of doubt that when a case is tried as a summary case, a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-ss. (1) and (2) of s. 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326 (3) does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice. [para 14] [815-E-H; 816-A-B]

1.4. The reliance placed by the High Court, on the pursis submitted by the appellants before the Metropolitan Magistrate declaring that they had no objection if matter was decided after taking into consideration the evidence recorded by his predecessor-in-office is misconceived. It is well settled that no amount of consent by the parties can confer jurisdiction where there exists none, on a court of law nor can they divest a court of jurisdiction which it possesses under the law. [para 15] [816-C-E]

1.5. From the language of s. 326(3) of the Code, it is plain that the provisions of s. 326(1) and s. 326(2) are not applicable to summary trial. Therefore, except in regard to those cases which fall within the ambit of s. 326 of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has got to try the case de novo. In this view of the matter, the High Court should have ordered de novo trial. [para 16] [816-H; 817-A]

1.6. The cardinal principal of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it. As s. 326 is an exception to the cardinal principle of trial of criminal cases, it is crystal clear that if that principle is violated by a particular Judge or a Magistrate, he would be doing something not being empowered by law in that behalf. Therefore, s. 461 would be applicable, which shows that the proceedings held by a Magistrate, to the extent that he is not empowered by law, would be void; and void proceedings cannot be validated u/s 465 of the Code. This defect is not a mere irregularity but want of competency, and the conviction of the appellants cannot, even if sustainable on the evidence, be upheld u/s 465 of the Code. [paras 16 and 17] [816-F-G; 817-B-C-G]

Payare Lal Vs. State of Punjab **AIR 1962 SC 690: (1962 (1) Crl LJ 688) – relied on.**

Pulukuri Kotayya Vs. Emperor, **AIR 1947 P.C. 67 – referred to**

1.7. Apart from s. 326 (1) and s.326 (2) which are not applicable to the instant case in view of s. 326 (3), the Code does not conceive of such a trial. Therefore, s. 465 of the Code has no application. It cannot be called in aid to make what was incompetent, competent. There has been no proper trial of the case and there should be one. [para 18] [818-C]

1.8. The judgment dated 09.08.2010 rendered by the Single Judge of the High Court upholding the conviction of the appellants for the offence punishable u/s 138 of the Act is set aside. The matter is remanded to the Metropolitan Magistrate for retrial in accordance with law, as early as possible.[para 19] [818-D-G]

Case Law Reference:

1962 SC 690: (1962 (1) Crl LJ 688)	**relied on**	**Para 16**
AIR 1947 P.C. 67	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1703 of 2011.

From the Judgment & Order dated 9.8.2010 of the High Court of Judicature at Gujarat in Crl. Revision Application No. 529 of 2003.

Amar Dave, P.S. Sudheer, Rishi Maheshwari for the Appellants.

Atul Y. Chitale, Nishtha Kumar, Abhijat P. Medh,

Hemantika Wahi, Pinky Behra Suveni Banerjee for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. This appeal by grant of special leave, is directed against judgment dated August 9, 2010, rendered by the learned Single Judge of High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 529 of 2003, by which the conviction of the appellants recorded by the learned Metropolitan Magistrate, Ahmedabad in Summary Case No. 2785 of 1998 under Section 138 of Negotiable Instruments Act, 1881 and confirmed by the learned Additional City Sessions Judge, Court No. 13, Ahmedabad is maintained but the sentence imposed upon the appellants for commission of said offence is set aside and matter is remanded to the learned Magistrate for passing appropriate order with regard to sentence and compensation, if any under Section 357 of Cr. P.C. within three months, after giving the parties reasonable opportunity of being heard.

3. The respondent No.1 herein is original complainant. He was doing business in the name of Navkar Steel Pvt. Ltd. The Complainant is known to the appellant No.1. The appellant No.1 is the Director of appellant No.2 which is a private limited company. It is the case of the complainant that the appellant No.1 had borrowed hand loan from him and in order to pay the legal dues, the appellant No.1 had given a cheque dated October 13, 1998 for the sum of Rs.11,23,000/- drawn on the State Bank of India. The cheque was signed by the appellant No.1 on behalf of the appellant No.2. The complainant presented the cheque for realization in the Central Bank of India. The cheque was dishonoured and sent back to the complainant with a memorandum dated October 15, 1998 mentioning that the cheque was dishonoured because of insufficiency of funds. Thereupon, the complainant served a demand notice dated October 28, 1998 which was returned unserved as unclaimed

on November 5, 1998. Therefore another notice was served by post under Postal Certificate. The appellants failed to pay the amount mentioned in the notice within 15 days from the date of receipt of notice. Therefore, the complainant filed complaint in the Court of learned Metropolitan Magistrate, Court No.2, Ahmedabad on December 15, 1998 and prayed to convict the appellants under Section 138 of the Act. On the basis of the complaint, Summary Case No. 2785 of 1998 was registered and after recording verification, the learned Magistrate had issued process.

4. The complainant examined himself and his witnesses and also produced documentary evidence in support of his case set up in the complaint. The appellants did not lead any defence evidence. However, the appellant No.1 in his statement recorded under Section 313 of the Code stated that his signature was obtained on the blank paper by kidnapping him and writing was written on it and that false complaint was lodged by misusing the signed blank cheque.

5. After the evidence was recorded by the learned Metropolitan Magistrate as stated above, he came to be transferred and therefore, ceased to exercise jurisdiction in the case. He was succeeded by another learned Metropolitan Magistrate who had and who exercised such jurisdiction. On August 03, 2001, a pursis was filed before the learned Metropolitan Magistrate by the appellants as well as the original complainant i.e. the respondent No.1 herein, declaring that the parties had no objection to proceed with the matter on the basis of evidence recorded by predecessor in office of the learned Metropolitan Magistrate in terms of Section 326 of the Code. On the basis of said pursis the learned Metropolitan Magistrate considered the evidence led by the complainant and heard the learned counsel for the parties.

6. The learned Metropolitan Magistrate by judgment dated February 13, 2003, delivered in Summary Case No. 2785 of 1998, convicted both the appellants under Section 138 of the

Act and sentenced each of them to suffer simple imprisonment for three months with fine of Rs.3,000/- i/d simple imprisonment for 15 days.

7. Feeling aggrieved, the appellants preferred Criminal Appeal No.19 of 2003 in the Court of the learned Additional City Sessions Judge at Ahmedabad. The learned Judge found that conviction of the appellants recorded under Section 138 of the Act was perfectly just but noticed that the appellant No. 2 is a private limited company and therefore, could not have been sentenced to simple imprisonment for three months. Therefore, the learned Additional City Sessions Judge, Court No.13, Ahmedabad by judgment dated October 16, 2003 dismissed the appeal but set aside sentence of simple imprisonment of three months imposed upon the appellant No.2 and maintained the full sentence imposed upon appellant No.1 as well as sentence of fine of Rs.3,000/- imposed upon the appellant No.2.

8. Dissatisfied with the judgment of the First Appellate Court, the appellants preferred Criminal Revision Application No.529 of 2003 in the High Court of Gujarat at Ahmedabad. The learned Single Judge by judgment dated August 09, 2010, maintained conviction of the appellants under Section 138 of Negotiable Instrument Act, but set aside final order of sentence imposed upon the appellants and remanded the matter to the learned Magistrate for passing appropriate order of sentence and compensation, if any payable under Section 357 of the Code, within three months, after giving to the parties reasonable opportunity of being heard, which has given rise to the instant appeal.

9. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal.

10. Section 326 of the Code deals with the procedure to be followed when any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry

or a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who exercises such jurisdiction. Section 326 of the code reads as under :-

> *"326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another: -*
>
> (1) Whenever any [Judge or Magistrate] after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercises jurisdiction therein and us succeeded by another [Judge or Magistrate] who has and who exercises such jurisdiction, the [Judge of Magistrate] so succeeding may act on the evidence so recorded by his predecessor and partly recorded by himself.
>
> Provided that if the succeeding [Judge or Magistrate] is of opinion that further examination of any of the witness whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.
>
> (2) When a case is transferred under the provisions of this Code [from one Judge to another Judge or from one Magistrate to another Magistrate,] the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).
>
> (3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325."

11. Section 326 is part of general provisions as to inquiries and trials contained in Chapter XXIV of the Code. It is one of the important principles of criminal law that the Judge

who hears and records the entire evidence must give judgment. Section 326 is an exception to the rule that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty. The Section is intended to meet the case of transfers of Magistrates from one place to another and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer. Section 326 empowers the succeeding Magistrate to pass sentence or to proceed with the case from the stage it was stopped by his preceding Magistrate. Under Section 326 (1), successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part. If he is of the opinion that any further examination is required, he may recall that witness and examine him, but there is no need of re-trial. In fact Section 326 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in Section 326 is that second Magistrate need not re-hear the whole case and he can start from the stage the first Magistrate left it. However, a bare perusal of sub Section (3) of Section 326 makes it more than evident that sub Section (1) which authorizes the Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to summary trials. The prohibition contained in sub Section (3) of Section 326 of the Code is absolute and admits of no exception. Where a Magistrate is transferred from one station to another, his jurisdiction ceases in the former station when the transfer takes effect.

12. Provision for summary trials is made in chapter XXI of the Code. Section 260 of the Code confers power upon any Chief Judicial Magistrate or any Metropolitan Magistrate or any Magistrate of the First Class specially empowered in this behalf by the High Court to try in a summary way all or any of the

offences enumerated therein. Section 262 lays down procedure for summary trial and sub Section (1) thereof inter alia prescribes that in summary trials the procedure specified in the Code for the trial of summons-case shall be followed subject to condition that no sentence of imprisonment for a term exceeding three months is passed in case of any conviction under the chapter.

13. The manner in which record in summary trials is to be maintained is provided in Section 263 of the Code. Section 264 mentions that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of evidence and a judgment containing a brief statement of the reasons for the finding. Thus the Magistrate is not expected to record full evidence which he would have been, otherwise required to record in a regular trial and his judgment should also contain a brief statement of the reasons for the finding and not elaborate reasons which otherwise he would have been required to record in regular trials.

14. The mandatory language in which Section 326 (3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-Section (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326 (3) of the Code does not permit the

Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

15. The High Court by the impugned judgment rejected the contention regarding proceedings having been vitiated under Section 461 of the Code, on the ground that parties had submitted pursis dated August 3, 2009 and in view of the provisions of Section 465 of the Code, the alleged irregularity cannot be regarded as having occasioned failure of justice and thus can be cured. The reliance placed by the High Court, on the pursis submitted by the appellants before the learned Metropolitan Magistrate declaring that they had no objection if matter was decided after taking into consideration the evidence recorded by his predecessor-in-office is misconceived. It is well settled that no amount of consent by the parties can confer jurisdiction where there exists none, on a Court of law nor can they divest a Court of jurisdiction which it possesses under the law.

16. The cardinal principal of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it. It is so stated by this Court in the decision in *Payare Lal Vs. State of Punjab,* AIR 1962 SC 690 : (1962 (1) Crl LJ 688). This principle was being rigorously applied prior to the introduction of Section 350 in the Code of Criminal Procedure, 1898. Section 326 of the new Code deals with what was intended to be dealt with by Section 350 of the old Code.

From the language of Section 326(3) of the Code, it is plain that the provisions of Section 326(1) and 326(2) of the new Code are not applicable to summary trial. Therefore, except in regard to those cases which fall within the ambit of Section 326

of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has got to try the case de novo. In this view of the matter, the High Court should have ordered de novo trial.

17. The next question that arises is as to from what stage the learned Metropolitan Magistrate Ahmedabad, should proceed with the trial de novo. As it has been seen that Section 326 of the new Code is an exception to the cardinal principle of trial of criminal cases, it is crystal clear that if that principle is violated by a particular Judge or a Magistrate, he would be doing something not being empowered by law in that behalf. Therefore, Section 461 of the new Code would be applicable. Section 461 of the new Code narrates irregularities which vitiate proceedings. The relevant provision is Clause (1). It reads as follows:-

> "461. Irregularities which vitiate proceedings:- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely;
>
> x x x x x
>
> (1) tries an offender;
>
> x x x x x
>
> his proceedings shall be void."

