MRS. ASHA SHARMA

v.

CHANDIGARH ADMINISTRATION AND ORS.

(Civil Appeal No. 7524 of 2011)

AUGUST 30, 2011

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

Government Residences (Chandigarh Administration General Pool) Allotment Rules, 1996:

r.13 – Allotment of accommodation – Appellant, an IAS Officer was allotted government accommodation in Chandigarh – She retired from service and was required to vacate the premises by 31st December, 2008 – On 31st December, 2008, she was appointed as the State Information Commissioner – She requested to the authorities for allotment of the government accommodation already in her occupation, but her request was not accepted – Estate Officer passed an eviction order against the appellant which was upheld by the appellate authority – Writ petition – The Single Judge of the High Court directed that as soon as any alternate accommodation is allotted to appellant, as per her entitlement under the Rules, she shall, within two weeks of such allotment, vacate the house presently under her occupation – However, the Division Bench stayed the directions of the Single Judge and directed the matter to be heard by a larger Bench – On appeal, held: No new house for any category/post should be earmarked unless the house already earmarked for such category/post has been vacated and placed in the general pool of the Chandigarh Administration for allotment in accordance with the Allotment Rules – No case of retention of government accommodation beyond the periods specified in the table to r.13(2) of the Allotment Rules shall be entertained by any authority under the Allotment Rules – An order of eviction and damages was passed against the

appellant – The matter in that behalf is still pending final hearing before the Single Judge – The parties are left to raise all their contentions before the Single Judge, who shall decide the matter in accordance with law – However, with regard to the interim order passed by the High Court, the State is directed to allot to her an alternative accommodation under the category as per her entitlement, in pursuance of her appointment as State Information Commissioner, within fifteen days and she shall be liable to vacate the accommodation presently in her occupation within two weeks thereafter – In the event the Government is unable to allot her an alternative accommodation of her category for the reason of non-availability of such accommodation, she should be provided with appropriate accommodation, including private accommodation of her status, within the same period.

r.7 – Earmarking of houses – Held: r.7 provides for earmarking of houses for specified officers from different branches of the State Administration and those houses which have not been so earmarked for any particular class of Government employees would be allotted to the general pool of the Chandigarh Administration – This Rule and its sub-Rules read together do not suffer from the vice of arbitrariness, as earmarking of houses is a known concept in relation to allotment of houses – In the instant case, the Single Judge of the High Court gave a clarificatory direction that when earmarked houses are occupied by an officer, who is at that time not entitled to that house, another house would not be earmarked for any particular officer, until the occupied house is vacated – One exception was carved out in favour of SSP, Chandigarh – This clarificatory direction is not violative of any rule or is otherwise impermissible – These directions attempted to ensure that there should not be more than one earmarked house for the same post as per the need – This would also ensure timely vacation of the earmarked houses by the officers concerned, upon their transfer, promotion or posting to a post where they are not entitled to an earmarked

accommodation – There is no reason to interfere with imposition of such a condition which is in conformity with the spirit of the said Rule.

r.11 – Out-of-Turn Allotments – Held: s.11 deals with Out-of-Turn Allotments, i.e. the House Allotment Committee may allot a house on Out-of-Turn basis to the cases specified under clauses (a) to (g) of that Rule – r.11 is a very comprehensive rule which deals with the specific situations where Out-of-Turn Allotment is permissible – The Allotment Rules and the guidelines are intended to control the exercise of discretion by the authorities concerned in granting Out-of-Turn Allotments – In the instant case, the absolute restriction on Out-of-Turn Allotments imposed by the Single Judge of the High Court was not just and fair and was opposed to the statutory provisions of the Allotment Rules – Therefore, such a restriction is not sustainable.

r.8 – Interpretation of – Held: The purpose of r.8 is not to allow discretionary allotment but is to provide overall powers of coordination and control to the Administrator, U.T., Chandigarh – The words 'for the purposes of allotment to any class or category of eligible government servant' appearing in r.8 mean the allotment made in terms of the Allotment Rules – Adding or withdrawing houses to the general pool is a power vested in the authority under r.8, but allotments still are to be made in accordance with the substantive rules enabling the authorities to make regular allotments.

r.9 – Objections regarding allotment of accommodation – Held: r.9 requires the authorities to invite applications for allotment of accommodation and also provides the manner in which the allotment of houses is to be made including showing the seniority of the applicants category-wise – There is no provision requiring invitation of objections – Once there is no rule, it will not serve any fruitful purpose to invite objections to each allotment apart from unnecessarily delaying allotments and rendering the working of the Rules

more complex and difficult – Further, r.9(5) of the Allotment Rules is a complete safeguard in regard to proper maintenance of the seniority list of the applicants – The directions issued by the Single Judge regarding invitation of objections from aggrieved officers who might assert preferential claim is set aside.

r.11 – Issues regarding the allotment of two houses to a single officer and/or to his family, one in Chandigarh and one in some other part of the same State; and the period of retention of the allotted house after the employee is retired, promoted, transferred or is sent on deputation – Held: The said issue is of serious concern – There is no rule providing that an officer who is posted outside Chandigarh/Panchkula/Mohali and whose spouse is not entitled to any Government accommodation of any category can be provided with two houses, one at the District/Division level to which he/she is transferred and another at Chandigarh and its adjourning areas – In absence of any such specific rule, it is directed that the State shall not allot two different houses to one government servant – In terms of r.11(1)(b) of the Allotment Rules, such allotment can be made in some circumstances but every effort should be made to ensure that such situations arise only in exceptional circumstances.

r.13 – Retention of government accommodation – Held: A government servant cannot be permitted to retain the accommodation beyond 4 to 6 months, which period is permissible under the substantive rules – A government servant knows in advance the period within which he has to vacate the accommodation allotted to him as part of his employment and so he has to surrender the house in question within the scheduled time – rr.13(1) and 13(2) are comprehensive, specific and provide more than reasonable time for a government servant to vacate the accommodation allotted to him/her – Court cannot lose sight of the fact that a large number of employees under different categories are awaiting their allotments and are being deprived of this benefit

for long periods because of excessive invocation of such discretionary powers – The provision is unguided and arbitrary and cannot stand the scrutiny of law – More so, the licence fee indicated is obviously minimal in comparison to the market rent for the said premises – It is a matter which a Court can safely take judicial notice of – Compelled by these circumstances, r.13(5) is not sustainable and the authorities are directed not to take recourse to the said provision under any circumstance – No case of retention of government accommodation beyond the periods specified in the table to r.13(2) shall be entertained by any authority under the Allotment Rules – The directions are passed being conscious of the fact that the Allotment Rules are in place and that the authorities are acting fairly and judiciously.

Allotment of accommodation – Duty of authorities – Held: The authorities are expected to be consistent in their decisions and bring certainty to the Allotment Rules – This can only be done by making fair, judicious and reasoned decisions on the one hand and refraining from amending the Allotment Rules except in exceptional and extraordinary circumstances on the other – The Doctrine of Certainty can appropriately be applied to legislative powers as it is applicable to judicial pronouncements – This would not mean that the power of the Legislature to amend rules is restricted by judicial pronouncements – But it is impressed upon the Legislature that the rules of the present kind should not be amended so frequently that no established practice or settled impression may be formed in the minds of the employees – Where the employer has limited resources, there the employee has a legitimate expectation of being dealt with fairly in relation to allotment to such government accommodation.

Administrative law:

Decision making process – Arbitrariness in – Held: Whenever both the decision making process and the decision taken are based on irrelevant facts, while ignoring relevant

considerations, such an action can normally be termed as 'arbitrary' – Where the process of decision making is followed but proper reasoning is not recorded for arriving at a conclusion, the action may still fall in the category of arbitrariness – Of course, sufficiency or otherwise of the reasoning may not be a valid ground for consideration within the scope of judicial review – Rationality, reasonableness, objectivity, application of mind and transparency are some of the pre-requisites of proper decision making.

Policy decisions – Judicial review – Scope of – Held: The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances – The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logical – Even if no rules are in force to govern executive action, still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent – Allotment of Government accommodation is one of the statutory benefits which a Government servant is entitled to under the Allotment Rules and, therefore, fair implementation of these Rules is a sine qua non to fair exercise of authority and betterment of the employee-employer relationship between the Government servant and the Government – Government Residences (Chandigarh Administration General Pool) Allotment Rules, 1996.

State action – Scope of judicial review of such actions – Held: Court has power, depending on the facts and circumstances of a given case, to issue appropriate directions in exercise of jurisdiction under Article 226 of the Constitution of India (by the High Court) and under Article 32 read with Article 141 of the Constitution of India (by the Supreme Court) – The Supreme Court in the process of interpreting the law can remove any lacunae and fill up the gaps by laying down

the directions with reference to the dispute before it; but normally it cannot declare a new law to be of general application in the same manner as the Legislature may do – The courts can issue directions with regard to the dispute in a particular case, but should be very reluctant to issue directions which are legislative in nature – Because of the new dimensions which constitutional law has come to include, it becomes imperative for the courts in some cases, to pass directions to ensure that statutory or executive authorities do not act arbitrarily, discriminatorily or contrary to the settled laws.

Administrative Jurisprudence – Held: It is a settled canon of Administrative Jurisprudence that wider the power conferred, more onerous is the responsibility to ensure that such power is not exercised in excess of what is required or relevant for the case and the decision.

CONSTITUTION OF INDIA, 1950: Articles 32 and 226 – Held: Confer on the Supreme Court and the High Court the power to issue directions, orders or writs for achieving the objectives of those Articles – In public interest, the courts may pass directions and even appoint committees for inducing the Government to carry out the constitutional mandate – The courts have been taking due care while exercising such jurisdiction so that they do not overstep the circumscribed judicial limits.

The appellant was an IAS Officer and was allotted government accommodation in Chandigarh. She retired from service on 28th February, 2007. As per the Government Residences (Chandigarh Administration General Pool) Allotment Rules, 1996 which has been amended from time to time, she was entitled to retain the Government accommodation, previously allotted to her while she was in service, for a period of four months with further possible extension upto six months, in terms of Rule 13 of the Allotment Rules. This extension could be

granted only in exceptional cases. Thus, she was required to vacate the residential premises allotted to her by 31st December, 2008. On 31st December, 2008, the appellant was appointed as the State Information Commissioner. As per the terms of appointment, she was entitled to Government accommodation and salary/ allowances of the same type and amount as were given to the Chief Secretary to the Government of Haryana. She applied to the authorities concerned requesting for allotment of the government accommodation already in her occupation, but her request was not accepted. On 16th April, 2008, the Estate Officer passed an eviction order against the appellant. The appellate authority upheld the order. The appellant filed a writ petition before the High Court. The Single Judge of the High Court passed certain general directions in relation to the procedure for allotment of Government houses, their retention and various other aspects relating thereto. The Single Judge directed that as soon as any alternate accommodation is allotted to the appellant, as per her entitlement under the Rules, she shall, within two weeks of such allotment, vacate the house presently under her occupation. It was further directed that no allotment should be made in exercise of the discretionary powers of the Administrator, UT., or Chief Ministers of Punjab and Haryana; that no house should be allotted 'out of turn' without prior permission of the Court; that no house should be 'earmarked' for any particular office/officer till the earlier 'earmarked' house which were subsequently 'de-earmarked' and allowed to be retained by the officers, who were not entitled to such allotment as their seniors in terms of pay, rank or status were still awaiting allotment of that Type or above houses, are got vacated except in the case of the SSP, Chandigarh in relation to whom one time concession has been granted by order dated 07.03.2011; that a list of the 'prospective allottees' should be prepared and displayed on the websites of the

Chandigarh Administration two weeks in advance inviting objections, if any, from the aggrieved officers/officials who might assert their preferential claim and only after considering/deciding their objections, the allotment letters should be issued; that no further 'addition' of the houses should be made to the discretionary quota of the Chief Ministers of Punjab and Haryana nor the possession of the vacant houses exceeding the said quota should be given to the allottees. On appeal, the Division Bench stayed the directions of the Single Judge and directed the matter to be heard by a larger Bench. The instant appeal was filed challenging the order of the Division Bench of the High Court.

Disposing of the appeal, the Court

HELD: 1.1. The allotment of government accommodation is governed by the statutory regime and the Allotment Rules are concerned with various facets of this concept. The Government Residences (Chandigarh Administration General Pool) Allotment Rules, 1996 cover concepts such as allotment, vacation, cancellation and preferential allotments of government accommodations. Despite the fact that the Allotment Rules are in force their proper implementation still remains an elusive endeavour. The grievance of the officers/officials has still persisted with regard to the manner in which the discretion under the Rules were being exercised. In other words, the element of discretion vested under these rules has caused serious dissatisfaction with the implementation of these Allotment Rules. [para 8] [905-H; 906-A-C]

1.2. Arbitrariness in State action can be demonstrated by existence of different circumstances. Whenever both the decision making process and the decision taken are based on irrelevant facts, while ignoring relevant considerations, such an action can normally be termed

as 'arbitrary'. Where the process of decision making is followed but proper reasoning is not recorded for arriving at a conclusion, the action may still fall in the category of arbitrariness. Of course, sufficiency or otherwise of the reasoning may not be a valid ground for consideration within the scope of judicial review. Rationality, reasonableness, objectivity, application of mind and transparency are some of the pre-requisites of proper decision making. [para 9] [906-D-E]

1.3. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logical. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Action by the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules. Even if no rules are in force to govern executive action still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. The standard of fairness is also dependant upon certainty in State action, that is, the class of persons, subject to regulation by the Allotment Rules, must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. The Allotment Rules have been framed with the approval of this Court and thereafter have been amended by the State Government with the intention to give some clarity and certainty to the implementation of the Allotment Rules, rather than subjecting it to further challenge on the ground of arbitrariness or discrimination. A Government

servant has a reasonable expectation of being dealt with justly and fairly in receiving rights that are granted to him/her under the Allotment Rules. Allotment of Government accommodation is one of the statutory benefits which a Government servant is entitled to under the Allotment Rules and, therefore, fair implementation of these Rules is a *sine qua non* to fair exercise of authority and betterment of the employee-employer relationship between the Government servant and the Government. [Paras 10, 11] [906-G-H; 907-B-H]

Netai Bag v. *State of West Bengal* **(2000) 8 SCC 262;** *Ramana Dayaram Shetty v. International Airport Authority of India* **(1979) 3 SCC 489: 1979 (3) SCR 1014 – relied on.**

1.4. Another settled principle of law, applicable to the instant case, is the scope of judicial review of such actions, which is usually quite limited. The Court has the power, depending on the facts and circumstances of a given case, to issue appropriate directions in exercise of jurisdiction under Article 226 of the Constitution of India (by the High Court) and under Article 32 read with Article 141 of the Constitution of India (by this Court). It is a settled canon of Constitutional Jurisprudence that this Court in the process of interpreting the law can remove any lacunae and fill up the gaps by laying down the directions with reference to the dispute before it; but normally it cannot declare a new law to be of general application in the same manner as the Legislature may do. The courts can issue directions with regard to the dispute in a particular case, but should be very reluctant to issue directions which are legislative in nature. Be that as it may, because of the new dimensions which constitutional law has come to include, it becomes imperative for the courts in some cases, to pass directions to ensure that statutory or executive authorities do not act arbitrarily, discriminatorily or contrary to the settled

laws. It was in light of these principles that this Court, vide its judgment dated 7th May, 1996 set aside the Full Bench Judgment of the High Court of Punjab and Haryana, brought into force some appropriate rules and sought to ensure that the competent authority acted in accordance with law and that it avoided total arbitrariness in allocation of government houses to its officers and employees. Once those rules came into force and were amended from time to time as per the leave granted by this Court, it was not proper exercise of judicial discretion and jurisdiction to pass directions, which were in direct conflict with the Allotment Rules which were approved by this Court or with the directions which were issued by this Court on earlier occasions. [Paras 13, 15, 16] [908-C-D; 910-F-G; 911-A-E]

P. Ramachandra Rao v. *State of Karnataka* **(2002) 4 SCC 578 – Followed.**

E.S.P. Rajaram and Ors. v. Union of India and Ors. **(2001) 1 SCR 203;** *Union of India & Ors. v. M. Bhaskar & Ors.* **(1996) 4 SCC 416: 1996(2) Suppl. SCR 358;** *Guruvayoor Devaswom Managing Committee v. C.K. Rajan* **(2003) 7 SCC 546: 2003 (2) Suppl. SCR 619;** *Reliance Airport Developers (P) Ltd. v. Airport Authority of India and Ors.;* **(2006) 10 SCC 1: 2006 (8) Suppl. SCR 398;** *Chandigarh Administration v. Manpreet Singh* **(1992) 1 SCC 380;** *P. Ramachandra Rao v. State of Karnataka* **(2002) 4 SCC 578 – relied on.**

2. Articles 32 and 226 of the Constitution confer on the Court and the High Court the power to issue directions, orders or writs for achieving the objectives of those Articles. The courts, in the past, have issued directions for various purposes. In public interest, the courts may pass directions and even appoint committees for inducing the Government to carry out the

constitutional mandate. The courts have been taking due care while exercising such jurisdiction so that they do not overstep the circumscribed judicial limits. The Allotment rules were subjected to different amendments from time to time and major amendments were carried out in the years 1997, 1998, 2004, 2007 and 2009. Besides these, certain guidelines were also framed which became part of the Allotment Rules. These amendments related to changes in the definition clauses as well as the substantive rules. This Court had granted leave by its judgment dated 7th May, 1996 to the Chandigarh Administration to amend the rules, as and when it considered such amendment necessary. The leave granted by this Court obviously meant that the amendment should be necessity based and not be intended to introduce the element of arbitrariness or discrimination in the rules and resultantly in the allotment of the houses to the government officers/ officials. [paras 17, 20] [911-G-H; 912-A; 913-H; 914-A-D]

3.1. Rule 7 of the Allotment Rules, which deals with the creation of pools of residences, provides for earmarking of houses for specified officers from different branches of the State Administration and those houses which have not been so earmarked for any particular class of Government employees would be allotted to the general pool of the Chandigarh Administration. This Rule and its sub-Rules read together do not suffer from the vice of arbitrariness, as earmarking of houses is a known concept in relation to allotment of houses. The Single Judge of the High Court has given a clarificatory direction that when earmarked houses are occupied by an officer, who is at that time not entitled to that house, another house would not be earmarked for any particular officer, until the occupied house is vacated. One exception is carved out in favour of SSP, Chandigarh in terms of order dated 7th March, 2011. This clarificatory direction is not

violative of any rule or is otherwise impermissible. These directions attempted to ensure that there should not be more than one earmarked house for the same post as per the need. This clarification or explanatory direction would also ensure timely vacation of the earmarked houses by the officers concerned, upon their transfer, promotion or posting to a post where they are not entitled to an earmarked accommodation. Thus, there is no reason to interfere with imposition of such a condition which is in conformity with the spirit of the said Rule. It is directed that no new house for any category/post should be earmarked unless the house already earmarked for such category/post has been vacated and placed in the general pool of the Chandigarh Administration for allotment in accordance with the Allotment Rules. [para 23] [915-F-H; 916-A-D]

3.2. There is no specific rule controlling the discretionary allotment by the Administrator, U.T., Chandigarh and the Chief Minister of State of Punjab and Haryana respectively. However, Rule 8 identifies the Controlling Authority which is the Administrator, U.T. Chandigarh, who would be the co-ordinating and controlling authority in respect of the houses belonging to Chandigarh Administration. He has been given the power to add or withdraw houses from any pool for the purposes of allotment to any class or category of eligible government employees and may also change the classification of houses on the recommendation of the House Allotment Committee. Rule 11 deals with Out-of-Turn Allotments, i.e. the House Allotment Committee may allot a house on Out-of-Turn basis to the cases specified under clauses (a) to (g) of that Rule. The House Allotment Committee in its Meeting dated 27th March, 2003 has further approved certain guidelines for the Out-of-Turn Allotments. Rule 11 is a very comprehensive rule which deals with the specific situations where Out-of-Turn

Allotment is permissible. The Allotment Rules and these guidelines are intended to control the exercise of discretion by the authorities concerned in granting out-of-turn allotments. There is some vagueness in Rule 11(1)(e), i.e. Out-of-Turn Allotments to a government employee due to the 'functional requirements' of the post. This expression is neither explained nor have any guidelines been issued in this regard. The criteria provided in Guideline (2) for allotments made in public interest under Rule 11(1)(f) is quite similar to the criteria for determining functional requirements. Both these heads refer to the nature of official duties and functions to be performed by the officer concerned. Thus, the category of 'functional requirement' allotment is nothing but a category created to allow more and more allotments under this head. In light of these rules, the absolute restriction on Out-of-Turn Allotments imposed by the Single Judge may not be just and fair and will be opposed to the statutory provisions of the Allotment Rules. Therefore, such a restriction is not sustainable. However, the powers vested in the concerned authority under Rules 8 and 11 of the Allotment Rules will only be exercised: (a) upon recommendation of the House Allotment Committee; (b) such recommendation should be supported by reasons with the requirements of the job and the data in support thereof; and (c) no allotments would be made under the provisions of Rule 11(1)(e). The maximum restriction of 10 per cent of all allotments being Out-of-Turn Allotments, as contemplated under Rule 11(2) of the Allotment Rules, shall be operative to entire Rule 11 as well as to Rule 8 of the Allotment Rules. In no event shall Out-of-Turn Allotment exceed 10 per cent of all houses allotted in a year. This is primarily to control the exercise of discretionary power as well as to ensure that the persons entitled to residential accommodation in the general pool are not made to wait unduly for an indefinite period. [paras 24, 25] [916-D-H; 917-A-H; 918-A]

3.3. Allotments under different categories and with the restrictions as stated in the Allotment Rules and the guidelines shall continue to be in force and should not be amended or altered except in exceptional circumstances by the appropriate body. This alone can add some certainty to the application of these provisions and to the expectations of the government employees, who have a legitimate expectation of allotment of government accommodation as part of their perks. It is also directed that the purpose of Rule 8 of the Allotment Rules is not to allow discretionary allotment but is to provide overall powers of coordination and control to the Administrator, U.T., Chandigarh. When the words 'for the purposes of allotment to any class or category of eligible government servant' appearing in Rule 8 are examined, these have to necessarily be construed to mean the allotment made in terms of the Allotment Rules. Adding or withdrawing houses to the general pool is a power vested in the authority under Rule 8, but allotments still are to be made in accordance with the substantive rules enabling the authorities to make regular allotments. [paras 26-27] [918-B-E]

3.4. Rule 9 of the Allotment Rules requires the authorities to invite applications for allotment of accommodation and also provides the manner in which the allotment of houses is to be made including showing the seniority of the applicants category-wise. There is no provision requiring invitation of objections. Once there is no rule, it will not serve any fruitful purpose to invite objections to each allotment apart from unnecessarily delaying allotments and rendering the working of the Rules more complex and difficult. Further, Rule 9(5) of the Allotment Rules is a complete safeguard in regard to proper maintenance of the seniority list of the applicants. Thus, the directions issued by the Single Judge in that behalf is set aside. However, it is directed that the final

list of allotments made by the House Allotment Committee should be placed on the website of the Government, as all interested persons would be entitled to know whether they have been allotted the accommodation or not. [para 28] [918-G-H; 919-A-B]

3.5. The issue regarding the allotment of two houses to a single officer and/or to his family, one in Chandigarh and one in some other part of the same State; and the second was regarding the period of retention of the allotted house after the employee is retired, promoted, transferred or is sent on deputation are of serious concern. There is no rule on the records providing that an officer who is posted outside Chandigarh/Panchkula/ Mohali and whose spouse is not entitled to any Government accommodation of any category can be provided with two houses, one at the District/Division level to which he/she is transferred and another at Chandigarh and its adjourning areas. In absence of any such specific rule, it is directed that the State shall not allot two different houses to one government servant. In terms of Rule 11(1)(b) of the Allotment Rules, such allotment can be made in some circumstances but every effort should be made to ensure that such situations arise only in exceptional circumstances. Even under the rules of transfer of the Government servant, a married couple, both of whom are government servants are normally posted at the same place. Be that as it may, it will be in the interest of all concerned that Rule 11(1)(b) is invoked sparingly and only by the authorities concerned, upon the recommendation of the House Allotment Committee. [para 29] [919-C-H]

4.1. The issue with regard to the retention of government accommodation is controlled by Rule 13 of the Allotment Rules. The table under clause 2 of the said Rule provides different periods of retention in different

situations. Rule 13, sub-rule 5 further carves out an exception, allowing the period of retention to be extended beyond the period stated in the table under Rule 13(2) of the Allotment Rules on payment of higher licence fee. There is no reason why a government servant should be permitted to retain the accommodation beyond 4 to 6 months, which period is permissible under the substantive rules. A government servant knows in advance the period within which he has to vacate the accommodation allotted to him as part of his employment and so he has to surrender the house in question within the scheduled time. What exceptional cases are contemplated under Rule 13(5) of the Allotment Rules is nowhere indicated. No guidelines are provided and it is only for the authorities concerned to decide whether the case falls in that category or not. There are no compelling circumstances for permitting discretion to the authorities under Rule 13(5) of the Allotment Rules. Rules 13(1) and 13(2) are comprehensive, specific and provide more than reasonable time for a government servant to vacate the accommodation allotted to him/her. The Court cannot lose sight of the fact that a large number of employees under different categories are awaiting their allotments and are being deprived of this benefit for long periods because of excessive invocation of such discretionary powers. The provision is unguided and arbitrary and cannot stand the scrutiny of law. More so, the licence fee indicated is obviously minimal in comparison to the market rent for the said premises. It is a matter which a Court can safely take judicial notice of. Compelled by these circumstances, Rule 13(5) is not sustainable and the authorities are directed not to take recourse to the said provision under any circumstance. No case of retention of government accommodation beyond the periods specified in the table to Rule 13(2) of the Allotment Rules shall be entertained by any authority under the Allotment Rules. The directions are passed

being conscious of the fact that the Allotment Rules are in place and that the authorities are acting fairly and judiciously. The directions issued by this Court are primarily explanatory and are intended to narrow the scope of discretion exercisable by the concerned authorities. It is a settled canon of Administrative Jurisprudence that wider the power conferred, more onerous is the responsibility to ensure that such power is not exercised in excess of what is required or relevant for the case and the decision. [paras 30-33] [920-A-H; 921-A-C]

4.2. The authorities are expected to be consistent in their decisions and bring certainty to the Allotment Rules. This can only be done by making fair, judicious and reasoned decisions on the one hand and refraining from amending the Allotment Rules except in exceptional and extraordinary circumstances on the other. The Doctrine of Certainty can appropriately be applied to legislative powers as it is applicable to judicial pronouncements. This would not mean that the power of the Legislature to amend rules is restricted by judicial pronouncements. But it is impressed upon the Legislature that the rules of the present kind should not be amended so frequently that no established practice or settled impression may be formed in the minds of the employees. Where the employer has limited resources, there the employee has a legitimate expectation of being dealt with fairly in relation to allotment to such government accommodation. Consequently, reverting to the case of the appellant, she is admittedly occupying an earmarked house. An order of eviction and damages has been passed against her and she has taken recourse to an appropriate remedy or against which she has already taken an appropriate remedy. The matter in that behalf is still pending final hearing before the Single Judge. The parties are left to raise all their contentions before the Single Judge, who

shall decide the matter in accordance with law. However, with regard to the interim order passed by the High Court, the State is directed to allot to her an alternative accommodation under the category which she is entitled to, in pursuance of her appointment as State Information Commissioner, within fifteen days from today and she shall be liable to vacate the accommodation presently in her occupation within two weeks thereafter. In the event the Government is unable to allot her an alternative accommodation of her category for the reason of non-availability of such accommodation, she should be provided with appropriate accommodation, including private accommodation of her status, within the same period. [para 34] [921-D-H; 922-A-C]

Case Law Reference:

(2000) 8 SCC 262	**relied on**	**Para 10**
1979 (3) SCR 1014	**relied on**	**Para 12**
(2001) 1 SCR 203	**referred to**	**Para 14**
1996 (2) Suppl. SCR 358	**referred to**	**Para 14**
2003 (2) Suppl. SCR 619	**referred to**	**Para 14**
2006 (8) Suppl. SCR 398	**referred to**	**Para 14**
1991 (2) Suppl. SCR 322	**referred to**	**Para 14**
(2002) 4 SCC 578	**Followed**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7524 of 2011.