A plain reading of this provision shows that the proceedings held by a Magistrate, to the extent that he is not empowered by law, would be void and void proceedings cannot be validated under Section 465 of the Code. This defect is not a mere irregularity and the conviction of the appellants cannot, even if sustainable on the evidence, be upheld under Section 465 of the Code. In regard to Section 350 of the old Code, it was said by *Privy Council in Pulukuri Kotayya Vs. Emperor,* AIR 1947 P.C. 67 that "when a trial is conducted in a manner different from that prescribed by the Code, the trial

is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537".

18. This is not a case of irregularity but want of competency. Apart from Section 326 (1) and 326 (2) which are not applicable to the present case in view of Section 326 (3), the Code does not conceive of such a trial. Therefore, Section 465 of the Code has no application. It cannot be called in aid to make what was incompetent, competent. There has been no proper trial of the case and there should be one.

19. For the foregoing reasons the appeal succeeds. The judgment dated August 09, 2010 rendered by the learned Single Judge of the High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 529 of 2003 upholding conviction of the appellants for the offence under Section 138 of the Act is hereby set aside. The matter is remanded to the learned Metropolitan Magistrate for retrial in accordance with law. The record shows that the appellant No.1 has resorted to dilatory tactics to delay the trial. The appellant No.1 is directed to remain present before the learned Metropolitan Magistrate when required without fail. If the appellant No. 1 fails to remain present before the learned Metropolitan Magistrate, it would be open to the learned Metropolitan Magistrate to take necessary steps including issuance of non-bailable warrant for securing his presence. Having regard to the facts of the case the learned Metropolitan Magistrate is directed to complete the trial of the case as early as possible and preferably within five months from the date of receipt of the writ from this Court. Subject to above mentioned observations the appeal stands disposed of.

R.P. Appeal disposed of.

BHILWARA DUGDH UTPADAK SAHAKARI S. LTD.

v.

VINOD KUMAR SHARMA DEAD BY LRS. AND ORS.

(Civil Appeal No. 2585 of 2006)

SEPTEMBER 01, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

Labour laws: Employer-employee relationship – Finding of fact recorded by Labour Court – Interference with, by High Court – Scope of – In the instant case, Labour Court held that the workmen-respondents were the employees of the appellant and not employees of the contractor – Cogent reasons were given by the Labour Court to come to the finding that in fact the concerned workmen were working under the orders of the officers of the appellant and were being paid Rs.70 per day while the workmen/employees of the contractor were paid Rs.56 per day – High Court declined to interfere with the finding of fact recorded by the Labour Court – On appeal, held: Labour statutes are meant to protect the employees/workmen because the employers and the employees are not on an equal bargaining position – Therefore, protection of employees is required so that they may not be exploited – It is implicit in the finding of Labour Court that there was subterfuge by employer to avoid its liabilties under various labour statutes – There was no infirmity in the judgment of the High Court.

Steel Authority of India v. National Union Waterfront Workers **2001 (7) SCC 1: 2001 (2) Suppl. SCR 343 – held inapplicable.**

Air India Statutory Corporation v. United Labour Union **1997 (9) SCC377: 1996 (9) Suppl. SCR 579 – referred to.**

Case Law Reference:

2001 (2) Suppl. SCR 343 held inapplicable Para 9

1996 (9) Suppl. SCR 579 referred to Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2585 of 2006.

From the Judgment & Order dated 23.8.2004 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal (Writ) No. 577 of 2004 and Judgment and Order dated 21.9.2004 in D.B. Civil Review Petition No. 34 of 2004.

Puneet Jain (for Sushil Kumar Jain) for the Appellant.

Surya Kant, Manu Mridul, A.K. Vatsya, Bushna Parveen, Neha Tanwar for the Respondents.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the appearing parties.

This Appeal has been filed against the impugned judgments dated 23.08.2004 and dated 21.09.2004 passed by the High Court of Judicature at Rajasthan.

This Appeal reveals the unfortunate state of affairs prevailing in the field of labour relations in our country.

In order to avoid their liability under various labour statutes employers are very often resorting to subterfuge by trying to show that their employees are, in fact, the employees of a contractor. It is high time that this subterfuge must come to an end.

Labour statutes were meant to protect the employees/workmen because it was realised that the employers and the

employees are not on an equal bargaining position. Hence, protection of employees was required so that they may not be exploited. However, this new technique of subterfuge has been adopted by some employers in recent years in order to deny the rights of the workmen under various labour statutes by showing that the concerned workmen are not their employees but are the employees/workmen of a contractor, or that they are merely daily wage or short term or casual employees when in fact they are doing the work of regular employees.

This Court cannot countenance such practices any more. Globalization/liberalization in the name of growth cannot be at the human cost of exploitation of workers.

The facts of the case are given in the judgment of the High Court dated 23.08.2004 and we are not repeating the same here. It has been clearly stated therein that subterfuge was resorted to by the appellant to show that the workmen concerned were only workmen of a contractor. The Labour Court has held that the workmen were the employees of the appellant and not employees of the contractor. Cogent reasons have been given by the Labour Court to come to this finding. The Labour Court has held that, in fact, the concerned workmen were working under the orders of the officers of the appellant, and were being paid Rs 70/- per day, while the workmen/employees of the contractor were paid Rs. 56/- per day.

We are of the opinion that the High Court has rightly refused to interfere with this finding of fact recorded by the Labour court.

The Judgment of this Court in *Steel Authority of India vs. National Union Waterfront Workers* (2001) 7 SCC 1 has no application in the present case. In that decision the question was whether in view of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 the employees of contractors stood automatically absorbed in the service of the principal employer. Overruling the decision in Air India *Statutory*

Corporation vs. United Labour Union, (1997) 9 SCC 377 this Court held that they did not.

In the present case that is not the question at all. Here the finding of fact of the Labour Court is that the respondents were not the contractor's employees but were the employees of the appellant. The SAIL judgment (Supra) applies where the employees were initially employees of the contractor and later claim to be absorbed in the service of the principal employer. That judgment was considerating the effect of the notification under Section 10 of the Act. That is not the case here. Hence, that decision is clearly distinguishable.

Mr. Puneet Jain, learned counsel for the appellant submitted that the High Court has wrongly held that the appellant resorted to a subterfuge, when there was no such finding by the Labour Court. The Labour Court has found that the plea of the employer that the respondents were employees of a contractor was not correct, and in fact they were the employees of the appellant. In our opinion, therefore, it is implicit in this finding that there was subterfuge by the appellant to avoid its liabilities under various labour statutes.

For the reasons given above, there is no infirmity in the impugned judgment of the High Court. The Appeal is dismissed accordingly. No costs.

D.G. Appeal dismissed.

STATE OF RAJASTHAN

v.

ARJUN SINGH & ORS. ETC.

(Criminal Appeal No. 552-554 of 2003 etc.)

SEPTEMBER 2, 2011

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

PENAL CODE, 1860:

ss.302/34 and 307/34 – Murders of two brothers and attempt to murder the third one – Nine accused convicted by trial court u/ss.302/149 and 307/149 – High Court acquitting six and convicting three u/s.302/34 and 307/34 – Held: The deposition of the injured, the medical evidence and other materials produced by prosecution clearly prove the guilt of the three convicted accused that they with their guns and with their common intention fired gunshots resulting in death of two brothers and serious injuries to the third – Their conviction and sentence as recorded by courts below confirmed – Evidence.

s.302 – Victim sustained 7 gunshot injuries and died 35 days thereafter due to septiceemia – HELD: The injuries were sufficient to cause death – Case falls within the ambit of s.302.

CRIMINAL LAW:

Motive – Held: Reliable evidence in the case indicates that there was previous enmity between one of the accused and the complainant because of a litigation – Even in the absence of specific evidence as to motive, in view of the evidence of the injured witness, the medical evidence and the fact that two persons have been killed and the third one sustained fired arm injuries, the prosecution case cannot be thrown out on this ground.

EVIDENCE:

Evidence of related witness – Discrepancies in evidence – Effect of – Held: The evidence of the eye-witness who suffered gun shot injuries in the incident is supported by medical evidence and other documentary evidence – Merely because he is related to the deceased is not a ground for rejection of his testimony – Certain discrepancies as to number of gun shots are liable to be ignored – However, High Court rightly observed that presence of other three eye-witnesses at the place of occurrence on the stated date and time was highly doubtful – Non recovery of pistol or cartridge does not detract the prosecution case, whose clinching and direct evidence is acceptable – Investigation.

The three appellants in Crl. A. No. 558 of 2003, along with the six respondents in Crl. A. Nos. 552-554 of 2003 filed by the State and Crl. A. Nos. 555-557 of 2003 filed by the son of the complainant, were prosecuted for causing murder of two brothers of P.W.2 and attempting to murder him. The prosecution case, as stated by injured 'HS' who later succumbed to his injuries, was that on the day of incident when he was standing outside his house, accused 'AS' fired at him from the roof of the neighbouring house . On hearing his cries two of his brothers, namely, 'RR' and 'RS' (PW-2) came there and took him inside the house and after leaving him there, when they were going to inform the police, accused 'BhS', 'GS' (both absconding), 'BS', 'KS' and 'SS' fired gunshots at them. Thereafter accused 'BRS' with a 'gandasa' came there and accused 'LR' also jumped into their house. Accused Smt. 'SB', Smt 'GK' and Smt. 'BK' were also present on the roof of the said neighbouring house and they tried to kill other family members of the deceased. The injured were taken to the hospital where the Munsif and Judicial Magistrate recorded the statements of 'HS' and 'RS' (PW-2). Since 'RR' was not

medically fit, his statement could not be recorded and he died the same day. 'HS' died subsequently. The trial court convicted and sentenced all the nine accused, inter alia, u/ss 302/149 and 307/149IPC. However, on appeal, the High Court acquitted the six respondents and convicted the three appellants u/ss 302/34 and 307/34 IPC.

Dismissing the appeals, the Court

HELD: 1.1. The doctor (PW-1) who examined the injured, explained to the Court that all the injuries mentioned in Exts. P-1, P-2 and P-4, were caused by gun shots; that PW-2 had also sustained injuries which were serious in nature; and that the injuries of 'HR' and 'RR' were sufficient to cause death in the ordinary course of nature. [para 9] [887-C]

1.2. PW-2, in his evidence, has stated that accused 'AS' was standing on the roof of the neighbouring house and fired from muzzle loaded gun at 'HR'. Though there is little discrepancy as to the distance from the upper portion of the house and the actual scene of occurrence, it cannot be concluded that the injuries on 'RR', 'HR' and PW-2 were not caused by fire arms. In this regard, it is relevant to point out the description of injuries as noted by PW-1 in Exts. P1-P4. In addition to the same, it is seen from the evidence of PW-1 that the blackening marks found around the wounds and the dead body confirmed that the deceased were within a distance of 6 feet from the assailants when they received the injuries. [para 9] [837-F-H; 838-A]

1.3. Mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, blood stained clothes etc. cannot be taken or construed as no such occurrence having taken place. As a matter of fact,

the gun shot injuries tallied with medical evidence. It is also seen that the two victims, who died, had received 8 and 7 gun shot wounds respectively while PW-2 also received 8 gun shots scattered in front of left thigh. All these injuries have been noted by the Doctor (PW-1) in his reports Exts. P1-P4. The evidence of the doctor (PW-1), his reports, Exts. P1-P4 and the evidence of PW-2 leads to the conclusion that gun shot injuries tallied with the medical evidence and both the deceased persons died due to the same reason. Similar conclusion arrived at by the High Court cannot be doubted. [para 10-11] [838-B-G]

2.1. Coming to the motive, it is not in dispute that 'RR' and 'HR' died due to gun shot injuries. The reliable eye-witnesses have stated that there was previous enmity between them and litigation was going on between accused-'KS' and the complainant. Even in the absence of motive, in view of the assertion of eye-witnesses, particularly, PW-2, coupled with the medical evidence as seen from Exts. P1-P4, and as deposed by the Doctor (PW-1), the case of the prosecution cannot be thrown out. [para 12] [839-A-C]

2.2. In a catena of decisions, this Court has held that motive for doing a criminal act is generally a difficult area for the prosecution to prove since one cannot normally be seen into the mind of another. Motive is the emotion which impels a man to do a particular act. Even in the absence of specific evidence as to motive, in view of the fact that in the case on hand, two persons have been killed and one sustained injuries due to fire arms, the case of the prosecution cannot be thrown out on this ground. [para 12] [839-B-D]

3.1. As regards the oral evidence led in by the prosecution. PW-2, PW-3 and PW-4 are brothers, PW-6 is their father and PW-5 and PW-9 were working as

labourers in the house of PW-6 at the time of occurrence. It is true that the names of PWs 3, 4 and 6 were not mentioned either in parchabayan (Ex. P32) or in the statements, Exts. P22-23, recorded by the Judicial Magistrate, (PW-18) on the day of the occurrence. This Court, in a series of decisions, has held that the testimony of eye-witnesses should not be rejected merely because witnesses are related to the deceased. Their testimonies have to be carefully analysed because of their relationship and if the same are cogent and if there is no discrepancy, the same are acceptable.[paras 13 and 14] [839-F-H; 840-A-B]

Abdul Rashid Abdul Rahiman Patel & Ors. vs. *State of Maharashtra* **(2007) 9 SCC 1 – relied on.**

3.2. Likewise, minor discrepancies in the evidence of eye-witnesses are also immaterial. However, as rightly pointed out, if PW-3 had sustained some injuries, his name could have been mentioned in Exs. P22, P23 and P32 which were earliest versions. In those documents, the names of 'RR', who died on the same day and 'HR', who died later and PW-2, who received gun shot injuries alone were mentioned and none else. Another aspect, is that when the injured persons were examined by the Doctor on the same day, admittedly, PW-3 was examined only on the fourth day of the incident and it was seen that he did not receive any gun shot injury. Considering all these aspects including the fact that there is no proof of receiving gun shot injury to PW-3 and also taking note of the fact that he was 13 years of age at the time of occurrence, as rightly pointed out by the High Court, his presence itself is doubtful. [para 14] [840-B-E]

3.3. The names of PWs 4 and 6 did not occur in parchabayan (Ex. P 32) as well as in the statements (Exts. P22 and P23) recorded by the Judicial Magistrate (PW-18), on the day of occurrence. The statement in Ex. P32 was

recorded at 11:40 a.m. and the incident took place at about 09:30 a.m. Though it was recorded within two hours, while mentioning the details of the occurrence, names of the assailants, eye-witnesses, the presence of PW-3, PW-4 and PW-6 was not mentioned. Even in Exts. P22-23, the names of PWs 3, 4 and 6 were not noted and no explanation has been offered for their absence. The verification of those documents clearly show that only the names of 'RR' and 'HR' (both died due to gun shot injuries) and PW-2 who also received gun shot injuries were noted and except these names, none else was noted. Another important factor is that 'HR', 'RR' and PW-2 alone were medically examined on the same day whereas PW-3 was examined after 4 days of the incident and that too by the very same Doctor (PW-1). There is no explanation at all for non-examination of PW-3 by the Doctor along with other injured witnesses. In these circumstances, the High Court has rightly observed that the presence of eye-witnesses, namely, PWs 3, 4 and 6 at the place of occurrence on the date and time as pleaded by the prosecution is highly doubtful. [para 15] [840-F-H; 841-A-D]

3.4. The only witness available to support the case of the prosecution is PW 2. Merely because the witness is related to eye-witnesses or the family of the deceased, is not a ground for rejection of his testimony. Further, merely because the prosecution has not examined the neighbours, it cannot be claimed that it is fatal to their case, when the evidence of eye-witnesses examined on their side is found to be acceptable and reliable. PW-2, in his evidence, in categorical terms has asserted that he saw five to seven persons standing on the roof of the house of 'KS'. He had specifically mentioned the names of those persons. Inasmuch as in the parchabayan (Ext. P32), only the name of accused 'AS' and as per Ext. P22 the names of accused 'AS' and 'BS' are mentioned, who

were present on the roof at the relevant time, the claim of PW-2 that all the accused persons were standing on the roof is not believable, however, his assertion that two persons 'AS' and 'BS' were on the roof cannot be denied. Even certain portion is eschewed from the evidence of PW-2, his assertion and the statement regarding the involvement of 'AS', 'SS' and 'BS' cannot be disputed. In categorical terms, he explained the role played by these persons. It is clear from his evidence that he received gun shot injuries which is also supported by medical evidence. In view of the same, his presence at the time of occurrence cannot be disputed and is found to be proved. This is also strengthened from his statement in parchabayan (Ext. P32) and Ext. P22 statement given to Judicial Magistrate (PW-18). A perusal of Ext. P32 makes it clear that it was 'AS' who first fired a gun shot at 'HR' and subsequently 'BhS', 'GS' (both absconding), 'BS' and 'SS' also fired at 'RR' and 'RS' causing injury to them. Ext. P32 also clearly shows that there are specific allegations of causing gun shot injuries against accused 'SS', 'AS' and 'BS'. In the same manner, verification of Ext. P22 shows that 'AS' and 'BS' fired at deceased 'HR' and, thereafter, 'BhS' and 'SS' fired at the brothers of 'HR' when they were going to inform the police. [para 16] [841-E-H; 842-A-H]

Kuldip Yadav vs. *State of Bihar* **(2011) 5 SCC 324 – relied on**

3.5. Though certain discrepancies as to the number of gun shots have been pointed out, in view of the number of injuries, as seen from Exts. P1-P4, supported by the evidence of PW-1, the said objection is liable to be rejected and participation of the three accused, namely, 'AS', 'BS' and 'SS' is clearly proved through various circumstances including the evidence of PW-2. [para 16] [842-H; 843-A]

4. Though 'HR' died after 35 days due to septicemia, considering the medical evidence that 'HR' sustained 7 gun shot injuries which were sufficient to cause death in the ordinary course, this Court is satisfied that the death of 'HR' undoubtedly falls within the ambit of s. 302 IPC. [para 17] [843-B-C]

5. The materials placed by the prosecution clearly prove the guilt against the three convicted accused-appellants, namely, 'SS', 'AS' and 'BS', who were armed with guns; and with their common intention they fired gun shots resulting in death of 'RR' and 'HR' as well as causing injuries to PW-2. In such circumstances, their conviction and sentence recorded by both the courts below are confirmed. [para 18] [843-D-E]

Case Law Reference:

(2007) 9 SCC 1	**relied on**	**para 13**
(2011) 5 SCC 324	**relied on**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 552-554 of 2003.

From the Judgment & Order dated 26.4.2002 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 504, 533 and 673 of 1995.

WITH

Crl.A.Nos. 555-557 & 558 of 2003.

S.R. Bajwa, Manish Singhvi, AAG, Puneet Jain, Pratibha Jain, Trishna Mohan, Vijay Kumar, Milind Kumar, Aishwarya Bhati, Sangram Singh, Gp. Capt. Karan Singh Bhati, Karmendra Singh, Sushil Kumar Jain, Aruneshwar Gupta for the appearing parties.

The Judgment of the Court was delivered by

P.SATHASIVAM,J. 1. These appeals are filed against the common final judgment and order dated 26.04.2002 passed by the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Criminal Appeal Nos. 504, 533 and 673 of 1995 whereby the High Court disposed of the appeals acquitting Karan Singh, Laxman Raigar, Bahadur Singh, Smt. Swaroop Bai, Smt. Gyan Kanwar and Smt. Bhagwan Kanwar of all the charges and altered the conviction and sentence of Shivraj Singh, Banney Singh and Arjun Singh from Sections 302/149 IPC and 307/149 IPC to Section 302/34 and 307/34 IPC passed by the trial Court.

2. Brief facts:

(a) On 24.12.1991, at about 09:30 a.m., an information was received by the In-charge, Police Out-post Anwa that cross firing had taken place between the Rajputs of that village. After recording the said information in Rojnamcha (Ex. P31), immediately the police proceeded towards the spot and recorded Parchabayan of injured Himmat Raj Singh (Ex. P32) at about 11.40 a.m. It was stated by Himmat Raj Singh (since deceased) that at 9.30 a.m., when he was standing outside his house, Arjun Singh fired at him from a muzzle loaded gun from the roof of Karan Singh thereby 2-3 bullets hit him on the left hand and another 2-3 hit his abdomen and left thigh. On hearing his cries, two of his brothers, namely, Raghuraj Singh (since deceased) and Raj Singh (PW-2) came there and took him inside the house and after leaving him there, when they were going to inform the police at Police out-post, Anwa, Bheem Singh and Gajender Singh (who are now absconding), Banney Singh, Karan Singh and Shivraj Singh fired gunshots at them, as a result of which, both of them received injuries. Thereafter, accused Bahadur Singh came with a gandassa. The other accused, Laxman Raigar also jumped into their house. It was also stated that Smt. Swaroop Bai, Smt. Gyan Kanwar and Smt. Bhagwan

Kanwar were also present on the roof of Karan Singh and they tried to kill the other family members of the deceased with deadly weapons.

(b) The moment Raghuraj Singh and Raj Singh (PW-2) received injuries, Roop Singh, their father immediately rushed to the Police Out-post to inform the Police about the incident. The police officials reached at the spot and on the basis of the statement of Himmat Raj Singh, a First Information Report (in short 'the FIR') being No. 228/1991 was registered against the accused persons for the offences punishable under Sections 307, 147, 148 and 149 IPC. The injured persons, Raghuraj Singh, Himmat Raj Singh, Dhiraj Raj Singh and Raj Singh were taken to the M.B.S. Hospital at Kota for treatment.

(c) Shri Ajay Kumar Gupta, (PW-18), Munsif and Judicial Magistrate (North), Kota recorded the statements of Himmat Raj Singh and Raj Singh (PW-2). Since Raghuraj Singh was not medically fit to make a statement, his statement was not recorded. On the same day, Raghuraj Singh died in the Hospital, therefore, offence punishable under Section 302 IPC was added. On 29.01.1992, Himmat Raj Singh also died in the Hospital. After due investigation, the police submitted four charge sheets at different stages against Arjun Singh, Banney Singh, Shivraj Singh, Bahadur Singh, Smt. Swaroop Bai, Smt. Gyan Kanwar, Smt. Bhagwan Kanwar, Karan Singh and Laxman Raigar.

(d) On 07.09.1995, the Additional Sessions Judge, Kota, after examining 30 prosecution witnesses and 8 defence witnesses convicted Karan Singh under Sections 148, 302/149, 307/149 IPC and Section 3/27 of the Arms Act, 1959, Shivraj Singh, Banney Singh and Arjun Singh under Sections 148, 302/149, 307/149 IPC and Smt. Swaroop Bai, Smt. Gyan Kanwar, Smt. Bhagwan Kanwar, Laxman Raigar and Bahadur Singh under Sections 148, 302/149,

307/149 and 452 IPC and sentenced all of them to undergo rigorous imprisonment.

(e) Aggrieved by the judgment of the trial Court, Arjun Singh, Banney Singh, Shivraj Singh, Bahadur Singh, Smt. Swaroop Bai, Smt. Gyan Kanwar and Smt. Bhagwan Kanwar filed D.B. Criminal Appeal No. 504 of 1995, Laxman Raigar filed D.B. Criminal Appeal No. 673 of 1995, Karan Singh filed D.B. Criminal Appeal No. 533 of 1995 and Roop Singh-the complainant, filed D.B. Criminal Revision Petition No. 250 of 1996 before the High Court of Judicature for Rajasthan, Jaipur Bench at Jaipur.

(f) On 26.04.2002, the High Court, by a common impugned judgment, set aside the order of conviction and sentence passed by the trial Judge against Karan Singh, Laxman Raigar, Bahadur Singh, Smt. Swaroop Bai, Smt. Gyan Kanwar and Smt. Bhagwan Kanwar and acquitted them of all the charges. As regards Arjun Singh, Banney Singh and Shivraj Singh, their conviction and sentences under Sections 302/149 and 307/149 IPC were altered to Sections 302/34 and 307/34 IPC.