From the Judgment & Order dated 16.5.2011 of the High Court of Punjab & Haryana at Chandigarh in L.P.A. No. 752 of 2011 (O & M) in C.W.P. No. 20252 of 2008.

D.P. Singh, Praveen Kumar Aggarwal, Ashok K. Mahajan for the Appellant.

T.S. Doabia, M.S. Doabia, Sudarshan Singh Rawat for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. The present appeal is directed against the judgment dated 16th May, 2011 of the High Court of Punjab and Haryana at Chandigarh whereby the Division Bench stayed the operation of the directions issued by the learned Single Judge in the order dated 10th March, 2011 and referred the matter to a larger Bench keeping in view the nature of the dispute and its significance.

3. This Court had issued directions on the same subject matter and approved the draft rules which were placed before it vide judgment dated 7th May, 1996 in Civil Appeal No. 8890 of 1996. Keeping in view the importance of the issues raised and the likelihood of such issues arising repeatedly before the High Court, this Court had issued notice vide order dated 3rd June, 2011, declined to pass any interim order and directed that the matter be listed for final hearing at that stage itself. Resultantly, this matter was finally heard by this Court.

4. Before we dwell upon the legal issues arising in the present appeal, it will be necessary for us to refer to the basic facts giving rise to the same. The appellant is an officer belonging to the Indian Administrative Services and had been allocated to the Haryana Cadre. She was allotted House No. 55, Sector 5, Chandigarh vide order dated 11th October, 1996, when her husband was posted on deputation to the Government of India. She retired from service on 28th February, 2007. As per the Government Residences (Chandigarh Administration General Pool) Allotment Rules, 1996 which has been amended from time to time, (hereinafter referred to as 'the Allotment Rules'), she was entitled to retain the Government accommodation previously allotted to her while she was in

service for a period of four months with further possible extension upto six months, in terms of Rule 13 of the Allotment Rules. This extension could be granted only in exceptional cases. In other words, she ought to have vacated the residential premises allotted to her by 31st December, 2008.

5. On 31st December, 2007, the appellant was appointed as the State Information Commissioner with effect from 3rd January, 2008. As per her terms of appointment, she was entitled to Government accommodation and salary/ allowances of the same type and amount as were given to the Chief Secretary to the Government of Haryana. She had applied to the authorities concerned requesting for allotment of the same accommodation, i.e., House No.55, Sector 5, Chandigarh to her, but her request had not been accepted. Proceedings for eviction began against her before the Estate Officer. The Estate Officer vide his order dated 9th April, 2008 declared the appellant an unauthorised occupant and passed an order of eviction on 16th April, 2008. Aggrieved by the said order, the appellant preferred an appeal before the Additional District Judge, Chandigarh which, however, came to be dismissed vide order dated 22nd October, 2008. This order of the Appellate Authority was challenged by the appellant through a writ petition in the High Court of Punjab and Haryana being Writ Petition No. 20252 of 2008. In this writ petition, the contention raised by the appellant was that she, in the capacity of an officer of the Administrative Service and later, on becoming the State Information Commissioner, was entitled to retain the accommodation previously allotted to her. It was contended that she was being evicted from the premises illegally, without authorization and in an illegal manner. The learned Single Judge of that Court vide order dated 10th March, 2011, passed certain general directions in relation to the procedure for allotment of Government houses, their retention and various other aspects relating thereto. The learned Single Judge modified the order dated 1st December, 2008 passed by the Division Bench when

the writ came up for hearing before the Single Judge *qua* the appellant and directed that as soon as any alternate accommodation is allotted to her, as per her entitlement under the Rules, she shall, within two weeks of such allotment, vacate the house presently under her occupation. Further, he directed the concerned authorities to sympathetically consider the case of the appellant for waiving of any penal rent imposed upon her and that no such penal rent would be payable till the Administrator of U.T. Chandigarh makes his decision in this regard. However, besides granting these reliefs to the appellant, the Court also passed the following directions :

> "Having heard Dr. Dhemka IAS in person and learned Senior Standing counsel for UT. Administration and keeping in view the fact that a number of Government houses kept un-allotted under the orders of this Court serve no one's purpose and rather their condition is deteriorating for want of proper up-keep and maintenance, the interim order dated 14.12.2009 is modified and the Chandigarh Administration is permitted to allot the vacant houses to the eligible applicants, subject to the following conditions/ directions:
>
> (i) No allotment shall be made in exercise of the discretionary powers of the Administrator, UT., or Chief Ministers of Punjab and Haryana.
>
> (ii) No house shall be allotted 'out of turn' without prior permission of this Court.
>
> (iii) No house shall be 'earmarked' for any particular office/ officer till the earlier 'earmarked' house which were subsequently 'de-earmarked' and allowed to be retained by the officers, who were not entitled to such allotment as their seniors in terms of pay, rank or status were still awaiting allotment of that Type or above houses, are got vacated except in the case of the SSP, Chandigarh in

> relation to whom one time concession has been granted vide order dated 07.03.2011.
>
> (iv) A list of the 'prospective allottees' shall be prepared and displayed on the websites of the Chandigarh Administration two weeks in advance inviting objections, if any, from the aggrieved officers/officials who might assert their preferential claim. It is only after considering/ deciding their objections that the allotment letters shall be issued.
>
> (v) The list of the prospective allottees shall be placed before this Court also on the adjourned date and any aggrieved officer/official shall be entitled to submit objections thereto;
>
> (vi) A public notice of the information at Sr. Nos. (iv) and (v) above shall be got published by the Chandigarh Administration at least in two daily newspapers;
>
> (vii) No further 'addition' of the houses shall be made to the discretionary quota of the Chief Ministers of Punjab and Haryana nor the possession of the vacant houses exceeding the said quota, as it exists today, shall be given to the allottees.
>
> (viii) An order of precedence amongst the functionaries of Constitutional, Statutory and Executive Authorities shall be prepared and placed before the Court on the adjourned date."

6. Aggrieved by the directions issued by the learned Single Judge, as afore-noticed, Chandigarh Administration preferred an appeal before the Division Bench of that Court being LPA No. 752 of 2011 which resulted in the order dated 16th May, 2011, whereby the Court stayed the directions of the learned Single Judge and directed the matter to be heard by a larger Bench. The basic contention raised before the Division

Bench was that since the prevalent Allotment Rules had been framed with the approval of this Court as per its order dated 7th May, 1996, no directions contrary thereto could be issued by the learned Single Judge. A somewhat similar argument is also raised before us in the present appeal.

7. It is an undisputed position, which also appears from the record, that a Full Bench of the High Court of Punjab and Haryana, in Writ Petition No. 16863 of 1994 entitled *Court on its own motion v. Advisor to the Administration, U.T. Chandigarh & Ors.* had noticed the arbitrariness in the practice of allotment of houses in the Union Territory of Chandigarh (hereinafter referred to as 'U.T., Chandigarh'). It was noticed in that judgment that the allotments were being made contrary to the earlier Allotment Rules. The Bench struck down Rule 7 of the earlier Allotment Rules, that had been in force at the relevant time, as arbitrary, quashed certain allotments made in favour of the officers and issued certain directions vide its judgment dated 1st June, 1995. The Chandigarh Administration had preferred an appeal before this Court against this judgment which, as already noticed, was registered as C.A. No. 8890 of 1996 and finally disposed of vide order dated 7th May, 1996. A three Judge Bench of this Court had set aside the order of the High Court and approved the draft rules which were placed before it. This Court in its judgment also directed certain amendments to be carried out to the draft rules particularly Rules 2(k), 4 and provisos to Rules 13 and 19. In furtherance to this, the Chandigarh Administration issued a notification dated 28th June, 1996 duly publishing the Allotment Rules of 1996 with which we are concerned in this case. This Court had granted liberty to the Chandigarh Administration to carry out amendments to the Allotment Rules, if necessary. These Allotment Rules were thereafter amended from time to time, but the Allotment Rules of 1996 still substantially remain in force till date.

8. The allotment of government accommodation is

governed by the statutory regime and the Allotment Rules are concerned with various facets of this concept. The Allotment Rules of 1996 cover concepts such as allotment, vacation, cancellation and preferential allotments of government accommodations. Despite the fact that the Allotment Rules are in force their proper implementation still remains an elusive endeavour. The grievance of the officers/officials has still persisted with regard to the manner in which the discretion under the Rules were being exercised. In other words, the element of discretion vested under these rules has caused serious dissatisfaction with the implementation of these Allotment Rules.

9. Arbitrariness in State action can be demonstrated by existence of different circumstances. Whenever both the decision making process and the decision taken are based on irrelevant facts, while ignoring relevant considerations, such an action can normally be termed as 'arbitrary'. Where the process of decision making is followed but proper reasoning is not recorded for arriving at a conclusion, the action may still fall in the category of arbitrariness. Of course, sufficiency or otherwise of the reasoning may not be a valid ground for consideration within the scope of judicial review. Rationality, reasonableness, objectivity and application of mind are some of the pre-requisites of proper decision making. The concept of transparency in the decision making process of the State has also become an essential part of our Administrative law.

10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logical. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and

circumstances of a given case. Reference in this regard can also be made to *Netai Bag* v. *State of West Bengal* [(2000) 8 SCC 262].

11. Action by the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules. Even if no rules are in force to govern executive action still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. Arbitrariness in State action, even where the rules vest discretion in an authority, has to be impermissible. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities, when vested with the powers to pass orders of determinative nature. The standard of fairness is also dependant upon certainty in State action, that is, the class of persons, subject to regulation by the Allotment Rules, must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. Arbitrariness and discrimination have inbuilt elements of uncertainty as the decisions of the State would then differ from person to person and from situation to situation, even if the determinative factors of the situations in question were identical. This uncertainty must be avoided. The Allotment Rules have been framed with the approval of this Court and thereafter have been amended by the State Government with the intention to give some clarity and certainty to the implementation of the Allotment Rules, rather than subjecting it to further challenge on the ground of arbitrariness or discrimination. A Government servant has a reasonable expectation of being dealt with justly and fairly in receiving rights that are granted to him/her under the Allotment Rules. Allotment of Government accommodation is one of the statutory benefits which a Government servant is entitled to under the Allotment Rules and, therefore, fair implementation of these Rules is a *sine qua non* to fair exercise of authority and betterment of the employee-employer relationship between the Government servant and the Government.

12. The public law principles controlling the administrative actions of the public authorities are well settled. Right from the case of *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] this Court cautioned that conditions of work cannot be arbitrarily altered and held that even the power of relaxation has to be exercised within the limited scope available, failing which, it would tantamount to denial of opportunity to employees.

13. Another settled principle of law, applicable to the present case, is the scope of judicial review of such actions, which is usually quite limited. The Court has the power, depending on the facts and circumstances of a given case, to issue appropriate directions in exercise of jurisdiction under Article 226 of the Constitution of India (by the High Court) and under Article 32 read with Article 141 of the Constitution of India (by this Court).

14. In the case of *E.S.P. Rajaram and Ors.* v. *Union of India and Ors.* [(2001) 1 SCR 203], this Court explained that the source of power of this Court to issue directions and pass the orders, as was explained in paragraph 18 of the case titled *Union of India & Ors*. vs. *M. Bhaskar & Ors*. [(1996) 4 SCC 416], could be traced to Article 142 of the Constitution of India. This provision vests power in this Court to pass such decree or make such orders as would be necessary for doing complete justice in the context of any case or matter pending before it. This provision contains no limitation which provides the causes or circumstances in which such power may be exercised. The exercise of power is left completely to the discretion of the highest Court of the country and its order or decree is thereafter binding on all Courts or Tribunals throughout the territory of India. However, in the case of *Guruvayoor Devaswom Managing Committee* vs. *C.K. Rajan* [(2003) 7 SCC 546] this Court, while specifying the scope and ambit of the Public Interest Litigation, clearly distinguished between the powers of the High Court under Article 226 of the

Constitution and the powers of this Court under Article 142 of the Constitution and observed '[T]he Court would ordinarily not step out of the known areas of judicial review. The High Courts although may pass an order for doing complete justice to the parties, it does not have a power akin to Article 142 of the Constitution of India'. Usefully, reference can also be made to the judgment of this Court in the case of *Reliance Airport Developers (P) Ltd.* v. *Airport Authority of India and Ors*. [(2006) 10 SCC 1], where while considering the scope for judicial interference in matters of administrative decisions, this Court held that it is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or if the exercise of power is manifestly arbitrary. Courts would exercise such power sparingly and would hardly interfere in a manner which may tantamount to enacting a law. They must primarily serve to bridge any gaps or to provide for peculiar unforeseen situations that may emerge from the facts and circumstances of a given case. These directions would be in force only till such time as the competent legislature enacts laws on the same issue. The high courts could exercise this power, again, with great caution and circumspection. Needless to say, when the High Court issues directions, the same ought not to be in conflict with laws remaining in force and with the directions issued by this Court. In the case of *Chandigarh Administration* v. *Manpreet Singh* [(1992) 1 SCC 380] while dealing with a matter of admission to engineering colleges and reservation of seats etc., this Court held as under:

> **"**11. Counsel for Chandigarh Administration and the college (petitioners in SLP Nos. 16066 and 16065 of 1991) contended that the High Court has exceeded its jurisdiction in granting the impugned directions. He submitted that High Court, while exercising the writ jurisdiction conferred upon by Article 226 of the Constitution of India, does not sit as an appellate authority over the rule-making authority nor can it rewrite the rules.

> If the rule or any portion of it was found to be bad, the High Court could have struck it down and directed the rule-making authority to re-frame the rule and make admissions on that basis but the High Court could not have either switched the categories or directed that Shaurya Chakra should be treated as equivalent to Vir Chakra. By its directions, the High Court has completely upset the course of admissions under this reserved quota and has gravely affected the chances of candidates falling in category 4 by downgrading them as category 5 without even hearing them. These are good reasons for the categorisation done by the Administration which was adopted by the college.
>
> **21.** While this is not the place to delve into or detail the self-constraints to be observed by the courts while exercising the jurisdiction under Article 226, one of them, which is relevant herein, is beyond dispute viz., while acting under Article 226, the High Court does not sit and/or act as an appellate authority over the orders/actions of the subordinate authorities/tribunals. Its jurisdiction is supervisory in nature. One of the main objectives of this jurisdiction is to keep the government and several other authorities and tribunals within the bounds of their respective jurisdiction. The High Court must ensure that while performing this function it does not overstep the well recognised bounds of its own jurisdiction."

15. It is a settled canon of Constitutional Jurisprudence that this Court in the process of interpreting the law can remove any lacunae and fill up the gaps by laying down the directions with reference to the dispute before it; but normally it cannot declare a new law to be of general application in the same manner as the Legislature may do. This principle was stated by a Seven-Judge Bench of this Court in the case of *P. Ramachandra Rao* v. *State of Karnataka* [(2002) 4 SCC 578].

16. On a proper analysis of the principles stated by this

Court in a catena of judgments including the judgment afore-referred, it is clear that the courts can issue directions with regard to the dispute in a particular case, but should be very reluctant to issue directions which are legislative in nature. Be that as it may, because of the new dimensions which constitutional law has come to include, it becomes imperative for the courts in some cases, to pass directions to ensure that statutory or executive authorities do not act arbitrarily, discriminatorily or contrary to the settled laws. It was in light of these principles that this Court, vide its judgment dated 7th May, 1996 set aside the Full Bench Judgment of the High Court of Punjab and Haryana, brought into force some appropriate rules and sought to ensure that the competent authority acted in accordance with law and that it avoided total arbitrariness in allocation of government houses to its officers and employees. Once those rules have come into force and were amended from time to time as per the leave granted by this Court, in our considered view, it was not proper exercise of judicial discretion and jurisdiction to pass directions, which were in direct conflict with the Allotment Rules which were approved by in conflict this Court or with the directions which were issued by this Court on earlier occasions. Shortly, we shall proceed to discuss the scope and effect of the directions issued by the learned Single Judge of the High Court, their correctness and impact upon the existing rules and the lacuna, if any, which still exists in day-to-day implementation of the Allotment Rules.

17. On the analysis of the above principles, it emerges that the Court would exercise its jurisdiction to issue appropriate writ, order or directions with reference to the facts and circumstances of a given case. Normally, the courts would not step in to pass directions, which could, at times, be construed as a form of legislation. Articles 32 and 226 of the Constitution confer on this Court and the High Court the power to issue directions, orders or writs for achieving the objectives of those Articles. The courts, in the past, have issued directions for various purposes. In public interest, the courts may pass

directions and even appoint committees for inducing the Government to carry out the constitutional mandate. The courts have been taking due care while exercising such jurisdiction so that they do not overstep the circumscribed judicial limits.

18. In light of the above legal framework, we would now revert to examine the legal questions raised before us. There are primarily three issues which require the consideration of this Court :

1. The interpretation and enforcement of the Allotment Rules framed by Notification dated 28th June, 1996 and the amendments made to it from time to time;

2. The relevancy of the directions issued by this Court vide its judgment dated 8th December, 1995 ; and

3. The conflict between the directions of this Court and the Rules framed thereafter and the directions issued by the learned Single Judge of the High Court of Punjab and Haryana.

19. We would further be required to examine whether the Allotment Rules, as amended from time to time, are in conflict with the earlier judgment of this Court or whether they suffer from any basic legal infirmity or are *ex facie* arbitrary and, if so, what directions could be passed to remedy such elements of arbitrariness, particularly, in view of the directions issued by the learned Single Judge of the High Court. We may notice that during the course of arguments before us, it was also pointed out that because the action of the authorities in allotting two houses of the same category, one at Chandigarh and the other outside Chandigarh (both within the State of Punjab and/or Haryana) which is not permissible, great hardship and discrimination has been caused to the employees placed in the same category. Secondly, it was also argued that taking advantage of the time factor involved in the decision making by the Committee, the officers allotted to higher category

accommodation continue to retain both houses i.e. one of a lower category and other of a higher category for an unnecessarily long period, thus, causing prejudice to the interests of others. For example, it is alleged that in the case of the appellant, she is retaining the higher category house and continues to hold such accommodation even now, when she is actually entitled to an accommodation of lower category. However, according to the appellant, as State Information Commissioner also, she is entitled to the same accommodation and perks that the Chief Secretary of the State is entitled to. It is argued on behalf of the appellant that there is no transparency in the functioning of the Allotment Committee. According to the respondents, she will not be entitled to retain an earmarked accommodation.

20. It is also contended on behalf of different parties that arbitrariness in allotment of houses still persists. There is no need for adding houses to the Chief Minister's pool and increasing the discretionary quota. It is the claim of the appellant that the imposition of damages/charges on her is arbitrary and she is entitled to retain the same accommodation. First and foremost, we have to consider the nature of the changes in the Allotment Rules as approved by this Court, whether such changes are disadvantageous to the government servants and whether they increase the arbitrariness in the implementation of the Allotment Rules. We have already noticed that the rules in force at the relevant time were the subject matter of controversy before the Full Bench of the High Court of Punjab and Haryana and had given rise to filing of a Special Leave Petition (converted into C.A. No. 8890 of 1996). It was in this petition that the draft rules had been filed, approved with certain amendments, as directed by this Court and thereafter published vide Notification dated 28th June, 1996, to finally result in the Allotment Rules. These rules were also subjected to different amendments from time to time and major amendments were carried out in the years 1997, 1998, 2004, 2007 and 2009. Besides these, certain guidelines were also framed which

became part of the Allotment Rules. These amendments related to changes in the definition clauses as well as the substantive rules. For example, Rule 7, which is related to the earmarking of houses was amended on 7th May, 1998; Rule 8, concerning the Controlling Authority was amended vide Notification dated 2nd June, 1997; Rule 11, which related to Out-of-Turn Allotment, was amended vide Notifications in 1997 and again vide Notification dated 4th August, 2004; Rules 13 and 14 relating to the period for which allotment subsists and concessional period for further retention and fixation of licence fee were amended by different amendments including those dated 17th December, 2009 and 11th October, 2007 respectively. These amendments have to be examined in light of the fact that this Court granted leave vide its judgment dated 7th May, 1996 to the Chandigarh Administration to amend the rules, as and when it considered such amendment necessary. The leave granted by this Court obviously means that the amendment should be necessity based and not be intended to introduce the element of arbitrariness or discrimination in the rules and resultantly in the allotment of the houses to the government officers/ officials.

21. Having stated the aforementioned principles, we will now proceed to discuss the scope and desirability of the directions issued by the learned Single Judge of the High Court of Punjab and Haryana. The learned Single Judge, while dealing with the case of the present appellant, issued certain general directions with regard to Out-of-Turn Allotment, the addition and earmarking of houses, allotment of discretionary quota and the Chief Minister's quota, instances of allotment of two houses to one officer, the display of lists of prospective allottees on the website and the drawing up of an order of precedence amongst the Constitutional, Statutory and Executive functionaries. The Court issued prohibitory orders as well. All these directions had been stayed by the Division Bench of that Court in an appeal preferred by the Chandigarh Administration.

22. As already noticed, fairness in State action is the

essence of proper governance. Where the authorities exercise their powers under the rules, they are expected to exercise the discretion vested in them fairly and with the intention to attain a balance between exercise of discretionary power and the larger public interest sought to be achieved by such discretion. Arbitrariness or irresponsible exercise of the power vested in the authorities, has been a matter of great concern before the courts. The Full Bench of High Court of Punjab and Haryana had declared Rule 7 of the Allotment Rules of 1972 as unconstitutional and being without any proper guidelines because the possibility of exercising unguided power resulted in arbitrariness on various occasions. Though that judgment had been set aside by this Court, surely it was still expected that the draft rules, as approved by this Court, would be acted upon fairly and without arbitrariness. However, the matters have not ended with the implementation of the new rules and, therefore, litigation in respect of these rules has been a continuous affair. The matter, which can be said to be of some public importance is not a question of the interpretation of the Allotment Rules as such, but is one of the manner of exercise of power with reference to the Allotment Rules.

23. Rule 7 of the Allotment Rules, which deals with the creation of pools of residences, provides for earmarking of houses for specified officers from different branches of the State Administration and those houses which have not been so earmarked for any particular class of Government employees would be allotted to the general pool of the Chandigarh Administration. This Rule and its sub-Rules read together do not suffer from the vice of arbitrariness, as earmarking of houses is a known concept in relation to allotment of houses. The learned Single Judge of the High Court of Punjab and Haryana has given a clarificatory direction that when earmarked houses are occupied by an officer, who is at that time not entitled to that house, another house would not be earmarked for any particular officer, until the occupied house is vacated. One exception is carved out in favour of SSP,

Chandigarh in terms of order dated 7th March, 2011. We do not think that this clarificatory direction is violative of any rule or is otherwise impermissible. These directions attempt to ensure that there should not be more than one earmarked house for the same post as per the need. This clarification or explanatory direction would also ensure timely vacation of the earmarked houses by the officers concerned, upon their transfer, promotion or posting to a post where they are not entitled to an earmarked accommodation. Thus, we see no reason to interfere with imposition of such a condition which is in conformity with the spirit of the aforesaid Rule. We, thus direct that no new house for any category/post should be earmarked unless the house already earmarked for such category/post has been vacated and placed in the general pool of the Chandigarh Administration for allotment in accordance with the Allotment Rules.

24. The next direction to which certain objections were raised by the parties appearing before this Court is with regard to Out-of-Turn Allotment and allotment of houses in exercise of the discretionary powers of the Administrator, U.T., Chandigarh and the Chief Minister of Punjab and Haryana respectively. At the outset, it may be noticed that there is no specific rule controlling the discretionary allotment by the Administrator, U.T., Chandigarh and the Chief Minister of State of Punjab and Haryana respectively. However, Rule 8 identifies the Controlling Authority which is the Administrator, U.T. Chandigarh, who would be the co-ordinating and controlling authority in respect of the houses belonging to Chandigarh Administration. He has been given the power to add or withdraw houses from any pool for the purposes of allotment to any class or category of eligible government employees and may also change the classification of houses on the recommendation of the House Allotment Committee. Rule 11 deals with Out-of-Turn Allotments, i.e. the House Allotment Committee may allot a house on Out-of-Turn basis to the cases specified under clauses (a) to (g) of that Rule. The House Allotment Committee in its Meeting dated 27th

March, 2003 has further approved certain guidelines for the Out-of-Turn Allotments.

25. Rule 11 is a very comprehensive rule which deals with the specific situations where Out-of-Turn Allotment is permissible. The Allotment Rules and these guidelines are intended to control the exercise of discretion by the authorities concerned in granting out-of-turn allotments. There is some vagueness in Rule 11(1)(e), i.e. Out-of-Turn Allotments to a government employee due to the 'functional requirements' of the post. This expression is neither explained nor have any guidelines been issued in this regard. The criteria provided in Guideline (2) for allotments made in public interest under Rule 11(1)(f) is quite similar to the criteria for determining functional requirements. Both these heads refer to the nature of official duties and functions to be performed by the officer concerned. Thus, the category of 'functional requirement' allotment is nothing but a category created to allow more and more allotments under this head. In light of these rules, the absolute restriction on Out-of-Turn Allotments imposed by the learned Single Judge may not be just and fair and will be opposed to the statutory provisions of the Allotment Rules. Therefore, we are unable to sustain such a restriction. However, we would further clarify that the powers vested in the concerned authority under Rules 8 and 11 of the Allotment Rules will only be exercised: (a) upon recommendation of the House Allotment Committee; (b) such recommendation should be supported by reasons with the requirements of the job and the data in support thereof; and (c) no allotments would be made under the provisions of Rule 11(1)(e). The maximum restriction of 10 per cent of all allotments being Out-of-Turn Allotments, as contemplated under Rule 11(2) of the Allotment Rules, shall be operative to entire Rule 11 as well as to Rule 8 of the Allotment Rules. In no event shall Out-of-Turn Allotment exceed 10 per cent of all houses allotted in a year. This is primarily to control the exercise of discretionary power as well as to ensure that the persons entitled to residential accommodation in the

general pool are not made to wait unduly for an indefinite period.

26. Allotments under different categories and with the restrictions as stated in the Allotment Rules and the guidelines shall continue to be in force and should not be amended or altered except in exceptional circumstances by the appropriate body. This alone can add some certainty to the application of these provisions and to the expectations of the government employees, who have a legitimate expectation of allotment of government accommodation as part of their perks.

27. We also direct that the purpose of Rule 8 of the Allotment Rules is not to allow discretionary allotment but is to provide overall powers of coordination and control to the Administrator, U.T., Chandigarh. When the words 'for the purposes of allotment to any class or category of eligible government servant' appearing in Rule 8 are examined, these have to necessarily be construed to mean the allotment made in terms of the Allotment Rules. Adding or withdrawing houses to the general pool is a power vested in the authority under Rule 8, but allotments still are to be made in accordance with the substantive rules enabling the authorities to make regular allotments.