(g) Against the acquitted persons, the State of Rajasthan filed Criminal Appeal Nos. 552-554 of 2003, Raj Singh, son of the Complainant-Roop Singh, who died during the pendency of the case, filed Criminal Appeal Nos. 555-557 of 2003. Against the order of conviction and sentence, accused Arjun Singh, Banney Singh and Shivraj Singh filed Criminal Appeal No. 558 of 2003 before this Court by way of special leave petitions.

3. Heard Mr. S.R. Bajwa, learned senior counsel for the convicted appellants, Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan and Ms. Aishwarya Bhatti, learned counsel for the son of the complainant.

Issues for consideration:

4. The question for consideration in these appeals is whether the High Court was justified in acquitting Bahadur Singh, Laxman Raigar, Karan Singh, Smt Swaroop Bai, Smt Gyan Kanwar and Smt Bhagwan Kanwar and also altering the conviction from 302/149 and 307/149 IPC to Sections 302/34 and 307/34 insofar as Arjun Singh, Banney Singh and Shivraj Singh.

5. Since the issues, allegations and overt acts are inter-connected, let us consider all the available materials and ascertain whether the prosecution had established its case as initiated at the first instance.

Discussion:

6. As mentioned earlier, on 24.12.1991, at about 09:30 a.m., all the accused gathered on the roof of Karan Singh. Accused- Arjun Singh fired at Himmat Raj Singh (since deceased) from the roof of Karan Singh from a capped gun thereby few bullets hit the deceased on the left hand and another 2-3 hit his abdomen and left thigh. On hearing his cries, brothers of the deceased, Raghuraj Singh and Raj Singh (PW-2) came there and took injured Himmat Raj Singh inside their house and after leaving him there, when both of them were going to police out-post to lodge a complaint, at that time, Bheem Singh, Gajendra Singh, Banney Singh, Karan Singh and Shivraj Singh fired on them resulting in the death of Raghuraj Singh. Other accused Bahadur Singh, Laxman Raigar, Smt Swaroop Bai, Smt. Gyan Kanwar and Smt Bhagwan Kanwar were also present on the roof of Karan Singh and they tried to kill other family members with deadly weapons. It is also the claim of the prosecution that the accused persons attempted on the life of Dhiraj Raj Singh - the brother of the deceased. The injured persons, namely, Raghuraj Singh, Himmat Raj Singh, Raj Singh and Dhiraj Raj Singh were taken to Kota Hospital. Raghuraj Singh died on the same day and Himmat Raj Singh died on

29.01.1992 in the hospital, however, Raj Singh survived. According to the High Court, there is complete consistency and credible evidence as far as three accused persons, namely, Arjun Singh, Banney Singh and Shivraj Singh are concerned, however, in respect of other six, there is no direct evidence and the case pleaded by the prosecution is unacceptable and acquitted them of all the charges.

7. The prosecution examined as many as 30 witnesses in support of its case. In the statements recorded under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called as "the Code"), all the accused denied the prosecution evidence and informed the Court that they were falsely implicated. In addition to their statements, 8 witnesses were examined in their defence.

8. Before considering the evidence of eye-witnesses, let us analyse the evidence of the Dr. Manmohan Sharma (PW-1), Medical Jurist in M.B.S. Hospital, Kota, who examined Raghuraj Singh, Himmat Raj Singh and Raj Singh on 24.12.1991 and Dhiraj Raj Singh on 28.12.1991. The injuries noted by Dr. Manmohan Sharma (PW-1) in Exs. P1-P4 are relevant, they are as follows:-

"Raghuraj Singh (Ex. P1)

1. Gunshot wound 1/2" x 3/4" oval with inverted margins blackening and tattooing on left shoulder outside.

2. Gunshot wound 3/4" x 1/2" oval with blackening on outer side lt. iliac crust posteriolateral aspect upper quadrant of lt. buttock.

3. Gunshot wound 1/2" x 1/2" on lt. lip 4" medial to No. 1.

4. Gunshot wound 1/4" x 3/4" upper quadrant of lt. buttock 5" below No. 1.

5. Gun shot wound 1/2" x 3/4", 2" medial to No. 1 on lt. buttock.

6. Gunshot wound 1/3" x 1/3" on sacral gorder of lt. buttock 3" away from middle.

7. Gun shot wound 1/3" x 1/3" 1" below No. 6, 3 & 1/2" away from middle.

8. Gun shot wound 1/3" x 1/3" 1/2" below No. 6, 3 & 2" away from middle.

Himmat Raj Singh (Ex. P2)

1. Gun shot wound 1/2" x 1/2 circular with inverted margin with blackish.

2. Gun shot wound 1/2" x 3/4" oval with blackening on the side of the abdomen.

3. Gun shot wound 3/4" x 3/4" oval iliac with blackening.

4. Gun shot wound 1/2" x 1/2" circular on left arm upper outer side with bleeding.

5. Gun shot wound 1/2" x 3/4" oval 2" below slight medial to forearm.

6. Gun shot wound 1/2" x 3/4" oval with inverted margin on left forearm innerside.

7. Gun shot wound 1/2" x 1/2" on the left hand.

Raj Singh (Ex. P4)

1. Eight gun shot wounds about 1/2" x 1/2" size to 1" x 3/4" scattered in front of left thigh blackening tattooing margin inverted.

Dhiraj Raj (Ex. P3)

1. Contusion 2” x 1” abrasion on left arm.

2. Contusion 3" x 1 and 1/2" with abrasion on left forearm.

3. Lacerated wound 1" x 1/3" x 1/3" abdomen right side outside in auxiliary 3” below knee joint.”

9. With reference to the specific question about the injuries, Dr. Manmohan Sharma (PW-1) has explained to the Court that all the injuries referred to above were caused by gun shots. It was further revealed that Raj Singh had also sustained injuries. It is seen from the X-ray Report (Ex.P5) that Raj Singh had fracture of femur bone and according to Dr. Manmohan Sharma (PW-1), the injuries were serious in nature. He also opined that the injuries of Himmat Raj Singh and Raghuraj Singh were sufficient to cause death in the ordinary course of nature. In his evidence, he also explained that the death of Himmat Raj Singh was caused due to septicemia shock as a result of multiple ante-mortem injuries to abdomen. With reference to a suggestion, PW-1 had denied that blackening and tattooing marks can be possible only when gun shots were fired from a distance of 3 or 4 feet. In respect of the same, Dr. Sharma, (PW-1), explained in detail in his cross-examination that the same marks are possible even in the case of gun shots which are fired from a distance of more than 3 or 4 feet and it depends upon the nature of gun, gun powder, cartridges etc. Raj Singh, (PW-2), in his evidence, has stated that the accused Arjun Singh was standing on the roof of the house of Karan Singh and fired from muzzle loaded gun at Himmat Raj Singh. Though there is little discrepancy as to the distance from the upper portion of the house and the actual scene of occurrence, it cannot be concluded that the injuries on Raghuraj Singh, Himmat Raj Singh and Raj Singh were not caused by fire arms. In this regard, it is relevant to point out the description of injuries as noted by Dr. Sharma (PW-1) in Exs. P1-P4 which we have extracted earlier. In addition to the same, it is seen from the evidence of PW-1 that the blackening marks found around the

wounds and the dead body confirmed that the deceased were within a distance of 6 feet from the assailants when they received the injuries.

10. Learned senior counsel for the accused persons contended that in the absence of recovery of pellets from the scene of occurrence or from the body of the injured persons, it is highly doubtful as to the scene of occurrence and whether such incident did take place in the manner suggested by the prosecution. Learned counsel appearing for the complainant pointed out that though there was an entry in Malkhana Register (Ex. P31A) wherein it was stated that a sealed packet containing pellets was deposited but prosecution failed to lead any evidence on this point. It was also pointed out that though a report was received from the Forensic Science Laboratory, no evidence regarding recovery of the pellets was produced. As rightly pointed out by the learned Additional Advocate General appearing for the State that mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, blood stained clothes etc. cannot be taken or construed as no such occurrence had taken place. As a matter of fact, we have already pointed out that the gun shot injuries tallied with medical evidence. It is also seen that Raghuraj Singh and Himmat Raj Singh, who had died, received 8 and 7 gun shot wounds respectively while Raj Singh (PW-2) also received 8 gun shots scattered in front of left thigh. All these injuries have been noted by the Doctor (PW-1) in his reports Exs. P1-P4.

11. If we analyze the evidence of Dr. Manmohan Sharma (PW-1), his reports, Exs.P1-P4 and the evidence of Raj Singh (PW-2), it leads to a conclusion that gun shot injuries tallied with the medical evidence and both the deceased persons died due to the same reason. Similar conclusion arrived at by the High Court cannot be doubted.

12. Coming to the contention relating to the motive, it is not in dispute that Raghuraj Singh and Himmat Raj Singh died due to gun shot injuries. The reliable eye-witnesses have stated that there was previous enmity between them and litigation was going on between the accused-Karan Singh and the complainant. Even in the absence of motive, in view of the assertion of eye-witnesses, particularly, Raj Singh, (PW-2), coupled with the medical evidence as seen from Exs. P1-P4, by the Doctor (PW-1), the case of the prosecution cannot be thrown out. In a catena of decisions, this Court has held that motive for doing a criminal act is generally a difficult area for the prosecution to prove since one cannot normally be seen into the mind of another. Motive is the emotion which impels a man to do a particular act. Even in the absence of specific evidence as to motive, in view of the fact that in the case on hand, two persons have been killed and one sustained injuries due to fire arms, the case of the prosecution cannot be thrown out on this ground.

13. Now, let us consider the oral evidence led in by the prosecution. We have already pointed out that though the prosecution has examined as many as 30 witnesses, they heavily relied only on 6 witnesses and out of these, Raj Singh (PW-2), Dhiraj Raj Singh (PW-3) and Brij Raj Singh (PW-4) are brothers, Roop Singh (PW-6) is their father and Durga Shankar (PW-5) and Satya Narain (PW-9) were working as labourers in the house of Roop Singh at the time of occurrence. It is true that the names of PWs 3, 4 and 6 were not mentioned either in parchabayan (Ex. P32) or in the statements, Exs. P22-23, recorded by the Judicial Magistrate, (PW-18) on the day of the occurrence.

14. It was also pointed out that all the eye-witnesses, particularly, PWs 3, 4 and 6 being brothers and father of the deceased, they are interested in their version and no reliance need to be placed on their statements. We are unable to accept the said contention. This Court, in a series of decisions,

has held that the testimony of such eye-witnesses should not be rejected merely because witnesses are related to the deceased. This Court has held that their testimonies have to be carefully analysed because of their relationship and if the same are cogent and if there is no discrepancy, the same are acceptable vide *Abdul Rashid Abdul Rahiman Patel & Ors. vs. State of Maharashtra* (2007) 9 SCC 1. Likewise, minor discrepancies in the evidence of eye-witnesses are also immaterial. However, as rightly pointed out, if Dhiraj Raj Singh (PW-3) had sustained some injuries, his name could have been mentioned in Exs. P22, P23 and P32 which were earliest versions. In those documents, the names of Raghuraj Singh, who died on the same day and Himmat Raj Singh, who died later and Raj Singh, who received gun shot injuries alone were mentioned and none else. Another aspect, as rightly pointed out is that when the injured persons were examined by the Doctor on the same day, admittedly, PW-3 was examined only on the fourth day of the incident and it was seen that he did not receive any gun shot injury. Considering all these aspects including the fact that there is no proof of receiving gun shot injury to PW-3 and also taking note of the fact that he was 13 years of age at the time of occurrence, as rightly pointed out by the High Court, his presence itself is doubtful.

15. The remaining eye-witnesses, as per the prosecution version, are PWs 2, 4 and 6. It was demonstrated before us by the learned senior counsel for the accused that the names of PWs 4 and 6 did not occur in parchabayan (Ex. P 32) as well as in the statements (Exs. P22 and P23) recorded by Shri Ajay Kumar Gupta, (PW-18), Judicial Magistrate, on the day of occurence. The statement in Ex. P32 was recorded at 11:40 a.m. and the incident took place at about 09:30 a.m. Though it was recorded within two hours, as rightly pointed out, while mentioning the details of the occurrence, names of the assailants, eye-witnesses, the presence of Dhiraj Raj Singh (PW-3), Brij Raj Singh (PW-4) and Roop Singh (PW-6) was not mentioned. We have already noted that even in Exs. P22-23,

the names of PWs 3, 4 and 6 were not noted and no explanation has been offered for their absence. The verification of those documents clearly show that only the names of Raghuraj Singh and Himmat Raj Singh (both died due to gun shot injuries) and Raj Singh (PW-2) who also received gun shot injuries were noted and except these names, none else was noted. Another important factor is that Himmat Raj Singh, Raghuraj Singh and Raj Singh (PW-2) alone were medically examined on the same day whereas Dhiraj Raj Singh (PW-3) was examined after 4 days of the incident and that too by the very same Doctor (PW-1). There is no explanation at all for non-examination of PW-3 by the Doctor along with other injured witnesses. In these circumstances, as rightly observed by the High Court, the presence of eye-witnesses, namely, PWs 3, 4 and 6 at the place of occurrence on the date and time as pleaded by the prosecution is highly doubtful. We agree with the said conclusion.

16. In the light of the above conclusion, the only witness available to support the case of the prosecution is Raj Singh (PW-2). Let us consider his evidentiary value and how far he supported the case of the prosecution. Mr. Bajwa, learned senior counsel for the accused, by pointing out certain contradictions, submitted that it is not safe to convict the accused based on his evidence. It is also pointed out that Raj Singh (PW-2) is highly interested witness and closely related to eye-witnesses. It was further pointed out that in the absence of any neighbour, conviction based on the testimony of PW-2 alone is not sustainable. In the light of the above submissions, we have carefully scrutinized the evidence of PW-2. First of all, merely because the witness is related to eye-witnesses or the family of the deceased is not a ground for rejection vide *Kuldip Yadav vs. State of Bihar* (2011) 5 SCC 324. It was also held that merely because the prosecution has not examined neighbours, it cannot be claimed that it is fatal to their case, when the evidence of eye-witnesses examined on their side is found to be acceptable and reliable. Raj Singh, (PW-2), in his

evidence, in categorical terms has asserted that he saw five to seven persons standing on the roof of the house of Karan Singh. He had specifically mentioned the names of those persons as Bahadur Singh, Shivraj Singh, Banney Singh, Smt Swaroop Bai, Smt Gyan Kanwar, Smt Bhagwan Kanwar, Gajendra Singh and Karan Singh. Inasmuch as in the parchabayan (Ex. P32), only the name of Arjun Singh and as per Ex. P22 the names of Arjun Singh and Banney Singh was mentioned, who were present on the roof at the relevant time, as rightly observed by the High Court, the claim of Raj Singh (PW-2) that all the accused persons were standing on the roof is not believable, however, his assertion that two persons Arjun Singh and Banney Singh were on the roof cannot be denied. Even if we eschew certain portion from the evidence of PW-2, his assertion and the statement regarding the involvement of Arjun Singh, Shivraj Singh and Banney Singh cannot be disputed. In categorical terms, he explained the role played by these persons. It is clear from his evidence that he received gun shot injuries which is also supported by medical evidence. In view of the same, his presence at the time of occurrence cannot be disputed and is found to be proved. This is also strengthened from his statement in parchabayan (Ex. P32) and Ex. P22 statement given to Judicial Magistrate (PW-18). A perusal of Ex. P32 makes it clear that it was Arjun Singh who first fired a gun shot at Himmat Raj Singh and subsequently Bheem Singh, Gajendra Singh (both absconding) Banney Singh and Shivraj Singh also fired at Raghuraj Singh and Raj Singh causing injury to them. Ex. P32 also clearly shows that there are specific allegations of causing gun shot injuries against Shivraj Singh, Arjun Singh and Banney Singh. In the same manner, verification of Ex. P22 shows that Arjun Singh and Banney Singh fired at the deceased Himmat Raj Singh and, thereafter, Bheem Singh and Shivraj Singh fired at the brothers of Himmat Raj Singh when they were going to inform the police. Though Mr. Bajwa pointed out certain discrepancies as to the number of gun shots, in view of the number of injuries, as seen from Exs. P1-P4, supported by the evidence of Dr.

Manmohan Sharma (PW-1), the said objection is liable to be rejected and participation of these three accused, namely, Arjun Singh, Banney Singh and Shivraj Singh is clearly proved through various circumstances including the evidence of PW-2.

17. Finally, learned senior counsel for the accused pointed out that inasmuch as Himmat Raj Singh died after 35 days due to septicemia, the Courts below are not justified in convicting the accused persons for an offence under Section 302 IPC for his death. Considering the medical evidence that Himmat Raj Singh sustained 7 gun shot injuries which were sufficient to cause death in the ordinary course, we are satisfied that the death of Himmat Raj Singh undoubtedly falls within the ambit of 302 IPC.

18. The materials placed by the prosecution clearly prove the guilt against the three convicted accused, namely, Shivraj Singh, Arjun Singh and Banney Singh who were armed with guns and with their common intention they fired gun shots resulting in death of Raghuraj Singh and Himmat Raj Singh as well as causing injuries to Raj Singh (PW-2), in such circumstances, their conviction and sentence by both the courts have to be confirmed.

19. Dr. Manish Singhvi vehemently argued as to the role of the acquitted accused. As discussed in the earlier paras and on going through the evidence relating to their role and the detailed analysis by the High Court, we agree with the said conclusion and reject his arguments. For the same reasoning, the appeals filed by the son of the complainant are also liable to be dismissed.

20.In view of the above discussion and conclusion, we agree with the decision of the High Court, consequently, all the appeals are dismissed.

R.P. Appeals dismissed.

BHUSHAN KUMAR MEEN

v.

STATE OF PUNJAB AND ORS.

(Criminal Appeal No.1709 OF 2011)

SEPTEMBER 2, 2011

[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER SINGH NIJJAR, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s. 482 – Petition seeking to quash criminal proceedings – Complaint by wife against her husband alleging commission of offence punishable u/s 498A – Women's Cell reporting that nothing had come out from the inquiry to prove the demand of dowry and issuance of threat – Subsequently, FIR registered – Petition of husband seeking to quash the FIR dismissed by High Court – Held: From the entire records available, it is clear that the complaint made by the wife did not make out a prima facie case to go to trial u/s.498-A IPC – The single Judge of the High Court did not appreciate the nature of the on and off relationship between the couple – The impugned order of the High Court is set aside and the FIR and all proceedings taken on the basis thereof are quashed – Penal Code, 1860 – s.498-A.

The marriage of the appellant and respondent no. 2 was solemnized on 27.11.2004 and the couple went to Gajarat where the appellant-husband was employed. Subsequently, differences arose between them and the wife, respondent no. 2, on 12.5.2006 made a complaint to the Senior Superintendent of Police, Patiala (Punjab) that a criminal case be registered against the appellant for commission of offence punishable u/s.498-A IPC. The complaint was forwarded to the Women's Cell, which reported that nothing had come out from the inquiry to

prove the demand of dowry and issuance of threat and the dispute was of a civil nature which did not call for ay action by the police at that stage. However, subsequently, when an FIR was registered against the appellant for offence punishable u/s 498-A IPC, he filed a petition u/s 482 Cr.P.C. seeking to quash the FIR. The High Court dismissed the petition.

Allowing the appeal filed by the husband, the Court

HELD: From the entire records available, it is clear that the complaint made by respondent No.2 does not make out a prima facie case to go to trial u/s 498-A IPC and appears to have been filed by respondent No.2 based on misunderstandings between the parties prompting respondent No.2 to attack the appellant for something which is likely to have occurred during their stormy marriage. The Single Judge of the High Court did not appreciate the nature of the on and off relationship between the appellant and respondent No.2. In such circumstances, no offence u/s 498-A IPC had been made out against the appellant. The impugned order of the High Court is set aside and the FIR lodged by respondent No.2 against the appellant, and all the proceedings taken on the basis thereof, are quashed. [Paras 9-13] [849-B-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1709 of 2011.

From the Judgment & Order dated 27.8.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Misc. No. 13709-M of 2007.

Vijay K. Aggarwal, Babanjeet Singh, Shekhar Kumar for the Appellant.

Gagan Gupta, Tarun Shankar B., Kuldip Singh, R.K.

Pandey, K.K. Pandey, Mohit Mudgil, H.S. Sandhu for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The appellant, who had all along been appearing in person, was represented by counsel, Mr. Vijay K. Aggarwal, at the time of final hearing of the appeal, which is directed against the judgment and order dated 27.8.2008 passed by the Punjab and Haryana High Court in Crl.M. No.13709 of 2007, dismissing the appellant's application under Section 482 Cr.P.C. for quashing the FIR No.9 dated 10.1.2007 of P.S. Patiala, filed by his wife, the respondent No.2 herein.

3. The appellant's marriage was solemnized with the respondent No.2 on 27.11.2004 as per Sikh rites. After their marriage, the couple went to Gujarat where the appellant was employed with Patronet L.N.G. Limited in District Bharuch, Gujarat, and lived together as husband and wife, though no child was born out of the said wedlock. Subsequently, differences arose between the appellant and the respondent No.2 which resulted in a complaint being made by the respondent No.2 on 12.5.2006 to the Senior Superintendent of Police, Patiala, requesting that a criminal case be registered against the appellant under Sections 406 and 498-A IPC. The said complaint was forwarded to the Women's Cell in Patiala, which made a detailed inquiry into the allegations made by the respondent No.2 against the appellant. After such inquiry, the Women's Cell came to the conclusion that even in spite of the periodical differences between the appellant and the respondent No.2, they continued to maintain their relationship as husband and wife. From the report it appears that even after she left Gujarat, at the instance of her husband she returned to Gujarat in January 2006, and, thereafter, they visited Mount Abu, Bombay, Shirdi, Udaipur, Jaipur, Delhi and Gandhinagar, and both of them even went to Ambala to attend the retirement

function of her mother-in-law, but after reaching Ambala she left for Patiala instead of going with the appellant to the Zirakpur. The Women's Cell also found that the respondent No.2 had great love for her parents and as a result she wanted to stay with them more often. Even on the question of dowry, it was found that the entire complaint had been exaggerated and that the respondent No.2 was determined to teach her husband and his family members a lesson by levelling serious allegations against them. The ultimate conclusion arrived at by the Women's Cell was that nothing had come out from the inquiry to prove the demand of dowry and issuance of threat, and that the dispute was of a civil nature which did not call for any action by the local police at the said stage.

4. Subsequently, a further inquiry was held by the Superintendent of Police, Patiala, who despite taking into consideration the report filed by the Women's Cell Patiala, came to the conclusion that the respondent No.2 had been harassed by the appellant and her father-in-law and mother-in-law for not meeting the demand of dowry and suggested action to be taken under Sections 406, 498-A IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961. However, on receipt of the said report, the Senior Superintendent of Police, Patiala, met the appellant and the respondent No.2 and was of the view that the matter did not appear to be a case of demand of dowry and the allegations needed to be checked again for evidence, though the ingredients of Section 498-A could be true. The Superintendent of Police, Patiala, was directed to re-verify and substantiate the evidence.

5. After further inquiry, the Superintendent of Police, once again came to the conclusion that the appellant had harassed the respondent No.2 which merited the registration of a case against the appellant under Section 498-A IPC. Upon the case being registered, the appellant filed Criminal Misc. No.13709 of 2007 under Section 482 Cr.P.C. for quashing the FIR. The matter was heard by the learned Single Judge, who, by his order

dated 27.8.2008, dismissed the application filed by the appellant for quashing of the FIR and held that in view of the specific allegations contained therein, no ground for quashing the same had been made out and the appellant would be at liberty to set up the plea in defence at the appropriate stage of the trial.

6. Aggrieved by the said order of the learned Single Judge, the appellant filed the Special Leave Petition out of which the present appeal arises.

7. Appearing for the appellant, Mr. Vijay K. Aggarwal, learned Advocate, submitted that at every stage the appellant had made sincere attempts to make the marriage with the respondent No.2 work, but at every stage such efforts of the appellant had been resisted. It was submitted that the appellant had agreed to live with the respondent No.2 in a house which was separate from the house in which his parents lived, since it was one of the complaints of the respondent No.2 that he was paying more attention to his parents than to her. According to the learned counsel appearing for the appellants, all the attempts made by the appellant to make the marriage work proved to be futile on account of the attitude of the respondent No.2, and even the complaint made against him was a fallout thereof, although, there was no truth whatsoever in any of the allegations made in the FIR.