28. Neither the judgment of this Court passed in Civil Appeal No. 8890 of 1996 nor the Allotment Rules duly notified by the Government, require publishing of list of prospective allottees on website and inviting objections to the same. Rule 9 of the Alltoment Rules requires the authorities to invite applications for allotment of accommodation and also provides the manner in which the allotment of houses is to be made including showing the seniority of the applicants category-wise. There is no provision requiring invitation of objections. Once there is no rule, in our considered view, it will not serve any fruitful purpose to invite objections to each allotment apart from unnecessarily delaying allotments and rendering the working of

the Rules more complex and difficult. Further, Rule 9(5) of the Allotment Rules is a complete safeguard in regard to proper maintenance of the seniority list of the applicants. Thus, we set aside the directions issued by the learned Single Judge in that behalf. However, we direct that the final list of allotments made by the House Allotment Committee should be placed on the website of the Government, as all interested persons would be entitled to know whether they have been allotted the accommodation or not.

29. Now, we will deal with the other two arguments that were raised before us. One argument was in regard to the allotment of two houses to a single officer and/or to his family, one in Chandigarh and one in some other part of the same State; and the second was regarding the period of retention of the allotted house after the employee is retired, promoted, transferred or is sent on deputation etc. These are matters of serious concern. There is no rule that has been brought to our notice or is available on the records providing that an officer who is posted outside Chandigarh/Panchkula/Mohali and whose spouse is not entitled to any Government accommodation of any category can be provided with two houses, one at the District/Division level to which he/she is transferred and another at Chandigarh and its adjourning areas. In absence of any such specific rule, we consider it appropriate to direct that the State shall not allot two different houses to one government servant. In terms of Rule 11(1)(b) of the Allotment Rules, such allotment can be made in some circumstances but we are constrained to observe that every effort should be made to ensure that such situations arise only in exceptional circumstances. We are informed that even under the rules of transfer of the Government servant, a married couple, both of whom are government servants are normally posted at the same place. Be that as it may, it will be in the interest of all concerned that Rule 11(1)(b) is invoked sparingly and only by the authorities concerned, upon the recommendation of the House Allotment Committee.

30. The issue with regard to the retention of government accommodation is controlled by Rule 13 of the Allotment Rules. The table under clause 2 of the said Rule provides different periods of retention in different situations. Rule 13, sub-rule 5 further carves out an exception, allowing the period of retention to be extended beyond the period stated in the table under Rule 13(2) of the Allotment Rules on payment of higher licence fee. We see no reason why a government servant should be permitted to retain the accommodation beyond 4 to 6 months, which period is permissible under the substantive rules. A government servant knows in advance the period within which he has to vacate the accommodation allotted to him as part of his employment and so he has to surrender the house in question within the scheduled time.

31. What exceptional cases are contemplated under Rule 13(5) of the Allotment Rules is nowhere indicated. No guidelines are provided and it is only for the authorities concerned to decide whether the case falls in that category or not. We are unable to see any compelling circumstances for permitting discretion to the authorities under Rule 13(5) of the Allotment Rules. Rules 13(1) and 13(2) are comprehensive, specific and provide more than reasonable time for a government servant to vacate the accommodation allotted to him/her. The Court cannot lose sight of the fact that a large number of employees under different categories, are awaiting their allotments and are being deprived of this benefit for long periods because of excessive invocation of such discretionary powers. The provision is unguided and arbitrary and cannot stand the scrutiny of law. More so, the licence fee indicated is obviously minimal in comparison to the market rent for the said premises. It is a matter which a Court can safely take judicial notice of.

32. Compelled by these circumstances, we find Rule 13(5) not sustainable and the authorities are directed not to take recourse to the said provision under any circumstance. No case of retention of government accommodation beyond the periods

specified in the table to Rule 13(2) of the Allotment Rules shall be entertained by any authority under the Allotment Rules.

33. We have issued the above directions being conscious of the fact that the Allotment Rules are in place and that the authorities are acting fairly and judiciously. The directions that we have issued are primarily explanatory and are intended to narrow the scope of discretion exercisable by the concerned authorities. It is a settled canon of Administrative Jurisprudence that wider the power conferred, more onerous is the responsibility to ensure that such power is not exercised in excess of what is required or relevant for the case and the decision.

34. We expect the authorities to be consistent in their decisions and bring certainty to the Allotment Rules. This can only be done by making fair, judicious and reasoned decisions on the one hand and refraining from amending the Allotment Rules except in exceptional and extraordinary circumstances on the other. The Doctrine of Certainty can appropriately be applied to legislative powers as it is applicable to judicial pronouncements. We must not be understood to say that the power of the Legislature to amend rules is restricted by judicial pronouncements, but we want to impress upon the Legislature that the rules of the present kind should not be amended so frequently that no established practice or settled impression may be formed in the minds of the employees. Where the employer has limited resources, there the employee has a legitimate expectation of being dealt with fairly in relation to allotment to such government accommodation. Consequently, reverting to the case of the appellant, she is admittedly occupying an earmarked house. An order of eviction and damages has been passed against her and she has taken recourse to an appropriate remedy or against which she has already taken an appropriate remedy. The matter in that behalf is still pending final hearing before the learned Single Judge. The parties are left to raise all their contentions before the

learned Single Judge, who shall decide the matter in accordance with law. However, with regard to the interim order passed by the High Court, we direct the State to allot to her an alternative accommodation under the category which she is entitled to, in pursuance of her appointment as State Information Commissioner, within fifteen days from today and she shall be liable to vacate the accommodation presently in her occupation within two weeks thereafter. We make it clear that in the event the Government is unable to allot her an alternative accommodation of her category for the reason of non-availability of such accommodation, she should be provided with appropriate accommodation, including private accommodation of her status, within the same period.

35. The appeal, for the reasons afore-recorded and with the directions afore-given, is disposed of while leaving the parties to bear their own costs.

D.G. Appeal disposed of.

RAMACHANDRAN & ORS. ETC.
v.
STATE OF KERALA
(Criminal Appeal No. 162 of 2006)

SEPTEMBER 02, 2011

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

Penal Code, 1860 – s.302/149 and s.307/149 – Unlawful assembly armed with various weapons causing murder of one person and serious injuries to two others – Applicability of s.149 – Held: Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act – Even mere presence in the unlawful assembly, but with an active mind, to achieve the common object makes a person vicariously liable for the acts of the unlawful assembly – It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of s.149 IPC, if the offence was such as the members knew was likely to be committed – "Common object" may also be developed at the time of incident – In the instant case, there was enough evidence on record to establish that the accused-appellants were present, armed with sword stick, choppers, knife and iron rods – All these weapons were used by the appellants for committing the offences and causing injuries to their victims – If all the circumstances are taken into consideration, it cannot be held that the appellants had not participated to prosecute a 'common object' – Even if it was not so, it had developed at the time of incident – Trial court as well as the High Court proceeded in correct perspective and rightly applied the provisions of s.149 IPC – All the accused were very well known to the witnesses – So their identification etc. was not in issue – As their participation

was governed by second part of s.149 IPC, overt act of an individual lost significance – Conviction of accused-appellants, as recorded by courts below, accordingly upheld.

Evidence – Witnesses – Murder trial – Seventeen accused – Incident was over within a very short time – Held: In such a case even if minor contradictions appeared in the evidence of witnesses, it is to be ignored for the reason that it is natural that exact version of the incident revealing any minute detail i.e. meticulous exactitude of individual acts cannot be expected from the eye-witnesses.

According to the prosecution, on account of past enmity, the accused persons formed an unlawful assembly for the purpose of committing the murder of PW2; that they waited in the house of A-1 and when PW.2 came along the pathway on the side of the house, A.1 repeatedly shouted "catch him" and then the accused persons chased PW2 and on seeing this, PW.2 ran towards the house of PW.3; however, A.1 inflicted cut injury on his hand; that thereafter though PW.2 succeeded in entering the said house and in closing the door from inside, the accused-appellants broke open the door and inflicted injuries on PW.2 with their respective weapons and also dragged and beat him; that on hearing the hue and cry, 'K', the father of PW.2 and PW.1 reached there, but the accused-appellants rushed towards him shouting "Kill them" and thereafter, A.1 inflicted a cut injury on his head with a sword stick in his hand and other accused inflicted injuries on him with their respective weapons, namely, choppers, knives and iron rods and that when PW.1 and PW.4 made an attempt to intervene, they were also attacked by the appellants and were rendered injured. 'K' succumbed to the injuries caused by the accused at the spot.

The trial court convicted A1 to A11, 14 and 15 under Sections 143, 147, 148, 307, 323, 324, 449, 427 and 302 of

the IPC read with Section 149 IPC and sentenced them to undergo imprisonment for life. The other accused, namely, A12, A13, A16 and A17 were convicted under Sections 143, 147, 148, 307, 323, 449, 427 read with Section 149 IPC. They were sentenced to undergo rigorous imprisonment for 10 years each. On appeal, the High Court modified the order of the trial court to the extent that conviction of A7, A10 and A11 under Section 302 IPC was set aside. However, their conviction and sentence for other offences were confirmed.

In the instant appeal, the appellants *inter alia* argued on application of the provisions of Section 149 IPC, contending that the appellant did not have common object to cause death of 'K' and as seventeen persons had been involved, it was not possible for the alleged eye-witnesses to give minute detail about their respective overt act; more so, PW.2 had become unconscious after being beaten and regained conscious after two days, thus, it was not possible for him to see the incident regarding the death of his father 'K'. The appellants contended that the courts below erred in making the case of some of the appellants distinguishable from others as one set of appellants stood convicted under Sections 302/149 IPC etc. while another set of appellants were convicted under Sections 307/149 IPC etc., though, under the facts and circumstances of the case, no distinction was permissible; that the appellants had not proceeded with common object to kill any person, thus, provisions of Section 149 IPC were not attracted; that though from the facts available on record, inference can be drawn that some of the appellants had an object to catch hold of PW.2, however, there was no intention to kill him; that no independent witness was examined and all the injured witnesses had been very close to the deceased; that in a case, where a very large number of assailants are there and the incident is over in a short span of time, it is not

possible for the eye-witnesses to identify all the accused and give detailed description of participation of each of them and thus evidence of the eye-witnesses cannot be relied upon.

Disposing of the appeal, the Court

HELD:1.1. Section 149 IPC has essentially two ingredients viz. (i) offence committed by any member of an unlawful assembly consisting five or more members and (ii) such offence must be committed in prosecution of the common object (under Section 141 IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object. [Para 10] [940-E]

1.2. For "common object", it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, the common object may form on spur of the moment; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. [Para 11] [940-F-G]

1.3. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under second part of Section 149 IPC if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that if a body of persons go armed to take forcible possession of the land, it would be right to say that someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood

and would be guilty under the second part of Section 149 IPC. [Para 12] [940-H; 941-A-B]

1.4. There may be cases which would come within the second part, but not within the first. The distinction between the two parts of Section 149 IPC cannot be ignored or obliterated. [Para 13] [941-C]

1.5. However, once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. [Para 14] [941-D-F]

1.6. The crucial question for determination in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. [Para 15] [941-G-H; 942-A]

1.7. The law of vicarious liability under Section 149 IPC is crystal clear that even the mere presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. [Para 18] [942-F-G]

1.8. This court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident. [Para 21] [943-H; 944-A-C]

Bhanwar Singh & Ors. v. State of M.P. **(2008) 16 SCC 657: 2008 (9) SCR 1;** *Mizaji & Anr. v. State of U.P.* **AIR 1959 SC 572: 1959 Suppl. SCR 940;** *Gangadhar Behera & Ors. v. State of Orissa* **AIR 2002 SC 3633;** *Daya Kishan v. State of Haryana* **(2010) 5 SCC 81: 2010 (4) SCR 854;** *Sikandar Singh v. State of Bihar* **(2010) 7 SCC 477: 2010 (8) SCR 373;** *Debashis Daw v. Stateof W.B.* **(2010) 9 SCC 111: 2010 (9) SCR 654;** *Masalti v. State of Uttar Pradesh* **AIR 1965 SC 202:1964 SCR 133;** *K.M. Ravi & Ors. v. State of Karnataka* **(2009) 16 SC 337;** *State of U.P. v. Krishanpal & Ors.* **(2008) 16 SCC 73: 2008 (11) SCR 1048;** *Amerika Rai & Ors. v. State of Bihar* **(2011) 4 SCC 677 and** *Charan Singh v. State of U.P.***(2004) 4 SCC 205: 2004 (2) SCR 925 – relied on.**

2. In the instant case, it is evident that the trial court as well as the High Court proceeded in correct perspective and applied the provisions of Section 149 IPC correctly. The facts have properly been analysed and appreciated. There is enough evidence on record to establish that the accused-appellants were present,

armed with sword stick, choppers, knife and iron rods. The seventeen accused gathered at the residence of A.1 and waited for the appropriate time knowing it well that PW.2 would return from the temple. Immediately, after seeing him, A.1 shouted "chase him, chase him". In order to save his life, he ran away and entered into the house of PW3. However, before he could enter the house, he was inflicted injury by A.1 with the sword stick. PW.2 succeeded in entering the house and closing the door from inside. The accused/appellants broke open the door and caused injuries of very serious nature to PW.2 and left him under the impression that he had died. The accused were having one sword stick, two choppers, one knife and twelve iron rods. All these weapons were used by the appellants for committing the offences and causing injuries to their victims. 'K' (deceased) received as many as 34 injuries. In view thereof, if all the circumstances are taken into consideration, it cannot be held that the appellants had not participated to prosecute a 'common object'. Even if it was not so, it had developed at the time of incident. In view thereof, submission made by the appellants in respect of applicability of Section 149 IPC is not worth consideration. [Paras 6, 24] [935-G; 946-G-H; 947-A-D]

3. There is no force in the submission made by the appellants that as the number of accused had been seventeen and the incident was over within a very short time, it was not possible for witnesses to give as detailed description as has been given in this case, and there had been several contradiction therein, therefore, their evidence is not reliable. In such a case even if minor contradictions appeared in the evidence of witnesses, it is to be ignored for the reason that it is natural that exact version of the incident revealing any minute detail i.e. meticulous exactitude of individual acts cannot be expected from the eye-witnesses. In this case all the

accused were very well known to the witnesses. So their identification etc. has not been in issue. As their participation being governed by second part of Section 149 IPC, overt act of an individual lost significance. [Para 25] [947-E-H]

Abdul Sayeed v. State of Madhya Pradesh **(2010) 10 SCC 259: 2010 (13) SCR 311 – relied on .**

4. However, the courts below have made distinction in two sets of the accused/appellants and that attained finality as the State did not prefer any appeal against the same. All appellants in the second set have been convicted for the offence punishable under Sections 307/ 149 IPC etc. and awarded sentence of 10 years rigorous imprisonment. These appellants have submitted the certificates of service of sentence rendered by them. According to the said certificate, these appellants have served 4-1/2 years to 8 years. All of them have been already granted bail by this Court. In the facts and circumstances of the case, their conviction is upheld, however, the sentence is reduced as undergone. Appeal of the other appellants stands dismissed. [Para 26] [948-A-C]

Case Law Reference:

2008 (9) SCR 1	relied on	Para 11
1959 Suppl. SCR 940	relied on	Para 13
AIR 2002 SC 3633	relied on	Para 13
2010 (4) SCR 854	relied on	Para 14
2010 (8) SCR 373	relied on	Para 14
2010 (9) SCR 654	relied on	Para 14
1964 SCR 133	relied on	Para 15

(2009) 16 SC 337	**relied on**	**Para 16**
2008 (11) SCR 1048	**relied on**	**Para 17**
(2011) 4 SCC 677	**relied on**	**Para 18**
2004 (2) SCR 925	**relied on**	**Para 19**
2010 (13) SCR 311	**relied on**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 162 of 2006.

From the Judgment & Order dated 7.4.2005 of the High Court of Kerala at Ernakulam in Crl. A.Nos. 1675 and 1955 of 2003.

C.N. Sree Kumar, Resmitha R. Chandran for the Appellants.

M.T. George, Ramesh Babu M.R., for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 7.4.2005 passed by the High Court of Kerala at Ernakulam in Criminal Appeal Nos. 1675 and 1955 of 2003 by which the High Court, while affirming the findings of fact, modified the judgment and order of the trial court dated 29.8.2003 in Sessions Case No. 58 of 2001 i.e. Criminal Appeal No. 1675 of 2003 stood dismissed, while Criminal Appeal No. 1955 of 2003 was partly allowed.

2. Facts and circumstance giving rise to this appeal are that:

A. Babu (PW.1); Sobhanan (PW.2); and Parvathy (PW.4) all relatives were having inimical terms with the appellants. Several criminal cases were pending between them. In order to take revenge, the appellants formed an unlawful assembly for the purpose of committing murder of Sobhanan (PW.2). They

waited in the house of Sudhakaran (A.1) on 12.4.2000, which was the last day of Mahotsavam conducted in the Shanmughaviiasam temple at Kulasekharamangalam, at about 10.00 p.m.

B. Sobhanan (PW.2) came alongwith his 8 years old son along the pathway on the eastern side of the house of Sudhakaran (A.1) from the temple. Sudhakaran (A.1) repeatedly shouted "catch him". The accused chased him and on seeing this, Sobhanan (PW.2) ran from the place leaving his son there towards the house of Sobhana (PW.3) i.e. "Sophia Bhawan". However, before Sobhanan (PW.2) could enter "Sophia Bhawan", Sudhakaran (A.1) inflicted cut injury on his hand. Sobhanan (PW.2) entered the said house and succeeded in closing the door from inside. All the accused except Shaji (A.18) broke open the door and inflicted injuries on Sobhanan (PW.2) with their respective weapons and he was dragged to the western courtyard and again beaten. In this process, a large number of articles of the use of "Sophia Bhawan" got destroyed.

C. While hearing the hue and cry, Kuttappan (deceased) father of Sobhanan (PW.2) and Babu (PW.1) reached there. The appellants rushed towards Kuttappan (deceased) shouting "Kill them" and thereafter, Sudhakaran (A.1) inflicted a cut injury on the head of the deceased with a sword stick in his hand and other accused inflicted injuries on him with their respective weapons, namely, choppers, knives and iron rods. When Babu (PW.1) and Parvathy (PW.4) made an attempt to intervene, they were also attacked by the appellants and injured. Kuttappan succumbed to the injuries caused by the accused at the spot and the accused persons ran away from the spot.

D. An FIR in respect of the incident was lodged and thus, investigation commenced. The recovery of the weapons was made at the instance of the accused and after completing the formalities, 18 accused were put on trial. The prosecution to prove its case examined a large number of witnesses including

five eye-witnesses. Out of them, four had been injured witnesses.

E. On conclusion of the trial, the court acquitted Shaji (A.18) and convicted A1 to A11, 14 and 15 under Sections 143, 147, 148, 307, 323, 324, 449, 427 and 302 of the Indian Penal Code, 1860 (hereinafter called 'the IPC') read with Section 149 IPC and sentenced to undergo imprisonment for life and also for payment of fine of Rs.25,000/- each, in default to undergo rigorous imprisonment for five years under Section 302 IPC and they are further sentenced to undergo rigorous imprisonment for ten years each and also to pay a fine of Rs.10,000/- each, in default to undergo rigorous imprisonment for three years each under Section 307 IPC and further sentenced to undergo rigorous imprisonment for one year each and also to pay a fine of Rs.3000/- each, in default to undergo rigorous imprisonment for two months each under Section 324 IPC and they are also liable to be sentenced to undergo rigorous imprisonment for six months each and also to pay a fine of Rs.1000/- each. In default to undergo rigorous Imprisonment for two months each under Section 323 IPC and further sentenced to undergo rigorous imprisonment for six months each and also to pay a fine of Rs.1000/- each, in default to undergo rigorous imprisonment for two months each under Section 427 IPC and they are further sentenced to undergo rigorous imprisonment for seven years each and also to pay a fine of Rs.5000/- each, in default to undergo rigorous imprisonment for two years each under Section 449 IPC and they are also sentenced to undergo rigorous imprisonment for six months each under Section 143 IPC and further sentenced to undergo rigorous imprisonment for one year each under Section 148 IPC and the sentences are directed to run concurrently.

Other accused, namely, A12, A13, A16 and A17 were convicted under Sections 143, 147, 148, 307, 323, 449, 427 read with Section 149 IPC. They were sentenced to undergo rigorous imprisonment for 10 years each and also to pay a fine

of Rs.,10,000/- each, in default to undergo rigorous imprisonment for 3 years each under Section 307 IPC and further sentenced to undergo rigorous imprisonment for six months each and also to pay a fine of Rs.1000/- each, in default to undergo rigorous imprisonment for two months each under Section 323 IPC and further sentenced to undergo rigorous imprisonment for six months each and also to pay a fine of Rs.1000/- each, in default to undergo rigorous imprisonment for two months each under Section 427 IPC and further sentenced to undergo rigorous imprisonment for seven years each, and also to pay a fine of Rs.5000/- each, in default to undergo rigorous imprisonment for two years each under Section 449 IPC and further sentenced to undergo rigorous imprisonment for one year each under Section 148 IPC and also further sentenced to undergo rigorous imprisonment or six months each under Section 143 IPC.

F. Being aggrieved, the appellants preferred the appeals which have been disposed of by common judgment and order dated 7.4.2005 by which the High Court modified the order of the trial court to the extent that conviction of A7, A10 and A11 under Section 302 IPC was set aside. However, their conviction and sentence for other offences have been confirmed.

Hence, this appeal.

3. Shri C.N. Sree Kumar, learned counsel appearing for the appellants, has submitted that courts below erred in making the case of some of the appellants distinguishable from others as one set of appellants stood convicted under Sections 302/149 IPC etc. and another set of appellants has been convicted under Sections 307/149 IPC etc., though, under the facts and circumstances of the case, no distinction is permissible. Even, if the case of some of the appellants has to be separated from others, the set of appellants who have been convicted under Section 302/149 IPC would have been convicted under Section 304 - Part I IPC. This was necessary in view of the evidence

of the doctors, who conducted the postmortem examination of Kuttappan (deceased) and examined other persons. The appellants had not proceeded with common object to kill any person in as much as to kill Kuttappan, thus, provisions of Section 149 IPC are not attracted. From the facts available on record, inference can be drawn that some of the appellants had an object to catch hold of Sobhanan (PW.2), however, there was no intention to kill him. No independent witness has been examined and all the injured witnesses had been very close to the deceased. In a case, where a very large number of assailants are there and the incident is over in a short span of time, it is not possible for the eye-witnesses to identify all the accused and give detailed description of participation of each of them. Thus, evidence of the eye-witnesses cannot be relied upon. The appeal deserves to be allowed.

4. Per contra, Shri M.T. George, learned counsel appearing for the respondent State, has opposed the appeal, contending that in the facts and circumstances of the case, provisions of Section 149 IPC have rightly been applied. The prosecution succeeded in proving its case by examining five eye-witnesses, out of them four had been injured witnesses. The medical evidence supports the case of the prosecution. Thus, the appeal lacks merit and is liable to be dismissed.

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

6. There is enough evidence on record to establish that appellants were present, armed with sword stick, choppers, knife and iron rods. Dr. Girish (PW.18) conducted the postmortem on the body of Kuttappan (deceased) and prepared report (Ex. P-14). According to which, the following 34 injuries were found on his person:

(1) Incised wound 7x1.5 cm. bone deep sagitally placed on right side of front of head, 3 c.m. outer to midline and 4 c.m. above eye brow. Frontal bone underneath sowed

fissured fracture 8.5 c.m. long extending to margin of coronal suture. Subarachnoid bleeding present on both sides of brain. Gyri of brain flattened and sulci narrowed.

(2) Contused abrasion. 0.5 x 0.5 c.m. on left side of face, 3 cm. in front of ear.

(3) Contused abrasion 7.5 x 0.7 c.m. horizontal, on right side of front of chest, just ouster to midline and 8.5 c.m. below collar bone.

(4) Multiple small abrasions over an area 3.5 x 1 c.m. on back of right elbow.

(5) Contused abrasion 6 x 0.5 c.m. oblique on outer aspect of right forearm 4 c.m. below elbow.

(6) Lacerated wound 0.7 x 0.5 c.m. on the front of right forearm. 10 c.m. below elbow.

(7) Contused abrasion 16 x 2 c.m. oblique on back of right forearm 1 c.m. above wrist.

(8) Multiple small contused abrasions over an area 4x2cm on back of right wrist and hand.

(9) Contused abrasion 3x1 cm oblique on the outer aspect of right elbow.

(?10) Contused abrasion 7x2em. Oblique on the outer aspect of right hip.

(11) Multiple contused abrasions over an area 11 x 4 cm. On the outer aspect of right thigh 7cm. Above knee.

(12) Contused abrasion 2x1cm on front of right knee.

(13) Multiple small contused abrasions over an area 10 x 8 cm. On back of right leg 3cm. Below Knee.

(14) Contused abrasion 2.5x1 cm. On front of right leg. 16cm. above ankle.

(15) Contused abrasion 2x1 cm on front of right ankle.

(16) Multiple small contused abrasions over an area 30x7cm. on front of left leg, just below Knee.

(17) Incised punctured wound 5x2x9 cm. oblique on outer aspect of left leg 2 cm. below Knee. Upper back end showed splitting of tissues and other end sharply cut. The wound was directed downwards.

(18) Contused abrasion 5.5x1cm. oblique on outer aspect of left Knee.

(19) Multiple small contused abrasions over an area 20x16 cm. on the front of left thigh and Knee.

(20) Incised punctured wound 3.5 x 1 x 7.5 cm. oblique on outer aspect of left hip. Upper back end was blunt and other end sharply cut. The wound was directed downwards.

?(21) Abrasion 2 x 1 cm. on the outer aspect of left hip, 2 cm. above injury No.20.

(22) Incised punctured wound 3.5x1.5 x 1 cm. oblique over left buttock. The upper inner end was blunt and other end sharp. The wound was directed forwards.

(23) Incised wound 1.5 x O.3xO.5 cm. over left buttock, 2 cm. below injury No.2.

(24) Contused abrasion 11x2 cm. oblique on right side of back of trunk 10 cm. below tip of shoulder blade.

(25) Contused abrasion 2.5x1 cm. oblique on right side of back of trunk, 2 cm. outer to midline and 5 cm. above lilac crest.

(26) Multiple contused abrasions over an area 24 x 11 cm. on left side of chest 8 cm. below armpit. 8th and 9th ribs underneath showed fracture at their outer angles.

(27) Incised punctured wound 2x0.5 cm. on left side of back of trunk. Inner upper blunt end being 4 cm. below tip of shoulder blade.

(28) Contused abrasion 1x0.5 cm. on back of left hand, just above root of middle finger.

(29) Incised wound 4 x 1 x 0.5 cm. oblique on back of left wrist.

(30) Incised wound 3x1xO.5 cm. oblique on back of left forearm 15 cm. below elbow.

(31) Multiple small abrasions over an area 13x4 cm. on the front of left forearm just below elbow.

(32) Multiple contused abrasions over an area 25x10 cm. on back of left arm, just above elbow.

(33) Abrasion 5x3 cm. on top of left shoulder.

(34) Abrasion 5 x 3 cm. on the tip of penis.

In the opinion of Dr. Girish (PW.18), the injuries were caused with the weapons recovered from the appellants and Kuttappan died of head injury i.e. injury no. 1. as it was sufficient to cause death.

7. Babu (PW.1) was examined by Dr. C.P. Venugopal (PW.20) and following injuries were found on his person:

(1) Cut injury 10 c.m. x 3 x 1 c.m. on the left thigh – posterior aspect.

(2) Lacerated injury 6 x 2 x 1.5 c.m. on the back of scalp left side bleeding.

8. Sobhanan (PW.2) son of the deceased was examined by Dr. P.R. Anil Kumar (PW.21) and following injuries were found on his person:

(1) A cut injury in the right elbow.

(2) Lacerated wound frontal to occipital areas of the scalp approximately 20 cm length.