8. On behalf of the respondent No.2 an attempt was made to show that the appellant is a person who was only interested in harassing the respondent No.2 for bringing dowry. However, the said allegations do not bear scrutiny in view of the report filed by the Women's Cell, Patiala that the appellant and the respondent No.2 had visited various places all over the country together, which, according to the learned counsel for the appellant, clearly proves that the appellant and the respondent No.2 continued to maintain a normal relationship of husband and wife despite their moments of disagreement. Coupled with the above, is the observation of the Senior Superintendent of

Police, Patiala, that after meeting the couple he was of the view that the matter did not relate to a dowry offence and that the dispute appeared to be of a civil nature.

9. The complaint made by the respondent No.2 does not, in our view, make out a case under Section 498-A IPC and appears to have been filed by the respondent No.2 based on misunderstandings between the parties prompting the respondent No.2 to attack the appellant for something which is likely to have occurred during their stormy marriage.

10. In our view, the learned Single Judge of the High Court did not appreciate the nature of the on and off relationship between the appellant and the respondent No.2, which caused him to dismiss the appellant's application under Section 482 Cr.P.C. on the ground that there were serious allegations in the FIR which have been registered against the appellant regarding his alleged cruelty and maltreatment of the respondent No.2 and even misappropriation by him.

11. We are unable to agree with the reasoning of the learned Single Judge, since from the entire records available it is clear that the complaint made by the respondent No.2 did not make out a prima facie case to go to trial under Section 498-A IPC.

12. In such circumstances, we are inclined to accept Mr. Aggarwal's submissions that no offence under Section 498-A IPC had been made out against the appellant and the complaint was, therefore, liable to be rejected and the FIR was also liable to be quashed.

13. The appeal is accordingly allowed. The impugned order of the High Court is set aside and the FIR lodged by the respondent No.2 against the appellant, and all the proceedings taken on the basis thereof, are quashed.

R.P. Appeal allowed.

ARUN KUMAR AGGARWAL

v.

STATE OF MADHYA PRADESH AND ORS.

(Criminal Appeal Nos.1706-08 of 2011)

SEPTEMBER 2, 2011

[G.S. SINGHVI AND H.L. DATTU, JJ.]

Judgment/Order:

Obiter dictum – Allegation of corruption against government servants – Police after conducting investigation exonerated accused of all the charges and submitted final closure report u/s.169, Cr.P.C. to the Special Judge – Special Judge rejected the closure report – The order of the Special Judge stated that there were sufficient grounds to take cognizance for the offence and matter may be taken up seeking necessary sanction to prosecute them – High Court quashed the order of the Special Judge by treating the operative portion of the order of Special Judge as direction issued to the sanctioning authority to sanction the prosecution of respondent nos.2 to 4 – On appeal, held: In the facts and circumstances of instant case, the refusal of the Special Judge to accept the final closure report submitted by Lokayukta Police was the only ratio decidendi of the Order – The other part of the Order dealing with the initiation of Challan proceedings could not be treated as the direction issued by the Special Judge – The wordings of the Order clearly suggested that it was not in the nature of the command or authoritative instruction – The Order was also not specific or clear in order to direct or address any authority or body to perform any act or duty – Therefore, it cannot be treated as the direction issued by the Special Judge but only Obiter Dictum' or mere passing remark made by the Special Judge, which only amounted to expression of his personal view – Therefore, this portion of the Order dealing with Challan

proceeding, was neither relevant, pertinent nor essential, while deciding the actual issues which were before the Special Judge and, therefore, cannot be treated as the part of the Judgment of the Special Judge – Therefore, there was no occasion for the High Court to interfere with the Order of the Special Judge.

Direction issued by the Court – Scope and nature of – Held: Direction issued by the Court is in the nature of a command or authoritative instruction which contemplates the performance of certain duty or act by a person upon whom it has been issued – Direction should be specific, simple, clear and just and proper depending upon the facts and circumstances of the case but it should not be vague or sweeping.

Obiter dictum – Scope and nature of – Held: Is a mere observation or remark made by the court while deciding the actual issue before it – The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and has no authoritative value – The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court – These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment.

Respondent nos.2 to 4 were the government servants. The appellant made a complaint to the Lokayukta that respondent nos.2 to 4 had entered into sale transactions which had resulted in loss of Rs.4 crores to the government. The FIR was registered against respondent nos.2 to 4 under Sections 13(1-d) and 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B, IPC. A criminal case was registered against respondent nos.2 to 4 in the court of Special Judge. However, the sanction of the Government was necessary

as mandated by Section 19 of the Act in order to prosecute the said respondents. The police after conducting the investigation exonerated respondent nos.2 to 4 of all the charges leveled against them and submitted final closure report under Section 169, Cr.P.C. to the Special Judge. The Special Judge rejected the closure report. It was held in the order of the Special Judge that *prima facie* the respondents-accused entered into conspiracy and caused financial loss to government and there were sufficient grounds to take cognizance for the offence. The order further read that all the accused persons working as Government servant while discharging their government duties committed offence under Section 19 of the Act and, therefore, it was necessary to obtain sanction to prosecute them under Section 13 of the Act and matter may be taken up seeking necessary sanction to prosecute the accused to prosecute them under Section 13(1-d), 13(2) of the Act and under Section 120-B, IPC and for necessary further action case be registered. The High Court allowed the revision petitions and quashed the order of the Special Judge by treating the operative portion of the order of Special Judge as direction issued to the sanctioning authority to sanction the prosecution of respondent nos.2 to 4. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1. The direction issued by the Court is in the nature of a command or authoritative instruction which contemplates the performance of certain duty or act by a person upon whom it has been issued. The direction should be specific, simple, clear and just and proper depending upon the facts and circumstances of the case but it should not be vague or sweeping. [Para 20] [863-B]

Rameshwar Bhartia v. The State of Assam **1953 SCR 126;** *IncomeTax Officer, A-Ward, Sitapur v. Murlidhar Bhagwan Das, Lakhimpurkheri* **(1964) 6 SCR 411;** *Rajinder Nath v. CIT* **(1979) 4 SCC 282:1979 (1) SCR 272;** *Kanhiya Lal Omar v. R.K. Trivedi & Ors.* **(1985) 4 SCC 628: 1985 (3) Suppl. SCR 1;** *Giani Devender Singh v. Union of India* **(1995) 1 SCC 391: 1995 (1) SCR 27 – relied on.**

Abhinandan Jha v. Dinesh Mishra, **AIR 1968 SC 117;** *Mansukh LalVithaldas Chauhan v. State of Gujarat* **AIR 1997 SC 3400: 1997 (3)Suppl. SCR 705 – referred to.**

The Blacks Law Dictionary **(9th ed. 2009);** *Corpus Juris Secundum*, **Vol. 26A;** *P. Ramanatha Aiyar, Advanced Law Lexicon* **3rd ed. 2005;***Words and Phrases, Permanent Edition*, **Vol. 12A;** *American Jurisprudence* **2d, Vol. 20;** *P. Ramanatha Aiyar, Advanced Law Lexicon* **(3rd ed. 2005;** *The Wharton's Law Lexicon* **(14th Ed. 1993);** *Blacks Law Dictionary*, **(9th ed, 2009);** *Word and Phrases, Permanent* ***Edition*****, Vol. 29;** *Corpus Juris Secundum*, **Vol. 21 – referred to.**

2. It is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment. In the facts and circumstances of the instant case, the refusal of the Special Judge to accept the final closure report submitted by Lokayukta Police is the only *ratio decidendi* of the Order. The other part of the Order which deals with the

initiation of Challan proceedings cannot be treated as the direction issued by the Special Judge. The relevant portion of the Order of the Special Judge dealing with Challan Proceeding reads as "Therefore matter may be taken up seeking necessary sanction to prosecute the accused persons Raghav Chandra, Shri Ram Meshram and Shahjaad Khan to prosecute them under Section 13 (1-d), 13 (2) Anti Corruption Act and under Section 120-B I.P.C and for necessary further action, case be registered in the criminal case diary." The wordings of this Order clearly suggest that it is not in the nature of the command or authoritative instruction. This Order is also not specific or clear in order to direct or address any authority or body to perform any act or duty. Therefore, by no stretch of imagination, this Order can be considered or treated as the direction issued by the Special Judge. The holistic reading of this Order leads to only one conclusion, that is, it is in the nature of 'Obiter Dictum' or mere passing remark made by the Special Judge, which only amounts to expression of his personal view. Therefore, this portion of the Order dealing with Challan proceeding, is neither relevant, pertinent nor essential, while deciding the actual issues which were before the Special Judge and, therefore, cannot be treated as the part of the Judgment of the Special Judge. The portion of the Order of the Special Judge which deals with the Challan proceedings is a mere observation or remark made by way of aside. In view of this, the High Court had grossly erred in considering and treating this mere observation of the Special Judge as the direction of the Court. Therefore, there was no occasion for the High Court to interfere with the Order of the Special Judge. [Para 31-33] [868-F-G; 869-A-F]

Municipal Corporation of Delhi v. Gurnam Kaur **(1989) 1 SCC 101: 1988 (2) Suppl. SCR 929;** *Divisional Controller, KSRTC v. MahadevaShetty* **(2003) 7 SCC 197: 2003 (2)**

Suppl. SCR 14; *State of Haryana v. Ranbir* **(2006) 5 SCC 167: 2006 (3) SCR 864;** *Girnar Traders v. State of Maharashtra* **(2007) 7 SCC 555: 2007 (9) SCR 383 – relied on.**

Case Law Reference:

1967 SCR 668	**referred to**	**Para 4**
1997 (3) Suppl. SCR 705	**referred to**	**Para 4**
1953 SCR 126	**relied on**	**Para 11**
(1964) 6 SCR 411	**relied on**	**Para 12**
1979 (1) SCR 272	**relied on**	**Para 13**
1985 (3) Suppl. SCR 1	**relied on**	**Para 14**
1995 (1) SCR 27	**relied on**	**Para 15**
1988 (2) Suppl. SCR 929	**relied on**	**Para 28**
2003 (2) Suppl. SCR 14	**relied on**	**Para 28**
2006 (3) SCR 864	**relied on**	**Para 29**
2007 (9) SCR 383	**relied on**	**Para 30**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1706-1708 of 2011.

From the Judgment & Order dated 22.4.2009 of the High Court of Madhya Pradesh judicature at Jabalpur in Criminal Revision Petition No. 821 and 966 of 2005 and Misc. Criminal Case No. 3403 of 2005.

Sumeet Sharma, Rohit Kumar Singh for the Appellant.

Arvind Verma, Vikas Bansal, B.S. Banthia, Vibha Datta Makhija, C.D. Singh for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. These appeals, by special leave, are directed against the Judgment and Order dated 22.4.2009 passed by the High Court of Madhya Pradesh in Criminal Revision No. 821 of 2005, Criminal Revision Petition No. 966 of 2005 and Criminal Case No. 3403 of 2005, whereby the High Court has allowed the revision application and *inter alia* quashed the Order dated 26.4.2005 in case diary of Crime No. 165 of 2002 passed by the First Additional Sessions Judge and Special Judge, Katni (hereinafter referred to as "learned Special Judge").