(3) Cut injury on the right thigh and right leg.

(4) Lacerated injury in the left ear.

(5) Lacerated injury on the left forearm, right palm and right forearm and right elbow.

(6) Lacerated injury on the right thigh.

(7) Punctured wound in the right thigh and right leg.

(8) Abrasions left and right shoulder.

(9) Swelling left cheek.

(10) Fracture mandible left side. Comminuted fracture left lateral malleious.

(11) Comminuted fracture fibular neck.

(12) Fracture lateral condyle left."

According to the opinion of Dr. P.R. Anil Kumar (PW.21), Sobhanan (PW.2) suffered very serious injuries of grave nature and had a very narrow escape from death.

9. In this factual scenario, Mr. C.N. Sree Kumar has mainly argued on the application of the provisions of Section 149 IPC, contending that all the appellant did not have common object to cause death of Kuttappan (deceased) and as the seventeen persons had been involved, it was not possible for the alleged eye-witnesses to give minute detail about their respective overt

act. More so, Sobhanan (PW.2) had become unconscious after being beaten and regained conscious after two days, thus, it was not possible for him to see the incident regarding the death of his father Kuttuppan.

The issue raised hereinabove alongwith other issues particularly that all the witnesses were partisan and no independent witness was examined; there was no light on the spot, therefore, the witnesses could not see the incident properly, recovery effected was not proved properly; identification of arms was far from satisfaction; there was lack of credibility of the version of the prosecution and minor contradictions in their statements have been properly considered by the courts below and those factual issues do not require any further appreciation.

SECTION 149 IPC: Scope and Object

10. Section 149 IPC has essentially two ingredients viz. (i) offence committed by any member of an unlawful assembly consisting five or more members and (ii) such offence must be committed in prosecution of the common object (under Section 141 IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object.

11. For "common object", it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, *the common object may form on spur of the moment;* it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. [Vide: *Bhanwar Singh & Ors. v. State of M.P.,* (2008) 16 SCC 657]

12. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet

fall under second part of Section 149 IPC if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that if a body of persons go armed to take forcible possession of the land, it would be right to say that someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149 IPC.

13. There may be cases which would come within the second part, but not within the first. The distinction between the two parts of Section 149 IPC cannot be ignored or obliterated. [See : *Mizaji & Anr. v. State of U.P.,* AIR 1959 SC 572; and *Gangadhar Behera & Ors. v. State of Orissa,* AIR 2002 SC 3633].

14. However, once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [See : *Daya Kishan v. State of Haryana,* (2010) 5 SCC 81; *Sikandar Singh v. State of Bihar,* (2010) 7 SCC 477, and *Debashis Daw v. State of W.B.,* (2010) 9 SCC 111].

15. The crucial question for determination in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons which were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.(Vide: *Masalti v. State of Uttar Pradesh,* AIR 1965 SC 202)

16. In *K.M. Ravi & Ors. v. State of Karnataka,* (2009) 16 SC 337, this Court observed that mere presence or association with other members alone does not per se be sufficient to hold every one of them criminally liable for the offences committed by the others unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act.

17. Similarly in *State of U.P. v. Krishanpal & Ors.,* (2008) 16 SCC 73, this Court held that once a membership of an unlawful assembly is established it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in prosecution of common object or members of assembly knew were likely to be committed.

18. In *Amerika Rai & Ors. v. State of Bihar,* (2011) 4 SCC 677, this Court opined that for a member of unlawful assembly having common object what is liable to be seen is as to whether there was any active participation and the presence of all the accused persons was with an active mind in furtherance of their common object. The law of vicarious liability under Section 149 IPC is crystal clear that even the mere presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly.

19. Regarding the application of Section 149, the following observations from *Charan Singh v. State of U.P.,* (2004) 4 SCC 205, are very relevant:

"13. … The crucial question to determine is whether the

assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. … The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter…."

20. In *Bhanwar Singh v. State of Madhya Pradesh,* (2008) 16 SCC 657, this Court held:

"Hence, the common object of the unlawful assembly in question depends firstly on whether such object can be classified as one of those described in Section 141 IPC. Secondly, such common object need not be the product of prior concert but, as per established law, may form on the spur of the moment (see also *Sukha v. State of Rajasthan* AIR 1956 SC 513). Finally, the nature of this common object is a question of fact to be determined by considering nature of arms, nature of the assembly, behaviour of the members, etc. (see also *Rachamreddi Chenna Reddy v. State of A.P.* (1999) 3 SCC 97)".

21. Thus, this court has been very cautious in the catena of judgments that where general allegations are made against

a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.

22. The trial court after appreciating the entire facts reached the following conclusion:

"Further the manner in which the injuries were inflicted on this witness as deposed by PWs. 2, 3 and 5 will go to show that the intention of accused Nos. 1 to 17 who inflicted the injury on PW.2 was with a common object to killing him. Further it was also brought out in the evidence of these witnesses that all the accused persons namely 1 to 17 were holding dangerous weapons in their hands. Further it cannot be said that any of the accused persons have not involved in committing the offence and it cannot also be said that they were not aware of the consequences of their act or result of the act that is likely to be resulted on account of the overt act committed by any one of the member of that assembly. Similarly, the evidence of PW3 will go to show that all these accused persons have criminally trespassed into her house and committed the crime. It is also brought out in evidence that 17th accused Sisupalan had beaten on her chest with hand and also Ext. 3 scene mahazar will go to show that on account of the act of accused Nos. 1, 8, 12 and 5 the western door of the house has been broken open and caused damage to the same. Further some of the vessels

also damaged in the incident which is spoken to by PW3 and that is also evident from the broken piece of wooden reaper with bold (M.O.10) and also the steel vessel (M.O.16) will go to show that damage has been caused to the building of PW3 and also damage to the vessel. It is also brought out in the evidence of PW3 that the food articles were also damaged in the incident. So it cannot be said that the accused persons who are the members of the assembly do not know about the consequence of their act. So it can be safely concluded that accused Nos. 1 to 17 have formed themselves into an unlawful assembly for the purpose of rioting with deadly weapons and also with the common object of causing murder of PW2 Sobhanan, attacked him with deadly weapons in their hands and also for the purpose of committing the crime, they criminally trespassed into the house of PW3 and also caused simple injury to her and caused damage to her house and also the food articles in the house and thereby all the accused persons name accused Nos. 1 to 17 have committed the offences punishable under Sections 143, 147, 148, 323, 307, 449 and 427 read with Section 149 IPC."

23. The High Court dealt with this issue and held as under:

"The accused persons armed with weapons were waiting in the house of accused No. 1 for return of PW2 to his house through the usual pathway after attending the temple festival. Even when he tried to escape by entering into the house of PW3, they followed, chased and inflicted serious injuries on him at the house of PW3. It is true that he luckily saved his life. But, when his father and PW1 came hearing the cry, they were also assaulted and father of PW2 was murdered. Yet, the Sessions Court convicted for murder of the deceased only of the persons participated in that act which was proved by evidence. Others, namely, Accused Nos.12, 13, 16 and 17 were convicted only for

offences under Sections 143, 147, 148, 323, 307, 449 and 427 IPC read with Section 149 IPC. It was deposed that A18 was unarmed and no witness has stated his role. Therefore he was acquitted. Considering the evidence in this case, the Sessions Court found that accused Nos.1 to 17 armed with weapons, formed an unlawful assembly with a common object of attacking PW2 and also they trespassed into the house of PW3 and brutally attacked PW2. Even though he suffered serious injuries, he escaped from death by luck. Common object can develop during the course of incident at the spot……. The Sessions court found that even though common object of the assembly was originally to attack PW2, when hearing the cry PW1 and the deceased arrived, they were attacked by some of the persons in the group which attacked PW2. All of them may not have shared the common object of murdering the deceased. The Sessions Court found that since Accused Nos.12, 13 and 16 were not attributed to have caused injury on the deceased, they cannot be held guilty under Section 302 IPC red with Section 149 IPC as it cannot be positively inferred that they shared the common intention with the others to murder the deceased. We are of the opinion that A10 and A11 only attacked PW1 and their involvement with regard to the deceased is equal to accused Nos. 12 and 13. Similarly, A7 also can be compared with A12 and 13 as it is not proved beyond doubt that they shared the common object to inflict injuries on the deceased."

24. It is evident from the above that the trial court as well as the High Court have proceeded in correct perspective and applied the provisions of Section 149 IPC correctly. The facts have properly been analysed and appreciated. In the instant case, seventeen accused gathered at the residence of Sudhakaran (A.1) and waited for the appropriate time knowing it well that Sobhanan (PW.2) would return from the temple. Immediately, after seeing him, Sudhakaran (A.1) shouted

"chase him, chase him". In order to save his life, he ran away and entered into "Sophia Bhawan". However, before he could enter the house, he was inflicted injury by Sudhakaran (A.1) with the sword stick. Sobhanan (PW.2) succeeded in entering the house and closing the door from inside. The accused/ appellants broke open the door and caused injuries of very serious nature to Sobhanan (PW.2) and left him under the impression that he had died. The accused were having one sword stick, two choppers, one knife and twelve iron rods. All these weapons were used by the appellants for committing the offences and causing injuries to their victims. Kuttappan (deceased) received as many as 34 injuries. In view thereof, if all the circumstances are taken into consideration, it cannot be held that the appellants had not participated to prosecute a 'common object'. Even if it was not so, it had developed at the time of incident. In view thereof, submission made by the learned counsel for the appellants in respect of applicability of Section 149 IPC is not worth consideration.

25. We do not find any force in the submission made by the learned counsel for the appellants that as the number of accused had been seventeen and the incident was over within a very short time, it was not possible for witnesses to give as detailed description as has been given in this case, and there had been several contradiction therein, therefore, their evidence is not reliable. In such a case even if minor contradictions appeared in the evidence of witnesses, it is to be ignored for the reason that it is natural that exact version of the incident revealing any minute detail i.e. meticulous exactitude of individual acts cannot be expected from the eye-witnesses. (See: *Abdul Sayeed v. State of Madhya Pradesh,* (2010) 10 SCC 259).

In this case all the accused were very well known to the witnesses. So their identification etc. has not been in issue. As their participation being governed by second part of Section 149 IPC, overt act of an individual lost significance.

26. However, the courts below have made distinction in two sets of the accused/appellants and that attained finality as the State did not prefer any appeal against the same. All appellants in the second set have been convicted for the offence punishable under Sections 307/149 IPC etc. and awarded sentence of 10 years rigorous imprisonment. These appellants have submitted the certificates of service of sentence rendered by them. According to the said certificate, these appellants have served 4-1/2 years to 8 years. All of them have been granted bail by this Court vide order dated 9.12.2009. In the facts and circumstances of the case, their conviction is upheld, however, the sentence is reduced as undergone. Their bail bonds are discharged. Appeal of the other appellants stands dismissed.

Subject to the above modification, the appeal stands disposed of.

B.B.B. Appeal disposed of.

PREM SINGH

v.

STATE OF HARYANA

(Criminal Appeal No.925 of 2009)

SEPTEMBER 2, 2011

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

Penal Code, 1860*: ss. 302/34 – Murder with common intention – Victim-deceased shot in broad daylight – PW-16, the brother of the victim-deceased was informed by his neighbour 'VK' that some persons came in a car and fired shots at the victim-deceased causing him serious injuries – Victim brought dead to hospital – As per the statement of widow of the victim, her husband had property dispute with accused 'DR' and the murder was committed as a consequence of the conspiracy hatched by him along with the co-accused – Appellant and other co-accused arrested – Appellant was arrested from jail where he was already incarcerated in some other criminal case – Appellant was sought to be produced for a test identification parade but he declined to do so – Statements of PW-11 and PW-12 claiming to be eye-witnesses to the murder on record – 'VK' who had informed about the incident to PW-16 was, however, not examined – Trial court acquitted the accused holding that the charges levelled against them were not proved – High Court set aside the acquittal of the appellant and co-accused 'VB' and convicted them u/ss.302/34 but upheld the acquittal of other co-accused – On appeal,* ***held****: **per Harjit Singh Bedi, J**: Non-examination of 'VK' was fatal to prosecution case – The presence of PWs 11 and 12 was in serious dispute since they were resident of another city – In the light of the uncertain eye witness account and the fact that 5 of the 7 accused stood acquitted on the same evidence, the order of the trial court of acquittal is restored – **per Gyan Sudha Misra, J** (Dissenting):*

Eye-witnesses PWs 11 and 12 gave a graphic description of the incident and stood the test of scrutiny of cross-examination but the accused had declined to participate in the test identification parade – If the accused-appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of T.I. Parade – But merely on account of the objection of the appellant, he could not have been permitted to decline from participating in the T.I. Parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case – Two eye-witnesses narrated the complete chain of incident in their depositions which were recorded merely after a few hours of the occurrence – Version of the eye-witnesses was not contradicted by the defence in any manner – Conviction of the appellant u/ss.302/34 confirmed – In view of the divergence in views, the matter referred to larger Bench.

The prosecution case was that on the fateful day, the victim-deceased had gone for morning walk. PW-16, the brother of the victim-deceased was informed by his neighbour 'VK' that some persons came in a car and fired shots at the victim-deceased causing him serious injuries. PW-16 rushed to the place of occurrence. The victim-deceased was taken to hospital where he was declared brought dead. The statement of PW-16 was recorded in the hospital. PW-23, the Inspector went to the place of occurrence and recorded the statements of PW-11 and PW-12 who claimed to be eye-witnesses to the murder. He also recorded the statement of PW-13, the widow of the deceased who gave information that accused 'DR' had property dispute with her husband and the murder was committed as a consequence of the conspiracy hatched by 'DR' along with the co-accused. The appellant and other co-accused were arrested. The

appellant was arrested from jail where he was already incarcerated in some other criminal case. The appellant was sought to be produced for a test identification parade but he declined to do so.

The prosecution examined PW-11, PW-12, PW-13 and PW-16. 'VK' who had informed the incident to PW-16 was however not examined. The trial court acquitted two accused even prior to the recording of the statements of the accused under Section 313, Cr.P.C. for want of evidence against them. The trial court acquitted rest of the accused holding that the charges levelled against them were not proved. The High Court upheld the acquittal of three accused but set aside the acquittal of the appellant and co-accused 'VB' and convicted them under Sections 302/34 IPC. The instant appeal was filed challenging the order of the High Court.

Referring the matter to larger bench, the Court

Per Harjit Singh Bedi, J:

Held:

1. Of the 7 accused only 2 stood convicted whereas the evidence with respect to all of them was identical. The High Court's interference in an appeal against acquittal is greatly circumscribed and though the Court is justified in reappraising the evidence to arrive at an independent conclusion, yet if the reasons given by the trial court for acquittal were germane and relevant on the evidence, interference by the High Court should not be made on the premise that a different view was also possible. This principle emanates from the broader principle that an accused is entitled to claim a plea of innocence and it is for the prosecution to prove its case beyond doubt and if the trial court has acquitted an accused, the presumption of innocence is greatly strengthened. The

High Court has ignored this long settled dictum. The trial court was greatly influenced by the fact that 'VK' was not even cited as an eye witness. The incident happened at about 7 or 7.30 a.m. on the 26th November 1993 and the statement of PW-16 was recorded in the hospital at 9 a.m. the same day with no clue as to the assailants and on its basis the first information report was registered in the Police Station a short while later. Significantly, however, the statement of 'VK' was recorded by the police for the first time on the 28th March 1994 and that too when the Public Prosecutor had raised an objection while checking the challan before its presentation in Court. Faced with this situation, the Public Prosecutor had submitted before the trial court that 'VK' had not been cited as an eye witness as it was in fact the daughter of 'VK' who had told him about the incident and that he himself had no knowledge thereof. This argument was based on the statement of the Investigating Officer which was introduced for the first time during the course of the evidence. This explanation is too an after thought and even otherwise meaningless. Assuming therefore that 'VK' had, in fact, not been an eye witness and his daughter had been the one who had seen the incident, the police concededly did not even try to take her statement at any stage. The prosecution story has accordingly been based on the statements of PW-11 and PW-12 who claimed to be eye witnesses. They identified the accused for the first time in court. PW-11 also admitted in his evidence that he was an employee of Aggarwal Sanitary Store which was owned by the brothers of PW-13, the wife of the deceased, and that PW-12 was his friend and had accompanied him for the morning walk when the incident had happened. This story is unacceptable for the reason that their conduct completely belies their presence. It has come in evidence that the two were aware of the identity of the victim and knew him by face and name since long and were also

conscious of the fact that his house was near the place of murder. Despite this knowledge and his association with the complainant family, PW-11 did not go to the house of PW-13 or even inform her brothers who were his employers as to what had happened or to go to the police station a very short distance away to lodge a report. On the contrary, it comes out from the evidence that after the incident PWs-11 & 12 had moved around aimlessly in Karnal before returning to the murder site at about 1.30 p.m. where their statements were recorded. This factor assumes even more significance as the names of these witnesses did not figure in the F.I.R., and the motive for the murder has been rejected even by the High Court as the acquittal of 'DR' has been maintained. [Paras 6, 7, 8] [963-C-H; 964-A-H; 965-A]

2. The very presence of PWs.11 and 12 in Karnal is in serious dispute. It has come in their evidence that they were residents of Sunam in the State of Punjab and that they had shifted from that town to Karnal about 2 months before the occurrence on account of the fear of terrorism and had settled down in Karnal by taking accommodation on rent and that they had returned to Sunam some time in the middle of 1994. The trial court has found, on a deep appreciation of the evidence, that this story was in doubt and the reasons have been succinctly spelt out. It has been found that the two had not given their addresses in Karnal in their 161 Cr.P.C. statements and when cross-examined by the defence counsel, were unable even at that stage to give accurate and precise details as to where they had been living in Karnal or to produce any rent receipt or document to show residence in Karnal on the day in question. Curiously enough the police did not even care to get hold of any material as to their residence in Karnal and no witness was produced to show that they had ever been residents in Karnal. The trial court has also noticed that they had shifted from Sunam because of the

fear of terrorism in the year 1993 but the two claimed to have returned to Sunam in the middle of 1994 when terrorism was still at its peak. There is absolutely no discussion as to their presence in Karnal on the crucial day or to the various factors that have been spelt to rule them out, and the High Court appears to have proceeded on the basis that they had been present as they had been cited as eye witnesses. [Para 9] [965-B-H; 966-B-G]

3. The High Court has been greatly influenced by the refusal of the accused to join the test identification parade. The evidence of PW-27 Inspector is relevant in this connection. He deposed that the accused had been arrested from different places at different times and that they had been brought to Karnal and put in a lock up and thereafter produced in court. Significantly, the accused pointed out to the Magistrate PW-27, as well as in their statements in court, that they had been shown to PWs.11 and 12 and also to the sons of the deceased in the Police Station. It is impossible for an accused to prove by positive evidence that he had been shown to a witness prior to the identification parade but if suspicion can be raised by the defence that this could have happened, no adverse inference can be drawn against the accused in such a case. In the light of these facts and particularly the uncertain eye witness account, and that these witnesses had not seen the incident and particularly the fact that the High Court was dealing with an appeal against acquittal and 5 of the 7 accused stand acquitted as of now on the same evidence, interference by the High Court was not called for in the case of the appellant. The judgment of the High Court is set aside and that of the trial court is restored and the appellant's acquittal is ordered. [Para 10] [966-A-E]

<u>Per Gyan Sudha Misra, J. (Dissenting):</u>

HELD: 1. The High Court was justified in convicting

the appellant under Section 302/34 I.P.C. alongwith 'VB' relying upon the evidence of the two eye-witnesses whose depositions in Court could not be contradicted by the defence using the statements which were recorded under Section 161, Cr.P.C. by PW-23 Inspector only after a few hours of the incident at 12.30 p.m. on the date of occurrence on 26.11.1993 as the incident of shooting had taken place on the same date in the morning at 6.30 a.m for which F.I.R. was registered at 9.25 a.m. These two eye-witnesses who also had gone for a morning walk had their residence quite near to the place of incident and were the most natural witnesses who had watched the incident of shooting from a close range at the deceased. If the prosecution had the intention merely to plant these two witnesses PW-11 and PW-12 as eye-witnesses to prove the prosecution story, then 'VK' who had informed the brother of the deceased about the incident would have been a better option for the prosecution to plant him as eye-witness but he has not even been examined. [Para 2] [967-C-F]

2. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. It was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But

merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case. [Para 3] [967-G-H; 968-A-C]

Shyam Babu v. State of Haryana, **(2008) 15 SCC 418: 2008 (15)SCR 1020;** *Munna v. State (NCT of Delhi),* **(2003) 4 Crimes 166: AIR 2003 SC 3805 – relied on.**

State of Haryana v. Surender **(2007) 11 SCC 281: 2007 (7) SCR 885;** *Teerath Singh (D) by LR v. State* **2007 (1) ALL LJ (NOR) 143 (UTR) – referred to.**

3. The arguments advanced by the defence that the two eye-witnesses were, in fact, not living in the neighbourhood near the place of incident where they claimed to have been living is quite a far fetched theory of the defence for once the witnesses furnished their addresses stating that they lived merely 250 feet away from the place of occurrence and PW-11 was also an employee of the brother-in-law of the deceased, his testimony could not be dislodged merely on a speculative story without any defence evidence to that effect that they had not migrated from Sunam (Punjab) to Karnal (Haryana) where the incident of shooting took place. In fact, the eye-witnesses PW-11 and PW-12 whose statements were recorded only after a few hours of the shooting and later deposed in Court without any variance or contradiction have not only given graphic description of the incident, but also described the colour of the car, the model of the car which was white Maruti as also the car No. which could be partially noticed as D-57 and had gone to the extent of stating that the number plate of the car was smeared with mud. It is not possible to brush aside all these weighty evidences of the eye witnesses led by the prosecution giving minute details so as to hold

that they were interested or partisan witnesses planted by the prosecution party merely to support the prosecution version. It would further not be appropriate to overlook a redeeming feature of the prosecution version that the present case is not a case based on circumstantial evidence but had happened during the morning walk of the deceased where the two eye-witnesses from the neighbourhood had the chance to witness the occurrence since they too had gone for a morning walk, who had residence close by in the neighbourhood. The defence version in order to demolish the evidence of these two eye-witnesses is too far fetched and not worthy of credence on the ground that they in fact had not been living near the place of incident as they had not even migrated to Karnal. The two eye-witnesses narrated the complete chain of incident in their deposition which they had witnessed and stands duly corroborated by their statement which were recorded under Section 161 Cr.P.C. merely after a few hours of the occurrence and their version could not be contradicted by the defence in any manner. The explanation that these witnesses had not been living there at the address given, does not stand to reason for if it were so, their statement could not have been recorded only after a few hours of the incident. The defence story that they were not living near the place of occurrence clearly stands contradicted by the Section 161 Cr. P.C. statement of these witnesses as it is well established that such statement is admissible at least for contradiction. [Paras 5, 6] [968-H; 969-A-H; 970-A-B]

4. The reason as to why the names of the eye witnesses had not been mentioned in the FIR has been convincingly explained as the FIR was registered in the morning at 9.25 a.m. and only upon preliminary enquiry, which is most natural human conduct that it came to the knowledge of the prosecution that these witnesses in fact

had not only seen the incident, but could also identify the assailants. Perhaps, there would have been scope to ignore the evidence of these two eye-witnesses on the plea that they had not migrated to Karnal and were not living near the place of incident if their statement had not been duly recorded on the date of the incident under Section 161 Cr.P.C. But the fact that their statements were recorded promptly and they also claimed to have identified the two accused who had fired the shots at the deceased and the appellant declined to participate in the test identification parade is sufficient to draw a reasonable and logical inference that the two eye-witnesses were in fact credible witnesses and could not be disbelieved on the specious plea that they were planted by the prosecution. In fact, there is yet another reason not to disbelieve these two witnesses for if the prosecution had reason to falsely implicate the accused persons, it is the master mind of the whole incident who was 'DR' with whom the deceased had differences on account of property dealings, who could have been roped in but the fact that 'DR' was not alleged to have shot the deceased but got it executed through the hired assailants that the appellant and 'VB' (who has not even appealed against his conviction and sentence) stood duly proved beyond reasonable doubt by the two eye-witnesses and their testimony cannot be disbelieved on the ground that they were not living near the place of incident as they had not migrated to Karnal. The defence story is too weak and speculative in order to brush aside the eye-witness account on the plea that they were not living in the neighbourhood. In fact, the prosecution witnesses have not even been cross-examined by the defence on the point that the eye-witnesses had not migrated to Karnal and were not living near the place of occurrence which could brush aside the eye-witness account. [Para 7, 8] [970-C-H; 971-A-C]

5. The High Court is correct and legally justified in convicting the appellant and 'VB' (who has not appealed) under Section 302/34 I.P.C. for shooting the deceased and his conviction and sentence is upheld. [Para 9] [971-D]

Case Law Reference

Per: Gyan Sudha Misra, J:

2008 (15)SCR 1020	**relied on**	**Para 4**
AIR 2003 SC 3805 (3809)	**relied on**	**Para 4**
2007 (7) SCR 885	**relied on**	**Para 4**
2007 (1) ALL LJ (NOR)	**referred to**	**Para 4**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 925 of 2009.

From the Judgment & Order dated 12.5.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 757-DBA of 1997.

D.B. Goswami, Sapan Biswajit Meitei, Gaurav Jasan, Khwairakpam Nobin Singh for the Appellant.

Suryanarayana Singh, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J.

This appeal by way of special leave arises out of the following facts:

1. At about 9.20 a.m. on the 26th November 1993 PW-16 Sohan Lal, the brother of the deceased Siri Krishan, was out for a morning walk when he was informed by his neighbour Vijay Kumar that some persons had come in a white coloured Maruti

car and had halted in front of Siri Krishan and had fired shots at him causing him serious injury. Sohan Lal PW-16 then rushed to the site and removed Siri Krishan to the Government hospital where he was declared brought dead on arrival. His statement was then recorded by PW-24 Sub-Inspector Gurcharan Singh in the Government hospital who reached there on receiving information from the doctor. The Inspector inspected the dead body and took steps to have it subjected to a post-mortem. He also visited the place of occurrence and recovered several empty cartridges and a spent bullet from the spot. Inspector Om Parkash PW-23 also went to the site of the murder at 12.30 p.m. and recorded the statements of PW-11 Sohan Lal son of Anant Lal and PW-12 Bhagat Lal son of Banarsi Dass at 1:30 p.m. who claimed to be the eye witnesses to the murder. He also recorded the statement of PW-13 Pushpa Devi, the widow of the deceased, who gave the information that Daulat Ram had a property dispute with her husband and this murder had been committed as a consequence of the conspiracy hatched by him along with his co-accused. Further investigation was also done by PW-27 Inspector Gordhan Singh. He arrested Daulat Ram on the 4th January 1994, and Prem Singh accused 10 days later from Tihar Jail where he was already incarcerated in some other criminal case. Prem Singh was also sought to be produced for a test identification parade but he declined to do so. Ballu accused was arrested on the 18th January 1994 and a pistol was recovered on a statement made by him, Vishwa Bandhu accused was arrested on the 23rd January 1994 and an effort was made to put him up for an identification but he too declined the offer. The other two accused Radhey Shyam and Surinder were arrested on the 19th April 1994 and 27th May 1994 respectively. On the completion of the investigation, the accused were charged for offences under Sections 302/149 and 120-B of the Indian Penal Code and Section 27 of the Arms Act and were accordingly brought to trial.