3. The brief factual matrix relating to this appeal is as follows: The respondent no. 2, Shri. Raghav Chandra, who is a Commissioner of M.P. Housing Board, Bhopal along with respondent no. 3, Shri. Shahjad Khan, posted as the then Collector, Katni, Jabalpur and respondent no. 4, Shri. Ram Meshram, posted as the Land Acquisition Officer, M.P. Housing Board, Bhopal, whilst, discharging their functions, had allegedly entered into conspiracy and made a secret plot with Shri. B.D. Gautam, the Director of Olphert Company and, subsequently, purchased the land belonging to Olphert Company at higher rates for the M.P. Housing Board, thereby, caused a financial loss of over '4 Crores to the Government. The appellant reported this alleged transaction of purchase of land by the M.P. Housing Board, alleging financial loss to the Government, to the Lokayukta, Bhopal. Subsequently, the Special Police Establishment (Lokayukta), Jabalpur (hereinafter referred to as "the Lokayukta Police") registered an FIR No. 165 of 2002 against accused respondent nos. 2 to 4, as the alleged act or conduct of the accused respondents, all working as Government Servants, amounts to an offence under Section 13 (1-d) and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the PCA") and Section 120-B of the Indian Penal Code (hereinafter referred to as "the IPC"). Accordingly a Criminal Case No. 165 of 2002 was registered against respondent nos. 2 to 4 in the Court of learned Special Judge. However, the sanction of the Government was

necessary as mandated by Section 19 of the PCA in order to prosecute the said accused respondents. Acting upon the complaint of the appellant, the Lokayukta Police, after conducting the investigation, had exonerated respondent nos. 2 to 4 of all the charges leveled against them and submitted final closure report, under Section 169 of the Criminal Procedure Code (hereinafter referred to as "the Cr. P.C."), to the learned Special Judge, Katni as no case had been made out to prosecute respondents. Thereafter, the learned Special Judge, Katni after hearing the respondents, appreciating the evidence on record and perusing the case diary, had rejected the closure report *vide* his Order dated 26.4.2005. The operative portion of the order dated 26.4.2005 passed by the learned Special Judge is extracted below:

> "31. In this way from above record produced, even prima facie, it is evident that the accused had made secrete plot (durabhi sandhi) with Shri B.D. Gautam the Director of Olphert Company with conspiracy and purchased land of Olphert Company on higher rate and caused financial loss over four crores to the Government which there are sufficient grounds for taking cognizance against the accused persons.
>
> 32. Accused person Shri Raghav Chandra is posted as Commissioner of M.P. Housing Board and Shri Ram Meshram is posted as Land Acquiring Officer in M.P. Housing Board and Shri Shahjaad Khan while remaining posted as Collector, all above accused persons working as Government servant, while discharging their government duties, committed above crime-under section 19 of Anti Corruption Act 1988, it is necessary to obtain sanction to prosecute Government Servant U/S 13 of Anti-Corruption Act. Therefore matter may be taken up seeking necessary sanction to prosecute the accused persons Raghav Chandra, Shri Ram Meshram and Shahjaad Khan to prosecute them under Section 13 (1-d), 13 (2) Anti Corruption Act and under Section 120-B I.P.C. and for necessary further action, case be registered in the criminal case diary."

4. Aggrieved by the above observation, respondent nos. 2 to 4 preferred Criminal Revision Petitions under Section 482 of the Cr.P.C. before the High Court. The High Court allowed the revision petitions and quashed the Order dated 26.4.2005 of the learned Special Judge on the ground that the Order of the learned Special Judge is illegal and without jurisdiction, in view of the decision of this Court in *Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117, as the Magistrate cannot impinge upon the jurisdiction of the police by directing them to change their opinion when the closure report had been submitted by the police under Section 169 of the Cr.P.C. The reliance is also placed on the observation made by this Court in the case of *Mansukh Lal Vithaldas Chauhan v. State of Gujarat* AIR 1997 SC 3400 wherein it is observed that:

> "19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority of the facts of the case as also the material and evidence collected during investigation it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. It is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

5. Being aggrieved, the appellant is before us in this appeal.

6. The issue involved in the present appeal for our consideration is: Whether the High Court is justified in treating the operative portion of the Order of the learned Special Judge as a direction issued to the sanctioning authority to sanction the prosecution of the accused respondent Nos. 2 to 4.

7. We have heard the learned counsel for the parties to the lis and perused the record.

8. The learned counsel for the appellant submits that the Special Judge, *vide* his Order dated 26.4.2005, refused to accept the closure report submitted before him by the Lokayukta Police as he found it to be not reasonable and finally rejected it. The other portion of the Order, wherein the learned Special Judge observed particularly about the initiation of Challan proceedings, is a mere observation or passing remark. In other words, the learned counsel submits that this portion of the Order, dealing with Challan proceedings, can, at the most, be treated as expression of his personal opinion. He further submits that wholistic reading of this Order clearly suggests that the learned Special Judge's remark pertaining to Challan proceedings is in the nature of mere obiter dicta and could not qualify to be treated as a direction of the Court even by any stretch of imagination. The learned counsel contends that the Order of the learned Special Judge cannot be treated as direction issued to the sanctioning authority to prosecute the respondents as this Order nowhere addresses sanctioning authority and moreover, nowhere directs sanctioning authority to do any affirmative action or abstain from doing anything. Therefore, the High Court is not justified in quashing the Order of the learned Special Judge and treating it to be a direction issued to the sanctioning authority to prosecute the accused respondent nos.2 to 4.

9. Per contra, the learned counsel for the respondents

submits that the Order of the learned Special Judge is in the nature of command and amounts to a direction to the sanctioning authority to prosecute respondent nos. 2 to 4. Therefore, this Order of the learned Special Judge is illegal and without jurisdiction. The learned counsel further supported the impugned Order and Judgment of the High Court.

10. We have heard the learned counsel for the parties before us. The short point in issue before us is based on the nature of the Order passed by the learned Special Judge whether it amounts to a direction issued by the Court to the concerned authority or mere observation of the Court.

11. We will first discuss the nature and scope of the expression 'direction' issued by the Court. This Court in *Rameshwar Bhartia v. The State of Assam,* 1953 SCR 126 whilst distinguishing the expression 'Sanction' from the 'Direction', for the purpose of initiating the prosecution has held:

> "15. But where a prosecution is directed, it means that the authority who gives the direction is satisfied in his own mind that the case must be initiated. Sanction is in the nature of a permission, while a *direction is in the nature of a command."* (Emphasis supplied).

12. In *Income Tax Officer, A-Ward, Sitapur v. Murlidhar Bhagwan Das, Lakhimpur kheri*, (1964) 6 SCR 411, this Court has observed that the expression "direction" cannot be construed in vacuum, but must be collated to the directions which the Assistant Appellate Commissioner can give under Section 31 of the Indian Income Tax Act, 1922.

13. This Court in *Rajinder Nath v. CIT, (1979) 4 SCC 282*, while considering the meaning of expression 'finding' and 'direction', occurring in Section 153(3)(ii) of the Income Tax Act, 1961, has held:

> "11. … As regards the expression "direction" in Section 153(3)(ii) of the Act, it is now well settled *that it must be*

an express direction necessary for the disposal of the case before the authority or court. It must also be a direction which the authority or court is empowered to give while deciding the case before it. The expressions "finding" and "direction" in Section 153(3)(ii) of the Act must be accordingly confined." (Emphasis supplied).

14. In *Kanhiya Lal Omar v. R.K. Trivedi & Ors.,* (1985) 4 SCC 628, this Court has observed that "*A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order.*"

15. In *Giani Devender Singh v. Union of India*, (1995) 1 SCC 391, this Court, whilst considering the direction issued by the High Court in a Public Interest Litigation, has observed that the directions should not be vague, sweeping or affected by sarcasm which are not capable of being implemented. It should be specific, just and proper in the facts and circumstances of the case. This Court further held:

"10. It appears to us that when the High Court was not in a position to precisely discern what was the complaint alleged by the petitioner and when the High Court was of the view that the prayer made by the petitioner was absurd and it also held that the officers who were alleged to have been carrying on nefarious activities were more imaginary than real, the direction in general and sweeping terms to sack erring officers (whomsoever they may be) and overhaul the administration by recruiting only conscientious and devoted people like the petitioner in order to satisfy the vanity of the petitioner, should not have been made. If the High Court intends to pass an order on an application presented before it by treating it as a public interest litigation, the High Court must precisely indicate the allegations or the statements contained in such petition relating to public interest litigation and should indicate how public interest was involved and only after ascertaining the

correctness of the allegation, should give specific direction as may deem just and proper in the facts of the case.

11. It appears to us that the application was disposed of by the Division Bench of Madhya Pradesh High Court in a lighter vein and the order dated 27-2-1992 is couched in veiled sarcasm. Such course of action, to say the least, is not desirable and *the High Court should not have issued mandate in general and sweeping terms which were not intended to be implemented and were not capable of being implemented because of utter vagueness of the mandate and of its inherent absurdity."* (Emphasis supplied)

16. The Blacks Law Dictionary (9th ed. 2009) defines the term 'Direction' as an order; an instruction on how to proceed.

17. The meaning of expression "Direction" has been discussed in Corpus Juris Secundum, Vol. 26A, at pg. 955-956 as thus:

"The word "direction" is of common usage, and is defined as meaning the act of governing, ordering, or ruling; the act of directing, authority to direct as circumstances may require; guidance; management; superintendence; "prescription;" also a command, an instruction, an order, an order prescribed, either verbally or written, or indicated by acts; that which is imposed by directing, a guiding or authoritative instruction; information as to method."

18. According to P. Ramanatha Aiyar, Advanced Law Lexicon (3rd ed. 2005) the word 'Direction' means: address of letter, order or instruction as to what one has to do. A direction may serve to direct to places as well as to persons. Direction contains most of instruction in it and should be followed. It is necessary to direct those who are unable to act for themselves. Directions given to servants must be clear, simple and precise.

19. According to the Words and Phrases, Permanent Edition, Vol. 12A, the term 'Direction' means a guiding or authoritative instruction, prescription, order, command.

20. To sum up, the direction issued by the Court is in the nature of a command or authoritative instruction which contemplates the performance of certain duty or act by a person upon whom it has been issued. The direction should be specific, simple, clear and just and proper depending upon the facts and circumstances of the case but it should not be vague or sweeping.

21. At this stage, it is pertinent to consider the nature and scope of a mere observation or obiter dictum in the Order of the Court. The expression obiter dicta or dicta has been discussed in American Jurisprudence 2d, Vol. 20, at pg. 437 as thus:

"74. –Dicta

Ordinarily, a court will decide only the questions necessary for determining the particular case presented. But once a court acquires jurisdiction, all material questions are open for its decision; it may properly decided all questions so involved, even though it is not absolutely essential to the result that all should be decided. It may, for instance, determine the question of the constitutionality of a statute, although it is not absolutely necessary to the disposition of the case, if the issue of constitutionality is involved in the suit and its settlement is of public importance. *An expression in an opinion which is not necessary to support the decision reached by the court is dictum or obiter dictum.*

"Dictum" or "obiter dictum: is distinguished from the "holding of the court in that the so-called "law of the case" does not extend to mere dicta, and mere dicta are not binding under the doctrine of stare decisis,

As applied to a particular opinion, the question of whether or not a certain part thereof is or is not a mere dictum is sometimes a matter of argument. And while the terms "dictum" and "obiter dictum" are generally used synonymously with regard to expressions in an opinion which are not necessary to support the decision, in connection with the doctrine of stare decisis, *a distinction has been drawn between mere obiter and "judicial dicta," the latter being an expression of opinion on a point deliberately passed upon by the court."* (Emphasis supplied).

Further at pg. 525 and 526, the effect of dictum has been discussed:

"190. Decision on legal point; effect of dictum

… In applying the doctrine of stare decisis, a distinction is made between a holding and a dictum. Generally stare decisis does not attach to such parts of an opinion of a court which are mere dicta. The reason for distinguishing a dictum from a holding has been said to be that a question actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation to the case decided, are seldom completely investigated as to their possible bearing on other cases. Nevertheless courts have sometimes given dicta the same effect as holdings, particularly where "judicial dicta" as distinguished from "obiter dicta" are involved."

22. According to P. Ramanatha Aiyar, Advanced Law Lexicon (3rd ed. 2005), the expression "observation" means a view, reflection; remark; statement; observed truth or facts; remarks in speech or writing in reference to something observed.

23. The Wharton's Law Lexicon (14th Ed. 1993) defines

term 'obiter dictum' as an opinion not necessary to a judgment; an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect; often called as obiter dictum, ; a remark by the way.

24. The Blacks Law Dictionary, (9th ed, 2009) defines term 'obiter dictum' as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). — Often shortened to *dictum* or, less commonly, *obiter*. "Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' — that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta,' these two terms being used interchangeably."