2. The prosecution in support of its case placed primary reliance on the testimony of PW-11 Sohan Lal and PW-12

Bharat Lal who claimed to be the eye witnesses to the murder, PW-13 Pushpa Devi who deposed to the property dispute between her husband and Daulat Ram accused and PW-16-Sohan Lal the first informant, who had received the information of the murder from Vijay Kumar. Vijay Kumar was, however, not examined. The Trial Court observed that on the basis of the evidence of the prosecution witnesses, as led, no evidence whatsoever had been spelt out against Satish and Surinder and they were accordingly acquitted even prior to the recording of the statements of the accused under Section 313 of the Cr.P.C. The Trial Court then, very comprehensively, examined the evidence against the other accused and recorded several reasons which have been spelt out by the High Court in its judgment and we quote therefrom herein below:

> "(i) Vijay Kumar who informed PW-16 Sohan Lal, brother of the deceased about the occurrence, was not examined, which was necessary for unfolding of the narrative of the prosecution.
>
> (ii) PW-11 Sohan Lal and PW-12 Bharat Lal were falsely introduced as eye witnesses. Both of them claimed to have come from Punjab about two months prior to the occurrence. One of them shifted back to Sunam. They did not have any proof of residence of Karnal. PW-11 Sohan Lal was employee of brother-in-law of the deceased. They did not go to the police station to lodge the report. Their names were mentioned in the FIR. Their versions were discrepant on the issue of the person who caught hold of the deceased Satish or Ballu. Their normal conduct was to be to go to the house of the deceased to give information. There were further discrepancies in their versions about the direction from which the car came.
>
> (iii) Recoveries and linkage of pistols with the empty cartridges was not free doubt.
>
> (iv) Identification in Court was not reliable.

> (v) The accused were arrested from one or the other lock up and could have been shown to the witnesses.
>
> (vi)No adverse inference could be drawn by their refusing to take in the TIP.
>
> (vii)Charge of conspiracy was without any basis."

3. The trial court accordingly acquitted all the accused of the charges leveled against them. An appeal was thereafter filed in the High Court by the State of Haryana against the acquittal of 5 of the accused, that is Daulat Ram, Prem Singh, Ballu, Radhey Shyam and Vishwa Bandhu. The High Court has, vide its judgment under challenge before us, confirmed the acquittal of Daulat Ram, Ballu @ Vijender and Radhey Shyam accused and dismissed the appeal but has set aside the judgment qua Prem Singh and Vishwa Bandhu and they have been convicted and sentenced to life imprisonment for the offence under Section 302/34 etc. The present appeal has been filed by Prem Singh alone.

4. The learned counsel for the appellant has raised several pleas before us. He has first pointed out that the prosecution story hinged primarily on the motive which Daulat Ram carried as he bore some animosity with the deceased and that he had obtained the services of the other accused who were apparently hired assassins to get rid of him and as Daulat Ram had been acquitted, the entire story perforce must fall through. He has also pointed out that the only witness who could have sworn to the incident was Vijay Kumar who had informed PW-16 Sohan Lal that he had witnessed the murder on which the latter had reached the spot, taken victim to the hospital and thereafter lodged the FIR but surprisingly Vijay Kumar had not even been cited as a witness and PW-11 Sohan Lal and PW-13 Bharat Lal had subsequently been introduced as eye witnesses clearly spelt out that the prosecution evidence could not be relied on, more particularly as their presence had not been explained and their conduct immediately after the incident also did not inspire

confidence. It has also been pointed out that merely because three of the accused had refused to join the test identification parade would not by itself be of any significance as the accused had alleged that they had already been shown to the witnesses.

5. The learned counsel for the State of Haryana has, however, supported the judgment of the High Court.

6. We see that of the 7 accused only 2 stand convicted whereas the evidence with respect to all of them is identical. In this background, it has also to be borne in mind that the High Court's interference in an appeal against acquittal is greatly circumscribed and though the Court is justified in reappraising the evidence to arrive at an independent conclusion, yet if the reasons given by the trial court for acquittal are germane and relevant on the evidence, interference by the High Court should not be made on the premise that a different view was also possible. This principle emanates from the broader principle that an accused is entitled to claim a plea of innocence and it is for the prosecution to prove its case beyond doubt and if the trial court has acquitted an accused, the presumption of innocence is greatly strengthened. We are of the opinion that the High Court has ignored this long settled dictum. We have examined the various arguments raised in the background of the above observations.

7. It will be seen that the trial court was greatly influenced by the fact that Vijay Kumar had not even been cited as an eye witness. The incident happened at about 7 or 7.30 a.m. on the 26th November 1993 and the statement of Sohan Lal PW-16 was recorded in the hospital at 9 a.m. the same day with no clue as to the assailants and on its basis the first information report had been registered in the Police Station a short while later. Significantly, however, the statement of Vijay Kumar was recorded by the police for the first time on the 28th March 1994 and that too when the Public Prosecutor had raised an objection while checking the challan before its presentation in Court.

Faced with this situation, the Public Prosecutor had submitted before the trial court that Vijay Kumar had not been cited as an eye witness as it was in fact Vijay Kumar's daughter who had told him about the incident and that he himself had no knowledge thereof. This argument was based on the statement of the Investigating Officer which was introduced for the first time during the course of the evidence. This explanation is too our mind an after thought and even otherwise meaningless. Assuming therefore that Vijay Kumar had, in fact, not been an eye witness and his daughter had been the one who had seen the incident, the police concededly did not even try to take her statement at any stage.

8. The prosecution story has accordingly been based on the statements of PW-11 Sohan Lal and PW-12 Bharat Lal who claimed to be eye witnesses. It is significant that they identified the accused for the first time in court. PW-11 also admitted in his evidence that he was an employee of Aggarwal Sanitary Store which was owned by Brij Lal and Naresh Kumar, the brothers of PW-13 Pushpa Devi, the wife of the deceased, and that PW-12 was his friend and had accompanied him for the morning walk when the incident had happened. This story is unacceptable for the reason that their conduct completely belies their presence. It has come in evidence that the two were aware of the identity of Siri Krishan and knew him by face and name since long and were also conscious of the fact that his house was near the place of murder. Despite this knowledge and his association with the complainant family, PW-11 did not go to the house of Pushpa Devi or even inform her brothers who were his employers as to what had happened or to go to the police station a very short distance away to lodge a report. On the contrary, it comes out from the evidence that after the incident PWs-11 & 12 had moved around aimlessly in Karnal before returning to the murder site at about 1.30 p.m. where their statements were recorded. This factor assumes even more significance as the names of these witnesses did not figure in

the F.I.R., and the motive for the murder has been rejected even by the High Court as the acquittal of Daulat Ram has been maintained.

9. We also see that the very presence of PWs.11 and 12 in Karnal is in serious dispute. It has come in their evidence that they were residents of Sunam in the State of Punjab and that they had shifted from that town to Karnal about 2 months before the occurrence on account of the fear of terrorism and had settled down in Karnal by taking accommodation on rent and that they had returned to Sunam some time in the middle of 1994. The trial court has found, on a deep appreciation of the evidence, that this story was in doubt and the reasons have been succinctly spelt out. It has been found that the two had not given their addresses in Karnal in their 161 Cr.P.C. statements and when cross-examined by the defence counsel, were unable even at that stage to give accurate and precise details as to where they had been living in Karnal or to produce any rent receipt or document to show residence in Karnal on the day in question. Curiously enough the police did not even care to get hold of any material as to their residence in Karnal and no witness was produced to show that they had ever been residents in Karnal. The trial court has also noticed that they had shifted from Sunam because of the fear of terrorism in the year 1993 but the two claimed to have returned to Sunam in the middle of 1994 when terrorism was still at its peak. We have also examined the reasons given by the High Court in concluding that the evidence of PWs.11 and 12 could be relied upon. We find that there is absolutely no discussion as to their presence in Karnal on the crucial day or to the various factors that have been spelt to rule them out, and the High Court appears to have proceeded on the basis that they had been present as they had been cited as eye witnesses. We are unable to accept such a conclusion and that too in a case of murder. The trial court has also examined their evidence inter-se in a broader perspective and has concluded that it differed in material particulars as well.

10. As already indicated, the High Court has been greatly influenced by the refusal of the accused to join the test identification parade. The evidence of PW-27 Inspector Gordhan Singh is relevant in this connection. He deposed that the accused had been arrested from different places at different times and that they had been brought to Karnal and put in a lock up and thereafter produced in court. Significantly, the accused pointed out to the Magistrate PW-27, as well as in their statements in court, that they had been shown to PWs.11 and 12 and also to the sons of Siri Krishan in the Police Station. It must be borne in mind that it is impossible for an accused to prove by positive evidence that he had been shown to a witness prior to the identification parade but if suspicion can be raised by the defence that this could have happened, no adverse inference can be drawn against the accused in such a case. We are of the opinion that in the light of the above facts and particularly the uncertain eye witness account, and our opinion that these witnesses had not seen the incident and particularly the fact that the High Court was dealing with an appeal against acquittal and 5 of the 7 accused stand acquitted as of now on the same evidence, interference by the High Court was not called for in the case of the appellant. We accordingly allow this appeal, set aside the judgment of the High Court and restore that of the trial court and order the appellant's acquittal.

DISSENTING JUDGMENT AND ORDER

GYAN SUDHA MISRA, J. 1. The High Court vide its impugned judgment and order has convicted the appellant Prem Singh under Section 302 read with Section 34 I.P.C. along with the co-accused Vishwa Bandhu essentially relying upon the testimony of the two eye-witnesses PW-11 Sohan Lal and PW-12 Bharat Lal who according to the prosecution had shot the deceased victim-Siri Krishan on 26.11.1993 at 6.30 a.m. while he had gone for a morning walk. The co-accused Vishwa Bandhu has not preferred any appeal against his conviction and it is only the appellant Prem Singh who has filed

this appeal and the other co-accused persons who were alleged to be in the Maruti Car on which the accused-appellant had arrived for killing the deceased Siri Krishan have been acquitted, as the appellant and co-accused Vishwa Bandhu have been held as hired shooters who killed the deceased from a point blank range.

2. Having carefully and meticulously examining the evidence of the eye-witnesses PW-11 and PW-12 in the light of the other attending circumstances, I am of the considered opinion that the learned Judges of the High Court were justified in convicting the appellant Prem Singh under Section 302/34 I.P.C. alongwith Vishwa Bandhu relying upon the evidence of the two eye-witnesses whose depositions in Court could not be contradicted by the defence using the statements which were recorded under Section 161, Cr.P.C. by PW-23 Inspector Om Prakash only after a few hours of the incident at 12.30 p.m. on the date of occurrence on 26.11.1993 as the incident of shooting had taken place on the same date in the morning at 6.30 a.m for which F.I.R. was registered at 9.25 a.m. These two eye-witnesses who also had gone for a morning walk had their residence quite near to the place of incident and were the most natural witnesses who had watched the incident of shooting from a close range at the deceased Siri Krishan. If the prosecution had the intention merely to plant these two witnesses PW-11 and PW-12 as eye-witnesses to prove the prosecution story, then Vijay Kumar who had informed the brother of the deceased about the incident would have been a better option for the prosecution to plant him as eye-witness but he has not even been examined.

3. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my

considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case.

4. In the matter of *Shyam Babu V. State of Haryana, (2008) 15 SCC 418 (425): AIR 2009 SC 577* where the accused persons had refused to participate in T.I. parade, it was held that it would speak volumes, about the participation in the Commission of the crime specially if there was no statement of the accused under Section 313 Cr. P.C. that he had refused to participate in the T.I. Parade since he had been shown to the witnesses in advance. In the matter of *Munna v. State (NCT of Delhi), (2003) 4 Crimes 166: (2003) 7 JT 361 : AIR 2003 SC 3805 (3809)* as also in the *State of Haryana Vs. Surender, (2007) 11 SCC 281 (284): AIR 2007 SC 2312;* in *Teerath Singh (D) by LR v. State, 2007 (1) ALL LJ (NOR) 143 (UTR)* the Supreme Court still further had been pleased to hold that if the statement of the accused refusing to participate in T.I. Parade which was recorded in the order of the Magistrate was missing under Section 313 Cr.P.C., it was held that it was not open to the accused to contend that the statement of the witnesses made for the first time in Court identifying him should not be relied upon.

5. The arguments advanced by the defence that the two eye-witnesses were, in fact, not living in the neighbourhood near

the place of incident where they claimed to have been living, in my opinion, is quite a far fetched theory of the defence for once the witnesses furnished their addresses stating that they lived merely 250 feets away from the place of occurrence and PW-11 was also an employee of the brother-in-law of the deceased, his testimony could not be dislodged merely on a speculative story without any defence evidence to that effect that they had not migrated from Sunam (Punjab) to Karnal (Haryana) where the incident of shooting took place. In fact, the eye-witnesses PW-11 and PW-12 whose statements were recorded only after a few hours of the shooting and later deposed in Court without any variance or contradiction have not only given graphic description of the incident, but also described the colour of the car, the model of the car which was white Maruti as also the car No. which could be partially noticed as D-57 and had gone to the extent of stating that the number plate of the car was smeared with mud. In my view, it is not possible to brush aside all these weighty evidences of the eye witnesses led by the prosecution giving minute details so as to hold that they were interested or partisan witnesses planted by the prosecution party merely to support the prosecution version.

6. It would further not be appropriate to overlook a redeeming feature of the prosecution version that the present case is not a case based on circumstantial evidence but had happened during the morning walk of the deceased where the two eye-witnesses from the neighbourhood had the chance to witness the occurrence since they too had gone for a morning walk, who had residence close by in the neighbourhood. The defence version in order to demolish the evidence of these two eye-witnesses is too far fetched and not worthy of credence in my opinion on the ground that they in fact had not been living near the place of incident as they had not even migrated to Karnal. The two eye-witnesses narrated the complete chain of incident in their deposition which they had witnessed and stands duly corroborated by their statement which were recorded

under Section 161 Cr.P.C. merely after a few hours of the occurrence and their version could not be contradicted by the defence in any manner. The explanation that these witnesses had not been living there at the address given, does not stand to reason for if it were so, their statement could not have been recorded only after a few hours of the incident. The defence story that they were not living near the place of occurrence clearly stands contradicted by the 161 Cr. P.C. statement of these witnesses as it is well established that such statement is admissible at least for contradiction.

7. The reason as to why the names of the eye witnesses had not been mentioned in the FIR has been convincingly explained as the FIR was registered in the morning at 9.25 a.m. and only upon preliminary enquiry, which is most natural human conduct that it came to the knowledge of the prosecution that these witnesses in fact had not only seen the incident, but could also identify the assailants. Perhaps, there would have been scope to ignore the evidence of these two eye-witnesses on the plea that they had not migrated to Karnal and were not living near the place of incident if their statement had not been duly recorded on the date of the incident under Section 161 Cr.P.C. But the fact that their statements were recorded promptly and they also claimed to have identified the two accused who had fired the shots at the deceased and the appellant Prem Singh declined to participate in the test identification parade is sufficient to draw a reasonable and logical inference that the two eye-witnesses were in fact credible witnesses and could not be disbelieved on the specious plea that they were planted by the prosecution.

8. In fact, there is yet another reason not to disbelieve these two witnesses for if the prosecution had reason to falsely implicate the accused persons, it is the master mind of the whole incident who was Daulat Ram with whom the deceased had differences on account of property dealings, who could have been roped in but the fact that Daulat Ram was not alleged to

have shot the deceased but got it executed through the hired assailants that the appellant Prem Singh and Vishwa Bandhu (who has not even appealed against his conviction and sentence) stands duly proved beyond reasonable doubt by the two eye-witnesses and their testimony cannot be disbelieved on the ground that they were not living near the place of incident as they had not migrated to Karnal. In my considered opinion, the defence story is too weak and speculative in order to brush aside the eye-witness account on the plea that they were not living in the neighbourhood. In fact, the prosecution witnesses have not even been cross-examined by the defence on the point that the eye-witnesses had not migrated to Karnal and were not living near the place of occurrence which could brush aside the eye-witness account.

9. I am, therefore, of the view that the High Court is correct and legally justified in convicting the appellant Prem Singh and Vishwa Bandhu (who has not appealed) under Section 302/34 I.P.C. for shooting the deceased and hence, I uphold his conviction and sentence. Consequently, this appeal is dismissed.

ORDER

In view of the divergence in views, the Registry is directed to place the matter before the Hon'ble the Chief Justice of India for placing the matter before a larger Bench.

D.G. Matter referred to Larger Bench.

HIGH COURT OF JUDICATURE AT PATNA
v.
MADAN MOHAN PRASAD & ORS.
(Civil Appeal No. 7630 of 2011)

SEPTEMBER 05, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

Service Law – Promotion and grant of consequential benefits – Respondent-Munsif in State Judicial Services, suspended from service – Thereafter, writ petitions and SLPs filed – Suspension order as well as departmental proceedings withdrawn – Notification issued posting the respondent as Additional Munsif (lowest post) – Challenged by respondent – He sought direction to the High Court on its administrative side to give him promotions from the dates when his juniors named in the petition were promoted during the period 1970 to 1981, with all increments and other benefits – Thereafter, respondent retired from service – Various petitions as also representations filed – Finally in a writ petition, the Division Bench directed the appellant-High Court on its administrative side to consider the case of promotion of the respondent as also consequential benefit in accordance with law – On appeal, held: Promotion is not a matter of right much less a fundamental right, more particularly when promotion in the subordinate judiciary is to be dealt with by the High Court which has complete control over the subordinate judiciary in view of Article 235 – On facts, respondent was claiming promotions to the post of Civil Judge, thereafter to the post of Additional District Judge and finally to the post of District Judge when his juniors were given such benefits in the years 1971, 1974 and 1978 respectively – Record shows that till the respondent had superannuated from service, he was discharging duties as Additional Munsif and was never confirmed in the cadre of Munsif – Thus, his claim for

promotion to higher post could not have been considered unless and until he was confirmed on the post of Munsif – Claim of promotion was stale one and could not have been entertained by the High Court – Juniors to the respondent who were given benefits of promotion were not impleaded as parties – In their absence, claim of the respondent could not be examined – Earlier the respondent had filed petition claiming promotions from retrospective dates with all claims, benefits and increments in various cadres from various dates as and when they had accrued and were given to his immediate juniors was dismissed and also attained finality and thus, would operate as res judicata – Also all rights and claims of respondent got crystallized – Neither at the time of disposal of SLP respondent claimed any other relief nor obtained permission to claim relief of promotion in future – Thus, the High Court erred in directing appellant to consider the case of respondent for promotion – Order of the High Court set aside.

Supreme Court Rules, 1966 – Or. XVI r. 10(1) proviso – Requirement of – Held: When a petition for special leave is filed beyond the period of limitation prescribed and is accompanied by an application for condonation of delay, the Court should not condone the delay without notice to the respondent – Once the Court forms an opinion that sufficient cause is made out for condonation of delay then issuance of notice to the respondent to show cause as to why delay should not be condoned may become an empty formality – In order to see that the respondent does not incur unnecessary expenditure for coming to Delhi from far off places and engage an advocate for contesting the said application, delay is condoned ex-parte – However, if the respondent is not issued a notice, then a right would be available to him at the stage of hearing to point out that the Court was not justified in condoning the delay and that the leave, if granted, should be revoked or notice issued should be dismissed.

Respondent No.1-Munsif in State Judicial Service filed a writ petition challenging his dismissal from service and he was reinstated in service. However, two years later he was suspended from service and departmental proceedings were initiated against him. Aggrieved, respondent No. 1 filed writ petitions and the same were dismissed. Thereafter, respondent No. 1 filed SLPs. During pendency thereof, the High Court issued a Notification suspending respondent No. 1 from service. This Court directed the High Court to withdraw the suspension order passed against the respondent No.1 as well as departmental proceedings initiated against him. By Notification dated October 12, 1981, respondent No.1 was posted as Additional Munsif (lowest post) which he had joined initially. Subsequently by another Notification dated December 10, 1981 he was posted as Additional Munsif at place 'D'. Meanwhile he made various representations to release his dues and to keep one post of appropriate rank reserved for him but did not receive any reply. He then filed CWJC No.1924 of 1982 for quashing Notification dated December 10, 1981 and seeking direction to the High Court on its administrative side to give him promotions from the dates when his juniors named in the petition were promoted during the period 1970 to 1981, with all increments and other benefits. The charge sheet was amended and fresh departmental proceedings were initiated against respondent No. 1 on August 19, 1982. Respondent No.1 retired from service on September 1, 1983. Various petitions which were filed became infructuous and were disposed of as withdrawn. Thereafter, in one of the SLP, this Court directed the State Government to restore pension payable to him and pay arrears due on the basis that he had superannuated from service from the date of superannuation, and a direction was given to pay him Provident Fund, Gratuity and leave salary as might be

admissible to him on superannuation. However, no direction was given to the appellant to consider the case of the respondent No.1 with retrospective effect with all benefits. Pension matter of respondent No.1 was finalized. Thereafter, he filed CWJC No. 4862 of 1987 in the High Court for lawful claims as were given to his juniors. The said petition was disposed of with a direction to the respondent No.1 to submit representation to the High Court on its administrative side. Pursuant thereto, the respondent No.1 submitted representations and the same were rejected. Respondent No.1 then filed CWJC No. 6538 of 1990 in the High Court. The Division Bench directed the appellant - High Court of Patna on its administrative side to consider the case of promotion of the respondent No.1 as also consequential benefit in accordance with law. Therefore, the appellant filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1. The submission that writ petition was filed by the respondent No.1 on November 10, 1990 i.e. seven years after he had superannuated from service, and therefore, writ petition should have been dismissed on the ground of delay and laches, cannot be accepted. The impugned judgment nowhere shows that such a point was argued by the appellant before the High Court. No grievance is made in the memorandum of SLP, that point regarding delay and laches was argued before the High Court but the same was not dealt with by the High Court when impugned judgment was delivered. Further it becomes evident that by the order passed in CWJC No. 4862 of 1987, the High Court had directed the respondent No.1 to submit representation to the High Court on its administrative side claiming benefits which were given to his juniors but were denied to him, pursuant to which the respondent No.1 had filed last representation on June 23,

1990 which was rejected by High Court on September 17, 1990. The question of delay and laches would have to be considered from the communication dated September 17, 1990 by which claim made by the respondent No.1 to give him benefits which were given to his juniors was rejected and not from the date of superannuation. Thus, the respondent No.1 is not liable to be non-suited on the ground of delay and laches in filing writ petition after his superannuation from service. [Para 12] [987-C-G]

1.2. It is clear from C.W.J.C. No. 6538 of 1990 that the petitioner is claiming promotions to the post of Civil Judge, Senior Division, thereafter to the post of Additional District Judge and finally to the post of District Judge when his juniors were given such benefits in the years 1971, 1974 and 1978 respectively. The record shows that till the respondent No.1 had superannuated from service on August 31, 1983, he was discharging duties as Additional Munsif and was never confirmed in the cadre of Munsif. Therefore, his claim for promotion to higher post could not have been considered unless and until he was confirmed on the post of Munsif. There is no manner of doubt that claim of promotion made in C.W.J.C. No. 6538 of 1990 was stale one and could not have been entertained by the High Court. The juniors to the respondent No.1 who were given benefits of promotion in the years 1971, 1974 and 1978 were not impleaded as respondents in the petition. In their absence, claim advanced by the respondent No.1 could not have been examined by the High Court. [Para 12] [988-D-F-G-H]

P.S. Sadasivaswamy vs. State of Tamil Nadu **(1975) 1 SCC 152: 1975(2) SCR 356 – referred to.**

1.3. The submission of the respondent No.1 that Interlocutory Application No. 1 of 2009 was filed for

condonation of delay in filing SLP and delay was condoned without issuing notice to him though it is mandatorily provided in the proviso to sub-rule(1) of rule 10 of Order XVI of the Supreme Court Rules that there shall be no condonation of delay without notice to the respondent and therefore, the SLP should be dismissed as barred by limitation cannot be accepted. The Office Report on limitation which was placed before this Court along with papers of SLP indicated that there was delay of eight days in filing SLP and delay of nine days in re-filing the petition. [Para 14] [989-D-F]

1.4. The proviso to sub-rule (1) of Rule 10 of Or. XVI of the Supreme Court Rules, 1996 requires that when a petition for special leave has been filed beyond the period of limitation prescribed therefore, and is accompanied by an application for condonation of delay, the Court should not condone the delay without notice to the respondent. However, it is noticed that it is consistent practice of this Court even after framing of Rules of 1966 that delay is condoned ex-parte without issuing notice to the respondent, if the Court hearing the special leave petition is of the opinion that sufficient cause is made out for condonation of delay and the petitioner has good case on merits. There is no manner of doubt that once the Court forms an opinion that sufficient cause is made out for condonation of delay then issuance of notice to the respondent calling upon him to show cause as to why delay should not be condoned may become an empty formality and in order to see that the respondent has not to incur unnecessary expenditure for coming to Delhi from far off places and engage an advocate for contesting application for condonation of delay, delay is condoned ex-parte. However, in view of requirements of proviso to sub-rule (1) of Rule 10 of Order XVI of 1966 Rules, it may be prudent to issue notice to the respondent before condoning the delay caused in filing the special leave

petition. However, if the respondent is not issued a notice, then a right would be available to him at the stage of hearing to point out that the Court was not justified in condoning the delay and that the leave, if granted, should be revoked or notice issued should be dismissed. [Para 18] [995-C-G]

M/s. Ram Lal Kapur and Sons (P) Ltd. vs. Ram Nath and Ors. **AIR1963 SC 1060:1963 Suppl. SCR 242;** *Commissioner of Customs vs. Rangi International* **(2003) 11 SCC 366 – referred to.**

1.5. At the beginning, respondent No. 1 had attempted to argue that there was unexplained delay of seven months and not of eight days, as was mentioned in the Office Report, but he could not make his submission good. It could not be pointed out to this Court that the calculation of delay of eight days made by the registry was erroneous. The explanation offered by the appellant-High Court in the application for condonation of delay is plausible and acceptable. The averments made in the application for condonation of delay would not indicate that the appellant-High Court was either negligent or diligent in prosecuting the matter nor the record indicates that the High Court had given up lis and acquiesced in the impugned judgment of the High Court. On the facts and in the circumstances of the case, this Court was justified in condoning the delay when the special leave petition was placed for preliminary hearing and was also justified in issuing notice to the respondent. Thus, the submission relating to condonation of delay, which was caused in filing the special leave petition is rejected. [Para 20] [996-G-H; 997-A-C]

1.6. Earlier the respondent No.1 had filed CWJC No. 1924 of 1982 in the High Court of Patna claiming promotions from retrospective dates with all claims, benefits and increments in various cadres from various

dates as and when they had accrued and were given to his immediate juniors. His prayer was to direct the High Court on its administrative side to issue a revised notification incorporating all the promotions to which he was entitled to from various dates as they had accrued when his immediate juniors were promoted and to post him as District Judge. His another prayer in the writ petition was to quash Notification dated December 10, 1981 by which he was posted as Additional Munsif. The writ petition was dismissed by the High Court as having become infructuous. Feeling aggrieved, the respondent No.1 filed SLP (C) No.8923 of 1983 in this Court which was dismissed as withdrawn. Thus, the order passed in CWJC No. 1924 of 1982 had attained finality when SLP filed against the said order was dismissed as withdrawn. There is no manner of doubt that the order dated February 24, 1983 passed in CWJC No. 1924 of 1982 refusing to grant promotions with retrospective dates read with order passed by this Court in SLP (C) No. 8923 of 1983, would operate as *res judicata*. [Para 21] [997-D-H; 998-A]

1.7. Promotion is not a matter of right much less a fundamental right, more particularly when promotion in the subordinate judiciary is to be dealt with by the High Court which has complete control over the subordinate judiciary in view of Article 235 of the Constitution. All rights and claims of the respondent No.1 got crystallized when order was passed in SLP (C) No.8621 of 1985 read with the order was passed in SLP (C) No. 8923 of 1983. If the respondent No. 1 had any other claim he ought to have made the same before this Court when the above said Special Leave Petitions were disposed of. In fact both the Special Leave Petitions were dismissed and therefore, all his claims stood finally rejected, except the direction given to pay him the pension etc. mentioned in the order passed in SLP (C) No.8621 of 1985. No

grievance was made by the respondent No.1 in C.W.J.C. No. 6538 of 1990 that the direction given in SLP (C) No.8621 of 1985 were not complied with by the appellant. Neither at the time of disposal of SLP (C) No.8923 of 1983 nor at the time of disposal of SLP (C) No. 8621 of 1985, respondent No.1 had claimed any other relief and had not obtained permission to claim relief of promotion in future. Therefore, the relief claimed in C.W.J.C. No.6538 of 1990 could not have been granted by the Court. [Para 22] [998-B-F]

1.8. It is evident that CWJC No. 6538 of 1990 was filed for the same reliefs which were claimed in CWJC No. 1924 of 1982 and were rejected, and therefore, it could not have been entertained. Further SLP No. 8261 of 1985 which was filed by the respondent No.1 against the order of the High Court in CWJC No. 2059 of 1984 was dismissed and the only relief granted was to direct the State to restore pension payable to him with arrears due on the basis that he had superannuated from service from the date of superannuation and a further direction was issued to pay him Provident Fund, Gratuity and leave salary as might be admissible to him on superannuation. It was never directed that the High Court on its administrative side should consider the claim of the respondent No.1 regarding deemed promotions. [Para 23] [998-G-H; 999-A-B]

1.9. The Division Bench of the High Court erred in law in directing the appellant to consider the case of respondent No.1 for promotion as also the consequential benefits in accordance with law by the impugned judgment. Thus, the impugned judgment is set aside. [Para 24] [999-C-D]

Case Law Reference:

1975 (2) SCR 356 Referred to. Para 13

1963 Suppl. SCR 242 **Referred to.** **Para 17, 18**

(2003) 11 SCC 366 **Referred to.** **Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7630 of 2011.