25 The Word and Phrases, Permanent Edition, Vol. 29 defines the expression 'obiter dicta' or 'dicta' thus:

> "Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself; obiter dicta are opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects; It is mere observation by a judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him; "Obiter dictum" is made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment

> in the particular issue, not binding as a precedent, but entitled to receive the respect due to the opinion of the judge who utters them; Discussion in an opinion of principles of law which are not pertinent, relevant, or essential to determination of issues before court is "obiter dictum"

26. The concept of "Dicta" has also been considered in Corpus Juris Secundum, Vol. 21, at pg. 309-12 as thus:

> "190. Dicta
>
> a. In General
>
> A Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a judge on a point not necessarily arising in the case; a statement or holding in an opinion not responsive to any issue and noty necessary to the decision of the case; an opinion expressed on a point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties; or an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the judge himself. The term "dictum" is generally used as an abbreviation of "obiter dictum" which means a remark or opinion uttered by the way.
>
> Such an expression or opinion, as a general rule, is not binding as authority or precedent within the stare decisis rule, even on courts inferior to the court from which such expression emanated, no matter how often it may be repeated. This general rule is particularly applicable where there are prior decisions to the contrary of the statement regarded as dictum; where the statement is declared, on rehearing, to be dictum; where the dictum is on a question

which the court expressly states that it does not decide; or where it is contrary to statute and would produce an inequitable result. It has also been held that a dictum is not the "law of the case," nor res judicata."

27. The concept of "Dicta" has been discussed in Halsbury's Laws of England, Fourth Edition (Reissue), Vol. 26, para. 574 as thus:

"574. Dicta. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that it is unnecessary for the purpose in hand are generally termed "dicta". They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as "obiter dicta", whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed "judicial dicta". A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported.

… Practice notes, being directions given without argument, do not have binding judicial effect. Interlocutory observations by members of a court during argument, while of persuasive weight, are not judicial pronouncements and do not decide anything."

28. In *Municipal Corporation of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101 and *Divisional Controller, KSRTC v. Mahadeva Shetty,* (2003) 7 SCC 197, this Court has observed that *"Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."*

29. In *State of Haryana v. Ranbir*, (2006) 5 SCC 167, this Court has discussed the concept of the obiter dictum thus:

"A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See ADM, Jabalpur v. Shivakant Shukla. It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. (See Divisional Controller, KSRTC v. Mahadeva Shetty)"

30. In *Girnar Traders v. State of Maharashtra*, (2007) 7 SCC 555, this Court has held:

"Thus, observations of the Court did not relate to any of the legal questions arising in the case and, accordingly, cannot be considered as the part of ratio decidendi. Hence, in light of the aforementioned judicial pronouncements, which have well settled the proposition that only the ratio decidendi can act as the binding or authoritative precedent, it is clear that the reliance placed on mere general observations or casual expressions of the Court, is not of much avail to the respondents."

31. In view of above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment.

32. In the facts and circumstances of the present case, we are of the opinion that the refusal of the learned Special Judge,

vide its Order dated 26.4.2005, to accept the final closure report submitted by Lokayukta Police is the only *ratio decidendi* of the Order. The other part of the Order which deals with the initiation of Challan proceedings cannot be treated as the direction issued by the learned Special Judge. The relevant portion of the Order of the learned Special Judge dealing with Challan Proceeding reads as *"Therefore matter may be taken up seeking necessary sanction to prosecute the accused persons Raghav Chandra, Shri Ram Meshram and Shahjaad Khan to prosecute them under Section 13 (1-d), 13 (2) Anti Corruption Act and under Section 120-B I.P.C and for necessary further action, case be registered in the criminal case diary."* The wordings of this Order clearly suggest that it is not in the nature of the command or authoritative instruction. This Order is also not specific or clear in order to direct or address any authority or body to perform any act or duty. Therefore, by no stretch of imagination, this Order can be considered or treated as the direction issued by the learned Special Judge. The wholistic reading of this Order leads to only one conclusion, that is, it is in the nature of 'Obiter Dictum' or mere passing remark made by the learned Special Judge, which only amounts to expression of his personal view. Therefore, this portion of the Order dealing with Challan proceeding, is neither relevant, pertinent nor essential, while deciding the actual issues which were before the learned Special Judge and hence, cannot be treated as the part of the Judgment of the learned Special Judge.

33. In the light of the above discussion, we are of the opinion that, the portion of the Order of the learned Special Judge which deals with the Challan proceedings is a mere observation or remark made by way of aside. In view of this, the High Court had grossly erred in considering and treating this mere observation of the learned Special Judge as the direction of the Court. Therefore, there was no occasion for the High Court to interfere with the Order of the learned Special Judge.

34. In the result, the appeals are allowed. The impugned Order and Judgment of the High Court in Criminal Revision No. 821 of 2005, Criminal Revision Petition No. 966 of 2005 and Criminal Case No. 3403 of 2005 dated 22.4.2009 is set aside. We restore the Order of the learned Special Judge dated 26.4.2005.

35. We direct the respondents to comply with the order passed by the Trial Court within two months from this date.

D.G. Appeals allowed.

STATE OF WEST BENGAL
v.
HOWRAH GANATANTRIK NAGARIK SAMITY & ORS.
(Civil Appeal No. 7785 of 2011)

SEPTEMBER 12, 2011

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

Environment Laws:

Public Interest Litigation – To protect and preserve Victoria Memorial Hall and its green surroundings – Bus terminus situated at Esplanade at the end of about 2 kms. of the green surroundings – Re-location of bus terminus – On recommendations of expert bodies including the National Environmental Engineering Research Institute (NEERI), direction by the High Court that the bus terminus at Esplanade be shifted to a distant place within six months – On appeal held: Shifting of the bus terminus at Esplanade area was suggested by NEERI as a long-term measure and not as an immediate measure – Bus terminus, where lakhs of people arrive and depart through different buses, if shifted immediately, would cause a lot of inconvenience to the traveling public – Moreover, before the bus terminus is shifted from Esplanade, another suitable place has to be found out to which the bus terminus, which can be shifted and various conveniences have to be provided for the traveling public at the new bus terminus – All this cannot be done within a period of six months – Thus, the direction passed by the High Court not justified – Recommendation of the NEERI that auto exhaust is the most important causative factor polluting the atmospheric environment around Victoria Memorial Hall is emphatic – Thus, the recommendation by NEERI that the bus terminus should be shifted from Esplanade area as a long-term measure to

protect and preserve the Victoria Memorial Hall deserves serious consideration, not only to preserve the monument but to de-congest the city – The impugned order of the High Court is modified and the State Government is directed to consider and take appropriate action on the NEERI report recommending relocation of the bus terminus away from the Esplanade.

M.C. Mehta v. Union of India and Ors. **(1997) 2 SCC 353: 1996 (10) Suppl. SCR 973 – referred to.**

Case Law Reference:

1996 (10) Suppl. SCR 973 Referred to Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7785 of 2011.

From the Judgment & Order dated 28.09.2007 of the Calcutta High Court in W.P. No. 7987 (W) of 2002.

WITH

SLP (C) No. 1135-1136 of 2009.

Avijit Bhattacharjee, Sarbani Kar, Debnjani Das Purkayastha, Bidyabrata Acharya, Pranab Kumar Mullick for the Appellants.

Respondent-In-Person Dharam Bir Raj Vohra for the Respondents.

The Order of the Court was delivered by

A. K. PATNAIK, J. 1. Delay condoned. Leave granted.

2. This is an appeal against the order dated 28.09.2007

of the Division Bench of the Calcutta High Court in Writ Petition No. 7987 (W) of 2002.

3. The facts very briefly are that during the British rule, Victoria Memorial Hall was built in the memory of Queen Victoria in Central Kolkata. After independence, this monument continues to be known for its beautiful architecture and green surroundings. To the north of the Victoria Memorial Hall is a huge stretch of land known as 'the Maidan' which is covered by green grass and interspersed with a large number of trees, bushes and shrubs. At the end of about 2 kms. of this greenery is the Esplanade where another monument known as the 'Sahid Minar' stands, and by the side of the Sahid Minar is a bus terminus. To protect and preserve the Victoria Memorial Hall and its green surroundings, a public interest litigation (Writ Petition No. 7987(W) of 2002) was filed in the Calcutta High Court by the respondent nos. 1 to 5.

4. After hearing all concerned parties and considering the concerned affidavits and counter-affidavits as well as recommendations of expert bodies including the National Environmental Engineering Research Institute (for short 'NEERI'), the High Court inter alia directed in the impugned order that the bus terminus at Esplanade be shifted to a distant place within six months. Aggrieved by this direction in the impugned order, the State of West Bengal is in appeal before us.

5. Learned counsel for the appellant submitted that the High Court could not have issued directions to the State Government to shift the bus terminus located at Esplanade, which had been in existence for more than six decades only on the recommendation of NEERI. He submitted that lakhs of people every day arrive at and depart from the bus terminus at Esplanade and this is because the bus terminus is located in a central area of Kolkata. He submitted that shifting of the

bus terminus from Esplanade will thus cause immense inconvenience to the traveling public. He further submitted that the bus terminus is situated 2 kms. to the north of Victoria Memorial Hall and does not at all damage this historic monument. The High Court, therefore, was not right in thinking that for preservation of the Victoria Memorial Hall, shifting of the bus terminus was necessary.

6. The respondent no.2, who appeared in-person on behalf of respondent no. 1, on the other hand, relied on the recommendation of NEERI that the bus terminus at Esplanade area should be shifted from the existing location. He submitted that the High Court was, therefore, right in directing the shifting of the bus terminus from Esplanade within six months. He submitted that this is not a fit case in which this Court should interfere with the impugned order of the High Court.

7. We have considered the submissions made on behalf of the appellant and the respondents and we find that NEERI has suggested some long term measures for preservation of the Victoria Memorial Hall in Para 5.2 of its report. The relevant portion of Para 5.2 of the report of NEERI is quoted hereinbelow:

"5.2 **LONG-TERM MEASURES**

Diversion of Heavy Road Traffic on the Road Encircling the VM Monument.

The pollution from auto exhaust is the most important causative factor when the Victoria Memorial protection from atmospheric environment is considered. Therefore, the traffic on roads around the VM should be minimum particularly complete banning of heavy traffic. Bus terminus at Esplanade Area (Commercial) should also be shifted from the existing location."

8. It will be clear from the recommendation of NEERI, quoted above, that shifting of the bus terminus at Esplanade area has been suggested by NEERI as a long-term measure and not as an immediate measure. A bus terminus, where lakhs of people arrive and depart through different buses, if shifted immediately, will cause a lot of inconvenience to the traveling public. Moreover, before the bus terminus is shifted from Esplanade, another suitable place has to be found out to which the bus terminus can be shifted and various conveniences have to be provided for the traveling public at the new bus terminus. All this cannot be done within a period of six months. The High Court, therefore, was not justified in directing in the impugned order that the bus terminus at Esplanade be shifted within six months.

9. The recommendation of the NEERI, quoted above, however, is emphatic that auto exhaust is the most important causative factor polluting the atmospheric environment around Victoria Memorial Hall. For this reason, NEERI has recommended that the traffic on roads around the Victoria Memorial Hall should be minimum and the bus terminus at Esplanade area should be shifted from the existing location. Hence, even though the bus terminus is located 2 kms. away from Victoria Memorial Hall the auto-exhaust from a large number of buses at the bus terminus would pollute the atmospheric environment around the Victoria Memorial Hall. In *M.C. Mehta v. Union of India & Ors.* [(1997) 2 SCC 353], this Court has directed relocation industries from Taj Trapezium Zone (TTZ) for protection and preservation of the Taj Mahal in Agra. The recommendation by NEERI that the bus terminus should be shifted from Esplanade area as a long-term measure to protect and preserve the Victoria Memorial Hall, deserves serious consideration, not only to preserve the monument but to de-congest the city.

10. We accordingly modify the impugned order of the

High Court and direct the State Government to consider and take appropriate action on the NEERI report recommending relocation of the bus terminus away from the Esplanade. The appeal is allowed to the extent indicated above. No order as to costs.

N.J. Appeal allowed.