From the Judgment & Order dated 27.6.2008 of the High Court of Judicature at Patna in C.W.J.C. No. 6538 of 1990.

P.H. Parekh, Ajay Kr. Jha, Pallavi Srivastava, Praekh & Co. for the Appellant.

Gopal Singh, Rudreshwar Singh, Gaurav Sharma, Anjani Aiyagari, Sushma Suri Respondent-In-Person for the Respondent.

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 June 27, 2008, rendered by the Division Bench of High Court of Judicature at Patna in Civil Writ Jurisdiction No. 6538 of 1990 by which the High Court of Patna on its administrative side is directed to consider the case of promotion of the respondent No.1 as also grant of consequential benefits to him in accordance with law.

3. The respondent No.1 was appointed to the Bihar Judicial Service as Munsif at Hajipur on January 13, 1955. On May 9, 1970, High Court of Patna recommended to the State Government the dismissal of respondent No.1 from service. On the basis of recommendation made by the High Court, the State Government issued a Notification dated January 15, 1972, dismissing the respondent No.1 from service. Thereupon the respondent No.1 filed W.P. No.121 of 1972 under Article 32 of the Constitution challenging his dismissal from service before this Court. The petition filed by the respondent No.1 was allowed vide judgment dated February 23, 1972 on the ground

that the termination of service was stigmatic and was ordered without holding an enquiry. It may be mentioned that judgment of this Court rendered in the petition filed by the respondent No.1 is reported in **(1973) 4 SCC 166**. In view of the above mentioned judgment of this Court, the respondent No.1 was reinstated in service. However, he was suspended from service on April 12, 1974 and departmental proceedings were initiated against him. Suspension order was challenged by him by filing CWJC No. 820 of 1974 and initiation of departmental proceedings was challenged by filing CWJC No. 593 of 1975 in the High Court of Patna. Both the writ petitions were dismissed in the year 1977 by the High Court. Thereupon, he had filed SLP (C) No.4344 of 1977 challenging dismissal of writ petition filed against suspension order and SLP (C) No. 4345 of 1977 challenging the decision in CWJC No. 593 of 1975 by which his prayer to set aside departmental proceedings was rejected. During the pendency of above numbered two SLPs another Notification dated January 30, 1978 was issued by the High Court suspending him from service. On March 01, 1978 this Court admitted both these Special Leave Petitions which were then converted into C.A. No.525 of 1978 and 526 of 1978 respectively. This Court by judgment dated 24.09.1981 directed the High Court of Patna to withdraw the suspension order dated January 30, 1978 passed against the respondent No.1 as well as departmental proceedings initiated against him and granted liberty to the High Court to amend the charge sheet before initiating departmental proceedings and to consider the question of his suspension from service afresh. By Notification dated October 12, 1981, the respondent No.1 was posted at Sasaram as Additional Munsif, which is the lowest post in judiciary and which post he had joined initially on January 13, 1955. Another Notification was issued on December 10, 1981 posting him at Darbhanga as Additional Munsif. Meanwhile he made various representations to release his dues and to keep one post of appropriate rank reserved for him. He did not receive any reply to those representations. Therefore, he filed CWJC No.1924

of 1982 on May 6, 1982 for quashing Notification dated December 10, 1981 issued by High Court posting him as Additional Munsif in Darbhanga and prayed to direct the High Court on its administrative side to give him promotions from the dates when his juniors named in the petition were promoted during the period 1970 to 1981, with all increments and other benefits. He also prayed to direct the High Court to issue a revised notification incorporating therein all the promotions to be given to him from due dates and to post him as a District Judge. After necessary amendment in the charge sheet, fresh departmental proceedings were initiated against him on August 19, 1982. No reply was filed by the respondent No.1 before the Inquiry Officer. After inquiry, the Inquiry Officer submitted his report dated December 10, 1982 holding that the charges levelled against him were proved. Thereupon, notice dated January 12, 1983 with copy of the report of Inquiry Officer was served upon him calling upon him to show cause as to why he should not be removed from service. The respondent No.1 did not file reply to the show cause notice.

4. When CWJC No.1924 of 1982 had come up for hearing before the Court on February 24, 1983, the learned Additional Advocate General had informed the Court that the departmental proceedings had concluded and second show cause notice was served upon him, calling upon him to show cause as to why he should not be removed from service. Thereupon, the court had expressed the view that the Writ Petition had become infructuous and dismissed the same accordingly by order dated February 24, 1983.

After receipt of show cause notice dated January 12, 1983 the respondent No.1 instituted CWJC No. 2959 of 1984 to quash (i) notification dated August 19, 1982 issued by High Court initiating departmental proceedings against him (ii) inquiry report dated December 10, 1982 forwarded by the District Judge Darbhanga and (3) notice dated January 12, 1983 calling

upon him to show cause as to why he should not be removed from service.

5. The learned Additional Advocate General who appeared for the Patna High Court in CWJC No. 2059 of 1984 had informed the Court on February 26, 1985 that the respondent No.1 had retired from service on September 1, 1983 and after his retirement the High Court had considered the question of penalty to be imposed on him and by Memorandum dated June 11, 1984, he was directed to show cause as to why the High Court should not make a recommendation to the State Government for withholding his pension permanently, and as no cause was shown by the respondent No.1, the High Court had recommended to the State Government for withholding his pension permanently but no final decision was yet taken by the State Government in that respect. The Division Bench hearing CWJC No. 2059 of 1984 was of the view that writ petition as filed had become infructuous and an opinion was expressed that respondent No.1 should wait till the final decision was taken by the State Government about finalization of pension. Accordingly, writ petition was dismissed as having become infructuous by judgment dated February 26, 1985 reserving liberty to the respondent No.1 to renew his prayer for monetary claims after finalization of pension matter.

6. The grievance of the respondent No.1 was that his claim for promotion from the various dates when his immediate juniors were promoted was not considered by the High Court nor was he paid benefits. Under the circumstances, he had approached this Court by filing SLP (C) No. 8923 of 1983 against order dated February 24, 1983 dismissing CWJC No. 1924 of 1982, as having become infructuous. The said SLP was listed for hearing on August 30, 1983. It was brought to the notice of this Court that second show cause notice had been issued to the respondent No.1 and that the respondent No.1 was to retire from service on August 31, 1983 i.e. the next day when SLP (C) No.

8923 of 2003 was taken up for hearing on August 30, 1983. The respondent No.1 had thereupon stated before the Court that the SLP had become infructuous and sought permission to withdraw the same. In view of the statement of the respondent No.1, the SLP was disposed of as withdrawn by order dated August 30, 1983.

Thus, there is no manner of doubt that order dated February 24, 1983 passed by the Division Bench of Patna High Court in CWJC No. 1924 of 1983 refusing to grant relief of promotion with deemed dates and monetary benefits had attained finality when SLP (C) No. 8923 of 1983 filed against the said order was unconditionally withdrawn by the respondent No.1 on August 30, 1983.

7. Again the respondent No.1 had filed SLP (C) No. 8621 of 1985, against order dated February 26, 1985 dismissing CWJC No. 2059 of 1984 as having become infructuous. During the pendency of the said SLP, a Resolution No. 10383 dated August 11, 1985 was passed forfeiting permanently pension payable to respondent No.1. The said Resolution was produced on the record of SLP (C) No. 8621 of 1985 on November 25, 1986. This Court had passed following order on November 25, 1986 in SLP (C) No. 8621 of 1985 :-

> "The Special Leave Petition is dismissed, but we would direct the State of Bihar to restore within six weeks the pensions payable to the petitioner with arrears due on the basis that he had superannuated from service from the date of superannuation. Provident Fund, Gratuity and leave salary as may be admissible to him on superannuation will also be paid to the petitioner."

8. The above quoted order makes it evident that the special leave petition which was against order dated February 26, 1985 passed by the Division Bench of High Court in CWJC No. 2059 of 1984 was dismissed. The learned counsel for the petitioner states at the bar that the respondent No.1 was a

Judicial Officer and therefore, when it was brought to the notice of this Court that his pension had been forfeited permanently, this Court had shown compassion, concern, sympathy and clemency to the respondent No.1 and had directed the State of Bihar to restore pension payable to him and pay arrears due on the basis that he had superannuated from service from the date of superannuation, and a direction was given to pay him Provident Fund, Gratuity and leave salary as might be admissible to him on superannuation. However, it is relevant to notice that no direction was given to the appellant to consider the case of the respondent No.1 with retrospective effect with all benefits.

9. According to the respondent No.1 his pension matter was finalized on July 14, 1987. After finalization of pension matter, he filed CWJC No. 4862 of 1987 in the High Court for lawful claims as were given to his juniors. The said petition was disposed of on November 9, 1989 with a direction to the respondent No.1 to submit representation to the High Court on its administrative side for legitimate claims as were given to his juniors. Pursuant to the above mentioned direction, the respondent No.1 had submitted representation dated February 12, 1990. The said representation was considered by the Standing Committee of the Patna High Court and was rejected on March 30, 1990.

10. Again respondent No.1 had sent representation dated April 30, 1990 repeating his prayer to grant him his lawful claims as were given to his juniors. The same was rejected by High Court on its Administrative side vide order dated May 25, 1990. The respondent No.1 had made third representation dated June 23, 1990 to the same effect which was rejected by the High Court vide communication dated September 17, 1990. Thereupon the respondent No.1 had filed CWJC No. 6538 of 1990 in the High Court of Patna. The Division Bench hearing the same has directed the appellant High Court to consider the case of promotion of the respondent No.1 as also

consequential benefit in accordance with law vide judgment dated June 27, 2008 which has given rise to the instant appeal.

11. This Court has heard the learned counsel for the appellant and the respondent No.1 who has appeared in person. The Court has also considered the documents forming part of the appeal.

12. The contention advanced on behalf of the appellant that writ petition was filed by the respondent No.1 on November 10, 1990 i.e. seven years after he had superannuated from service, and therefore, writ petition should have been dismissed on the ground of delay and latches cannot be accepted. The impugned judgment nowhere shows that such a point was argued by the appellant before the High Court. No grievance is made in the memorandum of SLP, that point regarding delay and latches was argued before the High Court but the same was not dealt with by the High Court when impugned judgment was delivered. Further from the facts noticed, it becomes evident that by order dated November 9, 1989, passed in CWJC No. 4862 of 1987, the High Court had directed the respondent No.1 to submit representation to the High Court on its administrative side claiming benefits which were given to his juniors but were denied to him, pursuant to which the respondent No.1 had filed last representation on June 23, 1990 which was rejected by High Court on September 17, 1990. The question of delay and latches will have to be considered from the communication dated September 17, 1990 by which claim made by the respondent No.1 to give him benefits which were given to his juniors was rejected and not from the date of superannuation. Thus, the respondent No.1 is not liable to be non-suited on the ground of delay and latches in filing writ petition after his superannuation from service.

However, there is no manner of doubt that the respondent No.1 is claiming promotions to different cadres from the post of Additional Munsif as well as promotional benefits from the

due dates as were given to his juniors in the years 1971, 1974 and 1978. In C.W.J.C. No. 6538 of 1990 from which the present appeal arises the petitioner had claimed following relief in paragraph 20 of the writ petition :

> "It is therefore respectfully prayed Your Lordship may be graciously pleased to admit this Writ Petition and may be pleased to direct the respondent Nos. 1 and 2 to give all the service claims of this petitioner as given to his juniors during the period he was illegally kept out of service and adequate compensation for having ruined the career of petitioner as fully stated in para 1 and 4 of this writ petition and may be pleased to pass such other order or orders as may be considered fit and proper".

If one looks to the averments made in the petition it becomes at once clear that the petitioner is claiming promotions to the post of Civil Judge, Senior Division, thereafter to the post of Additional District Judge and finally to the post of District Judge when his juniors were given such benefits in the years 1971, 1974 and 1978 respectively.

The record shows that till the respondent No.1 had superannuated from service on August 31, 1983, he was discharging duties as Additional Munsif and was never confirmed in the cadre of Munsif. Therefore, his claim for promotion to higher post could not have been considered unless and until he was confirmed on the post of Munsif. On this ground alone, the writ petition filed by him was liable to be dismissed.

There is no manner of doubt that claim of promotion made in C.W.J.C. No. 6538 of 1990 was stale one and could not have been entertained by the High Court. Further juniors to the respondent No.1 who were given benefits of promotion in the years 1971, 1974 and 1978 were not impleaded as respondents in the petition. In their absence, claim advanced by the respondent No.1 could not have been examined by the

High Court. Thus, the impugned judgment is liable to be set aside on the ground that stale claim of promotions to different cadres was advanced by the respondent No.1 after great delay and that too without impleading his juniors.

13. In *P.S. Sadasivaswamy Vs. State of Tamil Nadu* (1975) 1 SCC 152, this court has laid down a firm proposition of law that a person aggrieved by an order promoting a junior over his head should approach the Court at least within 6 months or at the most a year of such promotion and the High Court can refuse to exercise its extraordinary powers under Article 226 in case the person aggrieved does not approach the Court expeditiously for appropriate relief and puts forward stale claim and tries to unsettle settled matters. Therefore, C.W.J.C. No. 6538 of 1990 in which stale claim of promotion was made by the respondent No.1 was liable to be dismissed.

14. The contention of the respondent No.1 that Interlocutory Application No. 1 of 2009 was filed for condonation of delay in filing SLP and delay was condoned without issuing notice to him though it is mandatorily provided in the proviso to sub-rule(1) of rule 10 of Order XVI of the Supreme Court Rules that there shall be no condonation of delay without notice to the respondent and therefore, the SLP should be dismissed as barred by limitation has no substance. The Office Report on limitation dated December 24, 2008 which was placed before this Court along with papers of SLP indicated that there was delay of eight days in filing SLP and delay of nine days in re-filing the petition. The SLP was placed for preliminary hearing before the Court on February 9, 2009 and after hearing the learned counsel for the petitioner, following order was passed:-

"Delay condoned.

Issue notice.

There shall be interim stay of the impugned order until further orders."

15. In order to deal with the contention raised by the respondent No. 1 it would be necessary to refer to the Scheme envisaged by the Supreme Court Rules, 1950, which was subsequently amended and the Scheme contemplated by the Supreme Court Rules, 1966 as well as certain relevant decisions on the point.

16. The Supreme Court of India, in the exercise of its rule-making powers, and with the approval of the President, had made the Supreme Court Rules, 1950. Order XIII of the Rules of 1950 dealt with appeals by special leave. Rule 1, which is relevant for the purpose of deciding the issue raised in this appeal by the respondent No. 1, was reading as under: -

"1. A petition for special leave to appeal shall be lodged in the Court within sixty days from the date of refusal of a certificate by the High Court or within ninety days from the date of the judgment sought to be appealed from, whichever is longer:

Provided that

(i) in computing the period of ninety days the time requisite for obtaining a certified copy of the judgment sought to be appealed from shall be excluded;

(ii) where the period of limitation claimed is sixty days from the date of the refusal of a certificate, the time taken subsequent to the date of refusal in obtaining a certified copy of the judgment (in cases where no certified copy of the judgment had been obtained prior to the date of such refusal) shall be excluded in computing the period of sixty days;

(iii) where an application for certificate made to the High Court is dismissed as being out of time the period of limitation shall count from the date of the

judgment sought to be appealed from and not from the date of the dismissal of the said application;

(iv) where an application for leave to appeal to the High Court from the judgment of a single Judge of that Court has been made and refused, the period from the making of the application to the rejection thereof shall be excluded in computing the period under this Rule;

(v) the Court may for sufficient cause extend the time on application made for the purpose."

The Supreme Court Rules, 1950 were published in the Gazette of India Extra Ordinary dated January 28, 1950 and amended by the Supreme Court of India Notifications dated April 25, 1950, July 5, 1950, August 19, 1950, June 18, 1951, May 6, 1952, January 16, 1954, July 10, 1954, April 12, 1955, March 19, 1956, July 14, 1956, July 11, 1957, November 22, 1957, January 9, 1958 and April 8, 1959. After amendment Order XIII Rule 1 provided as under: -

"1. Subject to the provisions of Sections 4, 5, 12 and 14 of the Limitation Act, 1963 (36 of 1963) a Petition for Special Leave to Appeal shall be lodged in the Court in a case where a certificate for leave to appeal was refused by the High Court within sixty days from the date of the order of refusal and any other case within ninety days from the date of judgment or order sought to be appealed from."

Till the Supreme Court Rules 1966 were made by the Supreme Court, it was the practice of this Court to condone the delay caused in filing Special Leave Petition, without issuing notice to the respondent.

17. At this stage, it would be relevant to notice a Constitution Bench judgment of this Court in *M/s. Ram Lal Kapur and Sons (P) Ltd. vs. Ram Nath and others* AIR 1963 SC 1060. In the said case the first respondent Ram Nath was

owner of a building in Delhi of which the appellant company was one of the tenants. The appellant moved the Rent Controller, Delhi under Section 7A of the Delhi and Ajmer Rent Control Act, 1947 for fixation of the fair rent of the portion in its occupation. The Rent Controller, Delhi computed the fair rent for the entire building at Rs.565/- per month and the fair rent payable by the appellant at Rs.146/- per month. The respondent landlord preferred an appeal against the order of the Rent Controller to the learned District Judge, Delhi, but the appeal was dismissed. Thereafter, he moved the High Court of the Punjab under Article 227 of the Constitution challenging the correctness and propriety of every finding by the Rent Controller and of the District Judge on appeal. The petition came on for hearing before a learned single Judge of the High Court. A Division Bench of the High Court had sometime previously held in another batch of cases that Section 7A was unconstitutional and void. Following this decision the learned single Judge allowed the petition of the first respondent Ram Nath and set aside the order of the Rent Controller as without jurisdiction, without considering the other matters which would arise if the Section was valid and the Rent Controller had jurisdiction. From this decision of the learned single Judge the appellant preferred an appeal under the Letters Patent to a Division Bench.

Meanwhile, the judgment of the Division Bench holding that Section 7A was unconstitutional was brought up by way of appeal to this Court. As the said appeal was getting ready to be heard, the appellant, i.e., M/s. Ram Lal and Sons (P) Ltd. applied for and obtained special leave to appeal to this Court though the appeal filed by the appellant before the High Court was pending. Letters Patent Appeal was thereafter withdrawn by the appellant. An appeal against judgment of the Division Bench of the High Court holding that Section 7A was unconstitutional was heard by this Court and the same was allowed by judgment dated August 2, 1961 and this Court held

reversing the judgment of the High Court that Section 7A of the Act was valid.

It would thus be seen that only point which the learned Judge considered and on which the revision petition of the landlord respondent was allowed no longer subsisted and hence the appellant was entitled to have the appeal allowed. As the learned single Judge did not consider the other objections raised by the first respondent to the order of the Rent Controller fixing the standard fair rent payable by the appellant, the appeal had to be remanded to the High Court for being dealt with according to law.

However, a preliminary objection to the hearing of the appeal was raised by the learned counsel for the landlord respondent. His submission was that the special leave which was granted by this Court ex-parte should be revoked as having been improperly obtained. The judgment of the learned single Judge to appeal from which the leave was granted was dated January 5, 1955 and the application to this Court seeking leave was made on January 5, 1959, i.e., after a lapse of four years. It was obvious that it was a petition which had been filed far beyond the period of limitation prescribed by the Rules of this Court. The learned counsel for the respondent urged that there were no sufficient grounds for condoning that long delay and that this Court should, therefore, revoke the leave. The Constitution Bench of this Court was not disposed to accede to this request for revoking the leave. The learned counsel had drawn attention of the Constitution Bench to a few decisions in which leave granted ex-parte was revoked at the stage of hearing of the appeal on an objection raised by the respondent. However, the Constitution Bench did not consider that the facts of the appeal before it was bearing any analogy to those in the decisions cited. The Five Judge Constitution Bench was of the opinion that in fact the grant of special leave in the circumstances of the case merely served to shorten the proceedings and this Court had acceded to the petition for

leave obviously because the appeals in this Court from judgments in the cases where view was taken that Section 7A was unconstitutional, were getting ready for hearing and there was some advantage if the appellant was in a position to intervene in those other appeals. However, the Constitution Bench made following pertinent observations in paragraph 9 of the reported decision. They are as under: -

> "9. Nevertheless, we consider that we should add that, except in very rare cases, if not invariably, it should be proper that this Court should adopt as a settled rule that the delay in making an application for special leave should not be condoned ex parte but that before granting leave in such cases notice should be served on the respondent and the latter afforded an opportunity to resist the grant of the leave. Such a course besides being just, would be preferable to having to decide applications for revoking leave on the ground that the delay in making the same was improperly condoned years after the grant of the leave when the Court naturally feels embarrassed by the injustice which would be caused to the appellant if leave were then revoked when he would be deprived of the opportunity of pursuing other remedies if leave had been refused earlier. We would suggest that the rules of the Court should be amended suitably to achieve this purpose."

18. The Rules framed in the year 1950 were replaced by the present Rules, which are known as The Supreme Court Rules, 1966. They came into force with effect from January 15, 1966. The weighty recommendations made by the Constitution Bench in *Ram Lal and Sons (P) Ltd.* case (Supra) were taken into consideration and proviso to sub-rule (1) of Rule 10 of Order XVI was enacted, which reads as under:-

> "10 (1) Unless a caveat as prescribed by rule 2 of Order XVIII has been lodged by the other parties, who appeared in the Court below, petitions for grant of special leave shall be put up for hearing ex-parte, but the Court, if it thinks fit,

may direct issue of notice to the respondent and adjourn the hearing of the petition:

> Provided that where a petition for special leave has been filed beyond the period of limitation prescribed therefor and is accompanied by an application for condonation of delay, the Court shall not condone the delay without notice to the respondent."

Naturally, the proviso requires that when a petition for special leave has been filed beyond the period of limitation prescribed therefore and is accompanied by an application for condonation of delay, the Court should not condone the delay without notice to the respondent. However, it is noticed that it is consistent practice of this Court even after framing of Rules of 1966 that delay is condoned ex-parte without issuing notice to the respondent, if the Court hearing the special leave petition is of the opinion that sufficient cause is made out for condonation of delay and the petitioner has good case on merits. There is no manner of doubt that once the Court forms an opinion that sufficient cause is made out for condonation of delay then issuance of notice to the respondent calling upon him to show cause as to why delay should not be condoned may become an empty formality and in order to see that the respondent has not to incur unnecessary expenditure for coming to Delhi from far off places and engage an advocate for contesting application for condonation of delay, delay is condoned ex-parte. However, in view of requirements of proviso to sub-rule (1) of Rule 10 of Order XVI of 1966 Rules, it may be prudent to issue notice to the respondent before condoning the delay caused in filing the special leave petition. However, if the respondent is not noticed, then a right would be available to him at the stage of hearing to point out that the Court was not justified in condoning the delay and that the leave, if granted, should be revoked or notice issued should be dismissed.

19. In *Commissioner of Customs vs. Rangi International* (2003) 11 SCC 366, the SLP from which the appeal arose was

filed after a delay of 246 days. When the matter came up for preliminary hearing, it was found that without noticing the provisions of Supreme Court Rules in regard to the condonation of delay, this Court on 12.7.2000, had condoned the delay ex-parte and granted leave. On 2.4.2002, when the respondent appeared before the Court, a preliminary objection was raised that the condonation of delay was contrary to the Supreme Court Rules. Therefore, the Court hearing the appeal had looked to the papers. The Court found that proper particulars were not given in the application for condonation of delay. Therefore, the Court hearing the appeal had called upon the appellant to file an additional affidavit in support of the application for condonation of delay. Accordingly, the appellant had filed additional affidavit. To this the respondent had filed a counter pointing out that the explanation given by the appellant even in the additional affidavit did not explain the delay satisfactorily nor had the appellant been diligent in filing the appeal. This Court heard the learned counsel for the appellant as well as the respondent and having considered the reasons given for condonation of delay in the original affidavit as well as in the additional affidavit filed by the appellant was of the opinion that the appellant had not satisfactorily explained the delay in preferring the appeal. Therefore, accepting the contention of the respondent this Court had revoked the leave granted on 12.7.2000 and consequently dismissed the SLP as barred by limitation.

20. In view of the course adopted by this Court in the above mentioned decision this Court had heard the appellant and the respondent to satisfy itself as to whether sufficient cause was made out for condonation of delay of eight days. At the beginning, the respondent No. 1 had attempted to argue that there was unexplained delay of seven months and not of eight days, as was mentioned in the Office Report, but he could not make his submission good. It could not be pointed out to this Court that the calculation of delay of eight days made by the registry was erroneous. The explanation offered by the

appellant High Court in the application for condonation of delay is plausible and acceptable. The averments made in the application for condonation of delay would not indicate that the appellant High Court was either negligent or diligent in prosecuting the matter nor the record indicates that the High Court had given up lis and acquiesced in the impugned judgment of the High Court. On the facts and in the circumstances of the case this Court is of the opinion that this Court was justified in condoning the delay when the special leave petition was placed for preliminary hearing and was also justified in issuing notice to the respondent. Thus, this Court does not find any substance in the contention raised by the respondent No. 1 relating to condonation of delay, which was caused in filing the special leave petition and, therefore, the same is hereby rejected.

21. Coming to the merits of the matter this Court finds that earlier the respondent No.1 had filed CWJC No. 1924 of 1982 in the High Court of Patna claiming promotions from retrospective dates with all claims, benefits and increments in various cadres from various dates as and when they had accrued and were given to his immediate juniors. His prayer was to direct the High Court on its administrative side to issue a revised notification incorporating all the promotions to which he was entitled to from various dates as they had accrued when his immediate juniors were promoted and to post him as District Judge. His another prayer in the writ petition was to quash Notification dated December 10, 1981 by which he was posted as Additional Munsif in Darbhanga. The writ petition was dismissed by the High Court vide order dated February 24, 1983 as having become infructuous. Feeling aggrieved, the respondent No.1 had filed SLP (C) No.8923 of 1983 in this Court which was dismissed as withdrawn by order dated August 30, 1983. Thus the order dated February 24, 1983 passed in CWJC No. 1924 of 1982 had attained finality when SLP filed against the said order was dismissed as withdrawn. There is no manner of doubt that the order dated February 24, 1983

passed in CWJC No. 1924 of 1982 refusing to grant promotions with retrospective dates read with order passed by this Court in SLP (C) No. 8923 of 1983, would operate as *res judicata*.

22. It is well settled that promotion is not a matter of right much less a fundamental right, more particularly when promotion in the subordinate judiciary is to be dealt with by the High Court which has complete control over the subordinate judiciary in view of Article 235 of the Constitution. All rights and claims of the respondent No.1 got crystallized when this Court passed order dated November 25, 1986 in SLP (C) No.8621 of 1985 read with order dated August 30, 1983 passed by this Court in SLP (C) No. 8923 of 1983. If the respondent No. 1 had any other claim he ought to have made the same before this Court when the above numbered Special Leave Petitions were disposed of. In fact both the Special Leave Petitions were dismissed and therefore all his claims stood finally rejected, except the direction given to pay him the pension etc. mentioned in order dated November 25, 1986 passed in SLP (C) No.8621 of 1985. No grievance was made by the respondent No.1 in C.W.J.C. No. 6538 of 1990 that the direction given by this Court on November 25, 1986 in SLP (C) No.8621 of 1985 were not complied with by the appellant. Neither at the time of disposal of SLP (C) No.8923 of 1983 nor at the time of disposal of SLP (C) No. 8621 of 1985 the respondent No.1 had claimed any other relief and had not obtained permission to claim relief of promotion in future. Therefore, the relief claimed in C.W.J.C. No.6538 of 1990 could not have been granted by the Court.

23. It is evident that, CWJC No. 6538 of 1990 was filed for the same reliefs which were claimed in CWJC No. 1924 of 1982 and were rejected, and therefore, it could not have been entertained. Further SLP No. 8261 of 1985 which was filed by the respondent No.1 against judgment and order dated February 26, 1985 of the High Court of Judicature at Patna in

CWJC No. 2059 of 1984 was dismissed and the only relief granted by this Court was to direct the State of Bihar to restore pension payable to him with arrears due on the basis that he had superannuated from service from the date of superannuation and a further direction was issued to pay him Provident Fund, Gratuity and leave salary as might be admissible to him on superannuation. This court had never directed that the High Court of Patna on its administrative side should consider the claim of the respondent No.1 regarding deemed promotions.

24. In view of the above discussion, this Court is of the opinion that the High Court has erred in law in directing the original respondent No.2 i.e. present appellant to consider the case of promotion of respondent No.1 as also the consequential benefits in accordance with law by the impugned judgment. Thus the impugned judgment is liable to be set aside.

For the foregoing reasons the appeal succeeds, the judgment dated June 27, 2008 rendered by the Division Bench of High Court of Judicature at Patna in CWJC No. 6578 of 1990, directing the present appellant to consider the case of respondent No.1 for promotion as also consequential benefits, is hereby set aside. The appeal accordingly stands disposed of.

N.J. Appeal disposed of.

AJITSINGH HARNAMSINGH GUJRAL
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1969 of 2009)

SEPTEMBER 13, 2011

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

Penal Code, 1860 – s. 302 – Murder – Accused burnt his wife and three children to death by pouring petrol on them and setting them on fire – Convicted u/s. 302 and sentenced to penalty of death by courts below – On appeal, held: Prosecution established the entire chain of circumstances which connects the accused to the crime – Accused had pre-planned the diabolical and gruesome murder in a dastardly manner – He did not act on any spur of the moment – He cannot be reformed and rehabilitated – Thus, the penalty of death sentence is upheld.

Sentence/Sentencing – Death sentence – 'Rarest of rare case' – Held: Death sentence should only be given in the rarest of rare cases – On facts, the accused burnt living persons to death which is a horrible act causing excruciating pain to the victim, and this could not have been unknown to the accused – Accused did not act on any spur of the moment provocation – There was a quarrel between accused and his wife at midnight, but the accused having brought a large quantity of petrol into his residential apartment shows that he had pre-planned the diabolical and gruesome murder in a dastardly manner – Such person who instead of protecting his family kills them in such a cruel and barbaric manner cannot be reformed or rehabilitated – Balance sheet is heavily against him – Thus, all the requisites for death penalty are satisfied – Instant case belongs to the category of rarest of

rare cases – Death sentence awarded to the accused is upheld.

Death sentence – Broad guidelines to award death sentence – Stated.

Legislation – Abolition of death penalty – Held: It is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature – It is only the legislature which can abolish the death penalty and not the courts – As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it would tantamount to repeal of the death penalty by the judiciary.

According to the prosecution, appellant was married and having one son aged about 20 years and two daughters aged 22 years and 13 years respectively. On the fateful day, the appellant killed his wife 'KK' and three children by pouring petrol on their persons and setting them on fire. The said incident took place 25-27 years after the marriage of the appellant and 'KK'. The trial court convicted the appellant under Section 302 IPC and imposed penalty of death upon the appellant. The High Court dismissed the appeal and upheld the death sentence. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1. The prosecution has been able to establish the entire chain of circumstances which connect the accused to the crime. [Para 49] [1030-H]

2.1. In the instant case, reliance is entirely on circumstantial evidence, as there are no eye witnesses of the crime. It is true that motive is important in cases of circumstantial evidence, but that does not mean that in all cases of circumstantial evidence if the prosecution has been unable to satisfactorily prove a motive its case must fail. It all depends on the facts and circumstances of the

case since men may lie but circumstances do not. In cases of circumstantial evidence the prosecution must establish the entire chain of circumstances which connects the accused to the crime. [Paras 14, 20] [1018-E-F; 1022-D]

Wakkar and Anr. vs. State of Uttar Pradesh **2011(3) SCC 306: JT 2011(2) SC 502;** *Krishnan vs. State represented by Inspector of police* **2008(15)SCC 430** *Sharad Birdhichand Sarda vs. State of Maharashtra* **AIR 1984 SC 1622: 1985 (1) SCR 88;** *Mohd. Mannan alias Abdul Mannan vs. State of Bihar* **2011(5) SCC 317 – referred to.**

2.2. There is no reason to disbelieve PW3-brother-in-law of the appellant or PW5-mother-in-law of the appellant. From their testimony it is evident that the appellant was a dictatorial personality, who wanted to dominate over his family and was also hot tempered. He would even beat his wife (deceased) with a leather belt. [Para 17] [1021-E]

2.3. As regards the submission that if the relations between the accused and his wife were strained why did his wife continue to live with him for 25 years, in India many women accept the bad treatment of their husbands and continue living with them because a girl at the time of marriage is told by her parents that after marriage her place is with her husband and she has to accept whatever treatment she gets from her husband and in-laws. She has to 'nibhao' all treatment after marriage. Thus, she continues living with him even if her husband is a brutish, nasty and loathsome person. However, it is evident that when the children of the accused grew up they often resisted and protested against the dictatorial behaviour of the appellant, and this led to a lot of friction in the family. Thus, the appellant did not have a happy married life with his wife, rather it was just the reverse. [Para 18] [1021-F-H; 1022-A]

2.4. As to what motivated the appellant to commit this gruesome and ghastly act is impossible to say because the Court cannot enter into the mind of a human being and find out his motive. It can only be speculated. [Para 19] [1022-B-C]

2.5. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. [Para 31] [1024-F]

Mohd. Azad alias Samin vs. State of West Bengal **2008(15) SCC 449: 2008 (15) SCR 468;** *State through Central Bureau of Investigation vs. Mahender Singh Dahiya* **2011(3) SCC 109: 2011 (1) SCR 1104;** *S.K. Yusuf vs. State of West Bengal* **J.T. 2011 (6) SC 640 – relied on.**

2.6. There is no reason to disbelieve the evidences of PW3, PW4, PW 5 and PW 16. Their evidence fully establishes that the appellant was last seen with his wife at about midnight and was in fact quarreling with her at that time. The incident happened at 4 or 4.30 a.m. and thus, there was a time gap of only about 4 hours from the time when the appellant was seen with his wife (deceased) and the time of the incident. Thus, he was last seen with his wife and there was only a short interval between this and the fire. [Paras 29, 30] [1024-D-E]

2.7. Since the accused was last seen with his wife and the fire broke out about 4 hours thereafter, it was for him to properly explain how this incident happened, which he has not done. Thus, it is one of the strong links in the chain connecting the accused with the crime. Furthermore, the victims died in the house of the accused, and he was there according to the testimony of the witnesses. The incident took place at a time when

there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night. [Paras 32, 33] [1024-H; 1025-A-B]

2.8. The sudden disappearance of the accused from the scene after the incident is another link in the chain of circumstances connecting the accused with the crime. The version of the accused is that he left the scene as he had received a message that his sister in Delhi who was suffering from cancer had become critical, and thus, he rushed from Mumbai to be with her. The story is not at all convincing because in such a situation the person would ordinarily take a flight from Mumbai to Delhi which takes two hours, and would not go by car, which journey would take several days. There was no shortage of money with the appellant as he was found with cash of Rs.7,68,080/-. The submission that the appellant first went by car to the Dargah in Ajmer to pray for his sister, cannot be accepted because he could have gone to a Dargah only subsequently after seeing his sister. Under Section 114 of Evidence Act the natural conduct of persons is to be presumed. [Para 34, 35] [1025-C-G]

2.9. The order of the High Court that the plea of alibi was totally false and bogus is accepted. [Para 37] [1024-B]

2.10. It is difficult to speculate as to why the accused fled from the scene of the crime carrying cash of Rs.7,68.080/- apart from 7 safari suits and that too without a driver or an assistant, all of whom were easily available to him. It is quite possible that after having committed this horrible crime the accused may have himself realized the gravity of his crime and in this shocked state fled from the scene. However, this is only a speculation and nothing turns on it. [Para 38] [1027-C-D]

2.11. It was submitted that ordinarily the accused and his wife used to sleep in one bedroom, while the 3 children used to sleep in the other bedroom. However, all 4 victims were found burnt in the children's bedroom. This was explained by the prosecution by pointing that in the night of 9.4.2003 when the accused came from his hotel he had a heated quarrel with his wife and due to this quarrel the wife decided to sleep with the children and not with the accused. This version seems quite probable, and the defence cannot make much out of the fact that all 4 bodies were found in one bedroom. [Para 39] [1027-E-F]

2.12. When the police party carried out panchanama of the house of the accused, after the fire was fully extinguished and when the FIR was lodged by PW1, PSI who found that in the bedroom to the northern side of the hall on the bed i.e. on the mattress of the bed a 10 litre white plastic can was seen and it had some petrol in it. It was also found and noticed that the can was new. It is a fact that all the four inmates were burned to death by using petrol. Therefore, the finding of the 10 litre can with some petrol in it clearly shows that petrol, sufficient in quantity to burn and kill all the four persons, was brought by the accused. [Para 40] [1027-G-H; 1028-A]

2.13. The prosecution also tendered one more piece of evidence which is in the form of recovery at the instance of the accused under Section 27 of the Evidence Act. In this regard, the prosecution examined PW14-panch witness and proved the Exhibits which is the statement of the accused under Section 27 of the Evidence Act and the recovery panchanama. PW14 stated that on 14th April, 2003 he was called by the Police as the accused made a voluntary statement that he would point out the bucket in which he took petrol from the plastic can. This statement was recorded and thereafter,

the accused led the police party to his flat. The seal of the flat was removed and from the bath room of the said flat the accused pointed out the red bucket. The said bucket was sent to a Chemical Analyzer who submitted a report that the bucket showed positive result regarding detection of petrol. This means that the said bucket was used for pouring petrol on all the four victims. [Para, 41 42] [1028-B-E]

2.14. The submission that the recovery of the red bucket was a fabrication by the police cannot be accepted. It is true that on 10th April, 2003 the flat of the accused was searched, but it is quite natural that the investigating officer did not understand the significance of the said bucket even if it was seen on that day. They could not visualize or imagine the use of the bucket for splashing or spreading the petrol on the four victims. They came to know about it only after the accused made the disclosure statement, and then they recovered the said bucket. The investigating office, regarding other aspects of the matter appears to be truthful and sincere. There is no reason to suspect the bona fide of the investigating officer, and therefore, there is nothing on record from which it can be inferred that the said bucket was planted by the police to strengthen the case against the accused. [Paras 43, 44] [1028-F; 1029-A-C]

2.15. Nothing turns on the submission of the appellant that he was making phone calls to his mother-in-law after leaving his flat in Mumbai on 10.4.2003. It has come in evidence that AS, son of the accused, was looking after the business, and if the accused was going away for 3 to 4 days it was natural for him to expect calls from, and make calls to his son and his wife and other relatives, but that was not done. [Para 45] [1029-D]

2.16. Appellant submitted that as per the prosecution case, all the four victims were in one bed room; that two

bodies were found on the bed and two were lying on the ground; that if all four victims were sleeping on one bed then how were two bodies found on the ground; and that if petrol was splashed on the persons of four victims then why did none of them wake up before the accused set them to fire. The presence of the 10 litre can and using the bucket clearly show that petrol in large quantity was used. Use of the bucket further fortifies the prosecution case because if the petrol was sprinkled from a can it would have taken time to cover all the bodies of four persons, the bed and the surroundings. But use of the bucket clearly shows that splashing of petrol could be achieved within a second and that profuse splashing of petrol could be achieved by using the bucket and then setting the petrol on fire would not even require five seconds. Petrol is a very combustible material. It might be that before the actual death occurred two persons rolled down from the bed and fell on the ground. All this is speculation on which nothing turns. Since there were no eye witnesses, and since presence of the accused a few hours before the crime is proved, it was for the accused to explain all this. [Para 46] [1029-F-H; 1030-A-B]

2.17. There is no merit in the submission that several of the circumstances were not put to the accused under Section 313 Cr.P.C.; and that the circumstances which were not put to the accused in his examination under Section 313 could not be used against him. On careful examination of the statements of the accused under Section 313 Cr.P.C. it is found that as many as 168 questions were put to him relating to all the relevant circumstances. [Para 47] [1030-C-D]

State of U.P. vs. Mohd. Ikram **J.T. 2011 (6) SC 650 – referred to.**

2.18. As regards the submission that the incised

wounds on the son of the appellant, have not been explained by the prosecution, there were no eye witnesses and the entire prosecution case rests on circumstantial evidence it is hardly for the prosecution to explain these injuries, rather it was for the appellant, who was present at the time of the incident (as it has been found) to explain them. Moreover, the question of explaining the injuries ordinarily arises when the injuries are on an accused, and not on the victim. At any event, the prosecution has explained that these were due to the broken glass pieces found on the spot. [Para 48] [1030-E-G]

3.1. Section 302 provides the punishment for murder. It stipulates a punishment of death or imprisonment for life and fine. Once an offender is found by the court to be guilty of the offence of murder under Section 302, then it has to sentence the offender to either death or for imprisonment for life. The court has no power to impose any lesser sentence. If there is a reasonable doubt about the guilt of the offender, the only proper verdict is to acquit him and not to impose a sentence lesser than imprisonment for life. [Paras 53, 54] [1033-H; 1034-A-B]

Santosh vs. State of MP **AIR 1975 SC 654: 1975(3) SCR 463 – relied on.**

3.2. In the Code of Criminal Procedure, 1973, Section 354(3), the discretion of the judge to impose death sentence has been narrowed, for the court has now to provide special reasons for imposing a sentence of death. It has now made imprisonment for life the rule and death sentence an exception, in the matter of awarding punishment for murder. [Para 57] [1035-H; 1036-A]

3.3. Death sentence should only be given in the rarest of rare cases. This is one of such cases. Burning living persons to death is a horrible act which causes

excruciating pain to the victim, and this could not have been unknown to the appellant. In the instant case, the accused did not act on any spur of the moment provocation. It is no doubt that a quarrel occurred between him and his wife at midnight, but the fact that he had brought a large quantity of petrol into his residential apartment shows that he had pre-planned the diabolical and gruesome murder in a dastardly manner. A person like the appellant who instead of doing his duty of protecting his family kills them in such a cruel and barbaric manner cannot be reformed or rehabilitated. The balance sheet is heavily against him and thus, the death sentence awarded to him is upheld. [Paras 95, 96 and 97] [1050-D-G-F]

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

3.4. A distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous. While life sentence should be given in the former, the latter belongs to the category of rarest of rare cases, and thus, death sentence should be given. [Para 98] [1050-H; 1051-A]

Mohd. Mannan @ Abdul Mannan vs. State of Bihar **(2011) 5 SCC 317 – relied on.**

3.5. The expression 'rarest of the rare cases' cannot be defined with complete exactitude. The very fact that death penalty should be given only in the rarest of the rare cases means that in some cases it should be given and not that it should never be given. As to when it has to be given, the broad guidelines in this connection have been laid down in Macchi Singh's case which has been followed in several decisions. The accused deserves death penalty where the murder was grotesque, diabolical, revolting or of a dastardly manner so as to

arouse intense and extreme indignation of the community, and when the collective conscience of the community is petrified, or outraged. It has also to be seen whether the accused is a menace to society and continues to do so, threatening its peaceful and harmonious coexistence. The Court has to further enquire and believe that the accused cannot be reformed or rehabilitated and shall continue with his criminal acts. Thus a balance sheet is to be prepared in considering the imposition of death penalty of the aggravating and mitigating circumstances, and a just balance is to be struck. The said view is accepted and all the requisites for death penalty are satisfied in the instant case for the said reasons. [Paras 99, 100 and 101] [1052-D-H]

Machhi Singh and Ors. vs. State of Punjab **AIR 1983 SC 957: 1983 (3) SCR 413 – relied on.**

Sunder Singh vs. State of Uttaranchal **(2010) 10 SCC 611: 2010 (11) SCR 927;** *C.Muniappan vs. State of T. N.* **(2010) 9 SCC 567: 2010 (10) SCR 262;** *M. A. Antony vs. State of Kerala (2009) 6 SCC 220: 2009 (6) SCR 829; Jagdish vs.State of M. P.* **(2009) 9 SCC 495: 2009 (14) SCR 727;** *Prajeet Kumar Singh vs. State of Bihar* **(2008) 4 SCC 434: 2008 (5) SCR 969;** *Ram Singh vs. Sonia* **(2007) 3 SCC 1: 2007 (2) SCR 651;** *State of U.P. vs. Satish* **(2005) 3 SCC 114: 2005 (2) SCR 1132;** *Holiram Bordoli vs. State of Assam* **(2005) 3 SCC 793: 2005 (3) SCR 406;** *Saibanna vs. State of Karnatka* **(2005) 4 SCC 165: 2005 (3) SCR 760;** *Karan Singh vs. State of U.P.* **(2005) 6 SCC 342;** *Gurmeet Singh vs. State of U.P.* **(2005) 12 SCC 107: 2005 (3) Suppl. SCR 651;** *Sushil Murmu vs. State of Jharkhand* **(2004) 2 SCC 338: 2003 (6) Suppl. SCR 702;** *State of Rajasthan vs. Kheraj Ram* **(2003) 8 SCC 224: 2003 (2) Suppl. SCR 861;** *Om Prakash vs. State of Uttaranchal* **(2003) 1 SCC 648: 2002 (4) Suppl. SCR 623:;***Gurdev Singh vs. State of Punjab* **AIR 2003 SC 4187: 2003 (2) Suppl. SCR 80;** *Praveen Kumar vs. State of Karnataka* **(2003) 12 SCC 199;** *Suresh vs. State of*

U. P. **AIR 2001 SC 1344: 2001 (2) SCR 263;** *Molai vs. State of M.P.* **AIR 2000 SC 177: 1999 (4) Suppl. SCR 104;** *Ramdeo Chauhan vs. Stateof Assam* **AIR 2000 SC 2679: 2000 (2) Suppl. SCR 28;** *Narayan Chetanram Chaudhary vs. State of Mahrashtra* **AIR 2000 SC 3352: 2000 (3) Suppl. SCR 104;** *State of U.P. vs. Dharmendra Singh* **AIR 1999 SC 3789: 1999 (3) Suppl. SCR 52;** *Ronny vs. State of Mahrashtra* **AIR 1998 SC 1251: 1998 (2) SCR 162;** *Surja Ram vs. State of Rajasthan* **AIR 1997 SC 18: 1996 (6) Suppl. SCR 783;** *Umashankar Panda vs. State of M.P* **AIR 1996 SC 3011: 1996 (2) SCR 1154;** *Ravji vs. State of Rajasthan* **AIR 1996 SC 787: 1995 (6) Suppl. SCR 195;** *Suresh Chandra Bahri vs. State of Bihar* **AIR 1994 SC 2420: 1994 (1) Suppl. SCR 483;** *Bheru Singh vs. State of Rajasthan* **(1994) 2 SCC 467: 1994 (1) SCR 559;** *Sevaka Perumal vs. State of T. N.* **AIR 1991 SC 1463: 1991 (2) SCR 711;** *Sudam @ Rahul Kaniram Jadhav vs. State of Maharashtra* **Criminal Appeal Nos. 185-186 of 2011decided on 4.7. 2011;** *Ranjeet Singh vs. State of Rajasthan* **(1988) 1 SCC 633;** *Atbir vs. Govt. of NCT Delhi* **AIR 2010 SC 3477: 2010 (9) SCR 993;** *Surendra Koli vs. State of U.P.* **AIR 2011 SC 970;** *Bhagwan Dass vs. State (NCT) of Delhi* **AIR 2011 SC 1863;** *Prakash Kadam vs. R.V. Gupta* **AIR 2011 SC 1945;** *Satya Narayan Tiwari vs. State of U.P.* **(2010) 13 SCC 689: 2010 (12) SCR 1137 – referred to.**

Furman vs. Georgia **408 US 238 (1972);** *Gregg vs. Georgia* **28 US 153 (1976) – referred to.**

`Theories of Punishment' edited by Stanley E. Grupp; `Punishment' by Ted Honderich; `Punishment' by Philip Bean; 'The Death Penalty' edited by Irwin Isenberg;'The Penalty of Death' by Thorsten Sellen; `The Death Penalty' by Roger Hood **referred to.**

6. It is only the legislature which can abolish the death penalty and not the courts. As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary. It is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature. [Para 101] [1053-B]

Common Cause vs. Union of India **2008(5) SCC 511 – relied on.**

Case Law Reference:

2011 (3) SCC 306	**Referred to.**	**Para 20**
2008 (15) SCC 430	**Referred to.**	**Para 20**
1985 (1) SCR 88	**Referred to.**	**Para 20**
2011(5) SCC 317	**Relied on.**	**Para 20**
2008 (15) SCR 468	**Relied on.**	**Para 31**
2011 (1) SCR 1104	**Relied on.**	**Para 31**
J.T. 2011 (6) SC 640	**Relied on.**	**Para 31**
J.T. 2011 (6) SC 650	**Referred to.**	**Para 47**
408 US 238 (1972)	**Referred to.**	**Para 50**
428 US 153 (1976)	**Referred to.**	**Para 50**
1975 (3) SCR 463	**Relied on.**	**Para 54**
2010 (11) SCR 927	**Referred to.**	**Para 63**
2010 (10) SCR 262	**Referred to.**	**Para 64**
2009 (6) SCR 829	**Referred to.**	**Para 65**
2009 (14) SCR 727	**Referred to.**	**Para 66**
2008 (5) SCR 969	**Referred to.**	**Para 67**
2007 (2) SCR 651	**Referred to.**	**Para 68**

2005 (2) SCR 113	**Referred to.**	**Para 69**
2005 (3) SCR 406	**Referred to.**	**Para 70**
2005 (3) SCR 760	**Referred to.**	**Para 71**
(2005) 6 SCC 342	**Referred to.**	**Para 72**
2005 (3) Suppl. SCR 651	**Referred to.**	**Para 73**
2003 (6) Suppl. SCR 702	**Referred to.**	**Para 74**
2003 (2) Suppl. SCR 861	**Referred to.**	**Para 75**
2002 (4) Suppl. SCR 623	**Referred to.**	**Para 76**
2003 (2) Suppl. SCR 80	**Referred to.**	**Para 77**
(2003) 12 SCC 199	**Referred to.**	**Para 78**
2001 (2) SCR 263	**Referred to.**	**Para 79**
1999 (4) Suppl. SCR 104	**Referred to.**	**Para 80**
2000 (2) Suppl. SCR 28	**Referred to.**	**Para 81**
2000 (3) Suppl. SCR 104	**Referred to.**	**Para 82**
1999 (3) Suppl. SCR 52	**Referred to.**	**Para 83**
1998 (2) SCR 162	**Referred to.**	**Para 84**
1996 (6) Suppl. SCR 783	**Referred to.**	**Para 85**
1996 (2) SCR 1154	**Referred to.**	**Para 86**
1995 (6) Suppl. SCR 195	**Referred to.**	**Para 87**
1994 (1) Suppl. SCR 483	**Referred to.**	**Para 88**
1994 (1) SCR 559	**Referred to.**	**Para 89**
1991 (2) SCR 711	**Referred to.**	**Para 90**
(1988) 1 SCC 633	**Referred to.**	**Para 92**
2010 (9) SCR 993	**Referred to.**	**Para 93**

AIR 2011 SC 970	**Referred to.**	**Para 94**
AIR 1980 SC 898	**Relied on.**	**Para 95**
2011(5) SCC 317	**Relied on.**	**Para 99**
1983 (3) SCR 413	**Relied on.**	**Para 101**
2008(5) SCC 511	**Relied on.**	**Para 101**
AIR 2011 SC 1863	**Referred to.**	**Para 101**
AIR 2011 SC 1945	**Referred to.**	**Para 101**
2010 (12) SCR 1137	**Referred to.**	**Para 101**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1969 of 2009.

From the Judgment & Order dated 26.6.2006 of the High Court of Bombay at Bombay in Confirmation Case No. 3 of 2005 with Crl. A. No. 518 of 2005.

Jaspal Singh, Aman Vachher, Ashutosh Dubey, L.K. Sharma (for P.N. Puri) for the Appellant.

Sushil Karanjkar (for Asha Gopalan Nair) for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

"Qareeb hai yaaron roz-e-mahshar,
Chupega kushton ka khoon kyonkar,
Jo chup rahegi zubaan-e-khanjar,
Lahu pukaaregaa aasteen ka"

- Ameer Minai

1. Heard Shri Jaspal Singh, learned senior counsel for the appellant and learned counsel for the State of Maharashtra for the respondent. This is an appeal by special leave against the

judgment of the Bombay High Court dated 26.6.2006, which has confirmed the death sentence of the appellant given by the learned Sessions Judge dated 19.3.2005.

2. The accused is a businessman. He was a married man having one son and two daughters. He was married with the deceased Kanwaljeet Kaur about 25 to 27 years prior to the incident dated 10.4.2003. He had a son Amandeep Singh aged about 20 years and two daughters viz. Neeti and Taniya, aged about 22 years and 13 years respectively. All of them were allegedly killed by the accused in the early hours of the morning of 10.4.2003 by pouring petrol on their persons and setting them on fire.

3. Earlier the accused had lived at Ludhiana. However, it appears that he suffered business losses there, and so he shifted to Mumbai with his family and started residing in Jyotsna Building. Initially he was doing business of catering in the same building, and his son Amandeepsingh was assisting him in that business. After some time, the accused shifted his catering business to Kamlesh building which is situated in the same locality of Shere-Punjab colony, Andheri. There were several employees of the accused to assist him in the business of catering. Those servants used to sleep in front of his flat in the verandah. The accused was having a Maruti Zen Car and his son was having a motorcycle.

4. According to the prosecution, the accused was a hot tempered man. He was like a dictator in the family, and dominated his wife and children in the family, on account of which there was resentment in his family members. Further, it is alleged by the prosecution that the accused was ill-treating his wife and twice he had assaulted her with a leather belt.

5. On the night of 9.4.2003 the accused and all his family members were in their flat. All the servants were sleeping outside. The accused was seen coming to the flat between the night of 9.4.2003 and 10.4.2003 at about midnight. There were

two bed rooms in the flat of the accused. Ordinarily the accused and his wife used to sleep in one bed room while the children slept in another. There was a quarrel on the night of 9.4.2003 between the accused and his wife after he had returned back from work. Between 4.00 and 4.30 a.m. some of the servants heard a big noise of something bursting followed by or preceded by someone crying in pain. The servants woke up and found that the flat of the accused was on fire. There was utter confusion and chaos. Somebody phoned to the fire brigade and a fire engine came. The police also followed. The door of the flat was open, and it was smoky inside. Strong smell of petrol was coming from there. The fire was extinguished, and then only could they enter the bed room, where the four bodies of the members of the family of the accused viz. his wife, his son and two daughters were found burnt, and they were dead. The police made an inquiry from the servants and then a report of murder was lodged by PSI Prakash Shivram Kamble. The investigation soon started and inquest Panchanama, spot panchanama etc. were made. The bodies were then sent for post mortem.

6. In their preliminary inquiry, the police found that the Maruti Zen car of the accused was not there and the accused was also not there. Attempts were made to trace and search him, and ultimately the accused was arrested on or near Kishangadh, Madanganj in Ajmer District in Rajasthan on 14.4.2003. The car which the accused was driving was seized, and so also an amount of Rs.7,68,080/- in cash along with about 24 silver coins, 7 safari dresses and 7 turbans. A police officer was deputed from Mumbai and the accused was brought to Mumbai.

7. The statement of the accused was recorded under Section 27 of the Evidence Act and a red bucket from which he had allegedly thrown petrol on the persons of all the four members of his family was recovered at his instance.

8. All the material recovered by the police from the spot

viz. burned clothes, petrol can, bucket, broken glass pieces, etc. were sent to the Chemical Analyzer.

9. In the inquest, it was found that the son of the accused, Amandeepsingh had certain injuries on his body. Because of fire, the glass pieces were shattered in the room and one piece was removed from one of the injuries on the stomach of the son. An expert electrician was called, and he inspected the premises and opined that there was no short circuit. The Air-Conditioner's compressor was intact. Post mortem of all the bodies was conducted and it was found that all the four persons died as a result of burning.

10. During the course of investigation the statements of relatives of the deceased, neighbours, and the servants of the accused were recorded. All the seized property was sent to the Chemical Analyzer for opinion. Thereafter the charge sheet was filed. Separate charges under Section 302 of the Indian Penal Code was framed against the accused for committing murders of his wife Kanwaljeet Kaur, his son Amandeepsingh and two daughters Neeti and Taniya. The accused pleaded not guilty to the charges. Thereafter, the Additional Sessions Judge, recorded the evidence of the prosecution witnesses. In all 19 witnesses were examined as the prosecution witnesses. Thereafter the statement of the accused under Section 313 of the Criminal Procedure Code was recorded. The accused expressed his desire to examine witnesses in defence of his plea of alibi and, accordingly four witnesses were examined by the accused. The Additional Sessions Judge heard the arguments and also took on record the written arguments submitted by the advocate for the accused and, ultimately came to the conclusion that the prosecution had proved its case beyond reasonable doubt that the accused committed murders of all four members of his family. So far as sentence was concerned, the Additional Sessions Judge came to the conclusion, after considering the cases cited before him by both the sides, that this was a rarest of the rare case and imposed penalty of death upon the accused.

11. Two question arise before us (a) is the appellant guilty of murder? (b) if he is, should he be given the death sentence? We shall deal with these separately.

12. The appellant filed an appeal before the Bombay High Court and the matter was also sent for confirmation for the death sentence. By the impugned judgment the High Court dismissed the appeal and upheld the death sentence, and hence this appeal before us.

Is the appellant guilty of murder ?

13. Mr. Jaspal Singh, learned counsel for the appellant, first submitted that the appellant was leading a happy married life for more than 25 years before the incident and hence he had no motive to kill his wife and 3 children. He submitted that the prosecution has not been able to prove any motive, and motive is important in cases of circumstantial evidence like the present one.

14. This is a case relying entirely on circumstantial evidence, as there are no eye witnesses of the crime. It is true that motive is important in cases of circumstantial evidence, but that does not mean that in all cases of circumstantial evidence if the prosecution has been unable to satisfactorily prove a motive its case must fail. It all depends on the facts and circumstances of the case. As is often said, men may lie but circumstances do not.

15. The mother in law of the appellant Smt. Bhagwantkaur Oberoi, PW5 has stated in her deposition :

> ……"I was having three daughters Kanwaljeetkaur, Harjeetkaur and Harvinderkaur. Accused before the court is my son-in-law. He was married to my daughter Kanwaljeetkaur 25-26 years before. Accused was residing along with his wife and children at Sher-e-Punjab colony, Andheri, Mumbai. Accused came to Mumbai two years before. The relations between my daughter and accused

were not cordial and their matrimonial life was unhappy due to very angry nature of the accused. I used to go to the house of my daughter and vice-versa occasionally. There was talk between me and my daughter Kanwaljeetkaur. I used to ask my daughter how she is and how her husband is. At that time, she used to narrate to me that her husband is of very angry nature. She was very unhappy in her matrimonial life. She was subjected to the cruelty by the accused. She further told me that accused was behaving like a dictator. Children of my daughter Kanwaljeetkaur also used to tell me regarding angry nature of accused. My daughter also told me that accused used to beat her by leather belt. However, my daughter was behaving with the accused by way of adaptive nature. Whenever Kanwaljeetkaur was narrating me regarding ill treatment and harassment, I used to persuade her. I also told my daughter Kanwaljeetkaur that she should leave accused and reside separately along with her children. As I know the nature of the accused I never dared to persuade him.

On 19th March, 2003, there was birthday ceremony of my grandson Simarpalsingh. I invited my daughter Kanwaljeetkaur and her family members telephonically to attend the function at Mira road at my residence. Kanwaljeetkaur replied on telephone that she is unable to attend the function as she is busy with some work. After sometime my daughter Kanwaljeetkaur again made a telephone call to me and told that at the time of earlier telephone her husband was present and he quarreled and she along with her children were not allowed to attend the said function. At that time, Kanwaljeetkaur was crying on the telephone and while crying she told that she is very unhappy and she may die. I told my other daughter namely Harjeetkaur to ring Kanwaljeetkaur as there was quarrel between her and the accused. On that very day, at about 7 p.m. I received a telephonic call from Niti and she told that her father agreed and accordingly, we are attending

the function. Accordingly, Kanwaljeetkaur and accused and both daughters attended the function. At that time, accused was under the influence of liquor. While leaving my residence after the function accused told Kanwaljeetkaur and her daughters that he will put you all below the running truck to die.

On 9th April, 2003, at about 11.30 p.m. I received a telephonic call from the accused from his residence. On 10th April, 2003, at about 6 a.m. I received telephonic call from Phuldeepsingh Marva-PW3 regarding fire on the flat of accused. Accordingly, I went to the place of the incident. When I reached, I did not find the accused present. When I reached, four dead bodies were already kept in front of the flat. I became unconscious noticing the dead bodies. Police recorded my statement."

16. Phuldeepsingh Marva, PW3 also supported the prosecution case. His wife and the wife of the appellant were real sisters. In his deposition he has stated :

……."Before shifting to Mumbai, accused was doing business at Ludhiana, Punjab in automobile spare parts. Accused suffered loss in his business at Ludhiana and that is why he shifted to Mumbai. We were having cordial relations and we family members used to visit his house and vice-versa. The relations between accused and his entire family members were tense. Accused used to behave with his family members as a dictator. He was not having cordial relations with his family members. Son and daughters of the accused did not like the dictatorship of accused and that is why there were always quarrels between accused and his family. Accused used to tell me also that 75% decisions would be mine in my house. I persuaded the accused several times to change his nature. However, the accused never changed his nature and he was not ready to reduce his dictatorship.

There was also telephone in the house of accused. On 10th April, 2003, I was at my residence. I received a telephonic call from the landlord and estate agent of the accused at about 5.30 to 5.45 a.m. that there is a fire in the flat of the accused. I along with my wife rushed to the place of incident in my car. At about 6.30 a.m. I reached the place of incident. When I reached I saw fire brigade vehicles, police staff, fire brigade staff and four dead bodies which were kept in front of the flat. I saw all those four dead bodies. I identified four dead bodies i.e. of Kanwaljeetkaur, Amandeepsingh, Niti and Taniya. I noticed that accused along with his car was not present. Accused used to park his Zen car in front of the flat near the gate. I saw four dead bodies who sustained burn injuries on their person. I saw the bangles in the wrist of Kanwaljeetkaur. I also saw a piece of glass in the body of Amandeepsingh near wrist. Article 1 – pair of bangles before the court was in the hands of Kanwaljeetkaur. Police recorded my statement."

17. We see no reason to disbelieve PW3 or PW5. From their testimony it is evident that the appellant was a dictatorial personality, who wanted to dominate over his family and was also hot tempered. He would even beat his wife (deceased) with a leather belt.

18. Mr. Jaspal Singh, learned counsel for the appellant, submitted that if the relations between the accused and his wife were strained why did his wife Kanwaljeetkaur continue to live with him for 25 years. In this connection, we have only to point out that in India many women accept the bad treatment of their husbands and continue living with them because a girl at the time of marriage is told by her parents that after marriage her place is with her husband and she has to accept whatever treatment she gets from her husband and in- laws. She has to 'nibhao' all treatment after marriage. Hence she continues living with him even if her husband is a brutish, nasty and loathsome

person. However, it is evident that when the children of the accused grew up they often resisted and protested against the dictatorial behaviour of the appellant, and this led to a lot of friction in the family. Hence we are of the opinion that the appellant did not have a happy married life with his wife, rather it was just the reverse.

19. As to what motivated the appellant to commit this gruesome and ghastly act is impossible for us to say because the Court cannot enter into the mind of a human being and find out his motive. We can only speculate.

20. This is a case of circumstantial evidence and in cases of circumstantial evidence the settled law is that the prosecution must establish the entire chain of circumstances which connects the accused to the crime vide *Wakkar and Anr. vs. State of Uttar Pradesh* 2011(3) SCC 306 = JT 2011(2) SC 502, *Krishnan vs. State represented by Inspector of police* 2008(15)SCC 430=JT 2008(6) SC 282, *Sharad Birdhichand Sarda vs. State of Maharashtra* AIR 1984 SC 1622, *Mohd. Mannan alias Abdul Mannan vs. State of Bihar* 2011(5) SCC 317 (vide para 14), etc.

21. We have, therefore, to see whether the prosecution has been able to establish the chain of circumstances connecting the accused to the crime.

22. The accused was last seen with the deceased. It has come in the evidence of Vinodkumar Gudri Mandal, PW16 that he was working with the accused at Sher-E-Punjab caterers. This witness along with some servants used to sleep near the bedroom of the flat of the accused in the veranda. He has stated that at about midnight when he was in the veranda in front of the flat of the accused he heard loud sound of quarrels from the flat of the accused. He identified the sounds as the voice of the accused and his wife.

23. This witness has stated that he was on talking terms

with the family members of the accused. Since he was known to the accused and his family members he could obviously recognize their voices. Hence we see no reason to disbelieve his evidence that at about midnight of 9.4.2003 there was a quarrel between the appellant and his wife. No reason has been ascribed by the defence counsel as to why this witness should make a false statement.

24. This witness has also stated that on 10.4.2003 at 4.30 a.m. he heard a big sound in the building. He and the other servants saw fire in the flat of the accused. They tried to extinguish the fire with the help of water and sand but were unsuccessful. One member of the society informed the fire brigade telephonically and the fire brigade came and extinguished the fire. This witness identified the 4 dead bodies inside the flat of the accused. He also noticed that the Zen car was not at its parking place and the accused was also not present.

25. This witness has also stated in his evidence that one month before the incident when he returned to the building where the incident took place he went inside the flat of the accused and inadvertently opened a white color plastic can and he noticed petrol in the said can. The witness identified the said can before the court.

26. We see no reason to disbelieve this witness Vinodkumar Gudri Mandal. No enmity has been shown between him and the accused and no motive shown why he should give a false statement against the accused.

27. PW4, Kamalsingh Mahipatsingh Rawat was working as a cook in the hotel cum catering of the appellant. He has stated in his evidence that after his duty ended at 11.30 p.m. he used to sleep in front of the flat of the accused in Jyotsna building where the accused was residing with his wife and children. He said that he knows all the family members of the accused.

28. In his evidence he has stated that at about 11.30 to 11.45 p.m. he left the hotel and went towards the Jyotsna building where he sleeps in front of the flat of the accused. He has further stated that about half an hour thereafter the accused also returned to his residence. At about 4.00 to 4.30 a.m. he heard a noise of bursting of something and smoke was coming out from the flat which was on fire. He also heard the sound of crying from the said flat. He could not enter the flat as it was too smoky. Thereafter the fire brigade came and extinguished the fire. He entered the flat and saw the dead bodies of the deceased. The accused was not found there, nor his Maruti car. The witness had seen the Maruti car parked in front of the flat when he went to sleep but it was not found in the morning.

29. The evidences of PW3, PW4 and PW 5, which we see no reason to disbelieve, thus fully establish that the appellant was last seen with his wife at about midnight and was in fact quarreling with her at that time.

30. The incident happened at 4 or 4.30 a.m. and hence there was a time gap of only about 4 hours from the time when the appellant was seen with his wife (deceased) and the time of the incident. Thus he was last seen with his wife and there was only a short interval between this and the fire.

31. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible, vide *Mohd. Azad alias Samin vs. State of West Bengal* 2008(15) SCC 449 = JT 2008(11) SC658 and *State through Central Bureau of Investigation vs. Mahender Singh Dahiya* 2011(3) SCC 109 = JT 2011(1) SC 545, *S.K. Yusuf vs. State of West Bengal,* J.T. 2011 (6) SC 640 (para 14).

32. In our opinion, since the accused was last seen with his wife and the fire broke out about 4 hours thereafter it was

for him to properly explain how this incident happened, which he has not done. Hence this is one of the strong links in the chain connecting the accused with the crime.

33. The victims died in the house of the accused, and he was there according to the testimony of the above witnesses. The incident took place at a time when there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night.

34. Another link in the chain of circumstances connecting the accused with the crime is his sudden disappearance from the scene after the incident. The version of the accused is that he left the scene as he had received a message that his sister in Delhi who was suffering from cancer had become critical, and hence he rushed from Mumbai to be with her. We are not at all convinced with the story. When a person living in Mumbai receives a message that his relative is critical in Delhi, he would have ordinarily take a flight from Mumbai to Delhi, and would not go by car, which journey would take several days. A flight from Mumbai to Delhi takes two hours. There was no shortage of money with the appellant as he was found with cash of Rs.7,68,080/-.

35. Leaned counsel for the appellant submitted that the appellant first went by car to the Dargah in Ajmer to pray for his sister. We cannot accept this version. When a relative in Delhi is critical, a person in Mumbai would have rushed to Delhi by flight to see her and would have gone to a Dargah only subsequently. Under Section 114 of Evidence Act we have to presume the natural conduct of persons. Section 114 states :

> "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of events, human conduct, and public and private business"

36. We agree with the High Court which has observed in the impugned judgment :

> ……."We are not at all in agreement with the submissions made by the advocate for the accused in this regard. There are many reasons for this. The first reason is that there is nothing on record to show that a day or two before the accused left Mumbai on 10th April, 2003, the accused had received any urgent message from the wife of D.W.3 that his presence was imminently and immediately required at Delhi and her condition was critical or that the accused received SOS, that he should immediately rush to Delhi. Secondly, if the accused had earlier planned to go to Delhi in such a case of urgency and exigency, ordinarily he should have and could have traveled by flight or train and would not have driven to Delhi by his car. Thirdly, looking to the age of accused, who was around 50 to 52 years at that time, ordinarily the accused would not have gone alone on such a long journey. He had a number of servants at his disposal, at least 7 were sleeping in front of his flat in the veranda at that very night, he could have taken one of them as assistant on the road. Fourthly, there was no reason for the accused not to have taken a driver for such a long journey. Fifthly, there is no one examined from the hotel to whom the accused had disclosed that he would not be available for looking after the business for at least a couple of weeks or one week. The fact that the accused had with him 7 safari dresses and 7 turbans when he was arrested, clearly shows that the accused had an intention to stay for quite a long time away from his house and away from his business. There is nothing on record to show that prior to this incident the accused was not on talking terms or visiting terms with his mother in law. Not a single suggestion was give to this witness by the accused that they were informed by the accused that he is going to Delhi to see his sister or wife of D.W.3. Next impossibility in the theory of alibi is that

there is no earthly reason for the accused to leave his house at odd time of 2.00 a.m. He could have traveled either before mid night or he could have traveled after sunrise. Further there is no explanation from the accused as to why he was carrying such a huge amount of Rs.7,68,080/- and 24 silver coins."

37. We, therefore, agree with the High Court that the plea of alibi was totally false and bogus.

38. It is difficult for us to speculate as to why the accused fled from the scene of the crime carrying cash of Rs.7,68.080/- apart from 7 safari suits and that too without a driver or an assistant, all of whom were easily available to him. It is quite possible that after having committed this horrible crime the accused may have himself realized the gravity of his crime and in this shocked state fled from the scene. However, this is only a speculation and nothing turns on it.

39. It has then been argued that ordinarily the accused and his wife used to sleep in one bedroom, while the 3 children used to sleep in the other bedroom. However, all 4 victims were found burnt in the children's bedroom. This has been explained by the prosecution by pointing that in the night of 9.4.2003 when the accused came from his hotel he had a heated quarrel with his wife and due to this quarrel the wife decided to sleep with the children and not with the accused. This version seems quite probable, and the defence cannot make much out of the fact that all 4 bodies were found in one bedroom.

40. When the police party carried out panchanama of the house of the accused, that is, after the fire was fully extinguished and when the FIR was lodged by PW1, PSI Prakash Kamble, he found, as stated by him, that in the bedroom to the northern side of the hall on the bed i.e. on the mattress of the bed a 10 litre white plastic can was seen and it had some petrol in it. It was also found and noticed that the can was new. It is a fact that all the four inmates were burned to death by using petrol.

Therefore, the finding of the 10 litre can with some petrol in its clearly shows that petrol, sufficient in quantity to burn and kill all the four persons, was brought by the accused.

41. In addition to this, the prosecution has also tendered one more piece of evidence which is in the form of recovery at the instance of the accused under Section 27 of the Evidence Act. In this regard, the prosecution has examined PW14 Nilesh Kamalakar Aarate the panch witness and proved Exhibit 50 and 50-A. Exhibit 50 is the statement of the accused under Section 27 of the Evidence Act and Exhibit 50-A is recovery panchanama. In his evidence PW14 has stated that on 14th April, 2003 he was called by Meghwadi Police as the accused made a voluntary statement that he will point out the bucket in which he took petrol from the plastic can. This statement was recorded and thereafter the accused led the police party to his flat. The seal of the flat was removed and from the bath room of the said flat the accused pointed out the red bucket. Discovery panchanama was Exhibit 50-A and red bucket was Article 14.

42. This red bucket was sent to a Chemical Analyzer. The report of the C.A. (Exhibit 67) is that the bucket showed positive result regarding detection of petrol. This means that this bucket was used for pouring petrol on all the four victims.

43. Regarding this piece of evidence, the learned counsel for the appellant contended that this was a fabrication by the police. Learned counsel contended that if on 10th April, 2003 a detailed search of the house of the accused for finding out incriminating articles was made and if a detailed panchanama was prepared and a number of articles were seized, then how was it that the police could not find out this bucket on 10th April, 2003 itself and why they waited for recovery for this bucket till the accused was arrested and brought to Mumbai and made discovery statement on 14th April, 2003.

44. We are not at all convinced by this submission. It is

true that on 10th April, 2003 the flat of the accused was searched, but it is quite natural that the investigating officer did not understand the significance of this bucket even if it was seen on that day. They could not visualize or imagine the use of the bucket for splashing or spreading the petrol on the four victims. They came to know about it only after the accused made the disclosure statement, and then they recovered this bucket. The investigating office, regarding other aspects of the matter appears to be truthful and sincere. There is no reason to suspect the bona fide of the investigating officer, and therefore there is nothing on record from which it can be inferred that this bucket was planted by the police to strengthen the case against the accused.

45. Learned counsel for the appellant submitted that the appellant was making phone calls to his mother-in-law after leaving his flat in Mumbai on 10.4.2003. In our opinion nothing turns on that. It has come in evidence that Amandeep Singh, son of the accused, was looking after the business, and if the accused was going away for 3 to 4 days it was natural for him to expect calls from, and make calls to, his son Amandeep Singh and his wife and other relatives, but that was not done.

46. The learned counsel for the appellant then submitted that as per the prosecution case, all the four victims were in one bed room. Two bodies were found on the bed and two were lying on the ground. The learned counsel contended that if all four victims were sleeping on one bed then how were two bodies found on the ground. He also argued that if petrol was splashed on the persons of four victims then why did none of them wake up before the accused set them to fire. In our opinion, the presence of the 10 litre can and using the bucket clearly show that petrol in large quantity was used. Use of the bucket further fortifies the prosecution case because if the petrol was sprinkled from a can it would have taken time to cover all the bodies of four persons, the bed and the surroundings. But use of the bucket clearly shows that splashing of petrol could

be achieved within a second and that profuse splashing of petrol could be achieved by using the bucket and then setting the petrol on fire would not even require five seconds. Petrol is a very combustible material. It might be that before the actual death occurred two persons rolled down from the bed and fell on the ground. All this is speculation on which nothing turns. Since there were no eye witnesses, and since presence of the accused a few hours before the crime is proved, it was for the accused to explain all this.

47. Mr. Jaspal Singh submitted that several of the circumstances were not put to the accused under Section 313 Cr.P.C. It is true that circumstances which were not put to the accused in his examination under Section 313 cannot be used against him, vide *State of U.P. vs. Mohd. Ikram,* J.T. 2011 (6) SC 650 (para 13). However, we have carefully examined the statements of the accused under Section 313 Cr.P.C., and we find that as many as 168 questions were put to him relating to all the relevant circumstances. Hence there is no merit in this submission.

48. Mr. Jaspal Singh then submitted that the incised wounds on the son of the appellant, Amandeep, have not been explained by the prosecution. In this connection we wish to say that since there were no eye witnesses and the entire prosecution case rests on circumstantial evidence it is hardly for the prosecution to explain these injuries, rather it was for the appellant, who was present at the time of the incident (as we have found) to explain them. Moreover, the question of explaining the injuries ordinarily arises when the injuries are on an accused, and not on the victim. At any event, the prosecution has explained that these were due to the broken glass pieces found on the spot.

49. Thus, in our opinion the prosecution has been able to establish the entire chain of circumstances which connect the accused to the crime. These are :

1. There were strained relations between the accused and his family members including his wife. He used to beat his wife with a leather belt, and was dictatorial, which attitude was resented by the family members.

2. The accused came to his flat on 9th April, 2003 at midnight, and was last seen with his wife in his flat where his children also lived.

3. The accused had quarrel with his wife for five or ten minutes on the night of the incident.

4. Ten litre can with petrol residue was found in the house.

5. The bucket showing positive result in the test conducted by the Chemical Analyzer was found to have been used for splashing or throwing the petrol.

6. The incident happened in the flat of the accused where there was no one else inside except his family members. All the deceased were asleep when the petrol was poured over them and their bodies set on fire. They were killed in a most gruesome, diabolical and cruel manner.

7. It was a pre-planned murder, because the accused had brought sufficient petrol into his flat to kill everyone. Ordinarily no one keeps so much petrol in his residential apartment.

8. The accused absconded from the scene of the offence immediately thereafter, and did not disclose to his family members or servants about his departure.

9. The incident occurred between 4 to 4.30 A.M., and the accused was the person last seen with his wife before the incident.

10. The accused pointed out the bucket in his statement under Section 27 of the Evidence Act;

11. The accused was arrested at Kisangadh, Madanganj in Ajmer District (Rajasthan) four days thereafter with huge cash of Rs.7,60,080/-, with safari dresses, turbans and 24 silver coins etc..

12. He raised false defence of alibi

13. There was full opportunity for the accused to kill all the four persons. No one else was present in the flat.

Does the Appellant deserves the death sentence ?

Death Penalties Worldwide

50. There is a wide divergence in various countries in the world whether to permit or not permit the death penalty. According to Amnesty International as per 31.12.2010, 96 countries have legally abolished the death penalty, 34 countries have not used it for a considerable period of time while 58 countries have still retained it. Most European countries have abolished the death penalty . The United Kingdom abolished death penalty in 1973, France in 1981, Germany in 1949, Italy in 1947 etc. Canada abolished it in 1976. Russia legally permits death penalty, but has not used it after 1996. Australia last used the death penalty in 1967, and formally abolished it in 2010. China has death penalty for a variety of crimes, e.g. aggravated murder, drug trafficking, large scale corruption etc. China executes more people than all the rest of the world put together. In African and Latin American countries some permit death penalty while others do not. Most Asian and Arab countries permit death penalty. As regards the United States of America, some States permit it while others do not. The US

Supreme Court in *Furman vs. Georgia* 408 US 238 (1972) held the death penalty to be unconstitutional, but this decision was reversed four years later in *Gregg vs. Georgia* 428 US 153 (1976) which held that the death penalty is not unconstitutional.

51. The UN General Assembly in 2007-08 passed a non binding resolution calling for a global moratorium of execution with a view to eventual abolition. However, 65% of the world population live in countries like China, India, Indonesia and the US which continue to apply death penalty, although both India and Indonesia only use it rarely. Each of these four nations voted against the UN General Assembly resolution. Of the 194 independent States in the world that are members of the United Nations or have UN observer status, 42(22%) maintain the death penalty both in law and practice, 95 (49%) have abolished it, 8(4%) retain it for crimes committed in exceptional circumstances such as in time of war and 49(25%) permit its use for ordinary crimes, but have not used it for at least 10 years and have a policy or established practice of not carrying out an execution or it is under a moratorium.

52. In the present case, we are not going into the validity or otherwise of various theories of criminal penology viz., the retributive, deterrent, preventive and reformative theories. Suffice it to say that there are conflicting views and even conflicting data on this topic (see 'Theories of Punishment' edited by Stanley E. Grupp, 'Punishment' by Ted Honderich, 'Punishment' by Philip Bean, 'The Death Penalty' edited by Irwin Isenberg, 'The Penalty of Death' by Thorsten Sellen, 'The Death Penalty' by Roger Hood, etc.). We shall, therefore, confine ourselves to the case before us.

Death Penalty in India

53. Section 302 provides the punishment for murder. It stipulates a punishment of death or imprisonment for life and fine. Once an offender is found by the court to be guilty of the offence of murder under Section 302, then it has to sentence

the offender to either death or for imprisonment for life. The court has no power to impose any lesser sentence.

54. If there is a reasonable doubt about the guilt of the offender, the only proper verdict is to acquit him and not to impose a sentence lesser than imprisonment for life vide *Santosh vs. State of MP* AIR 1975 SC 654.

55. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows:

> "In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at the conclusion:
>
> (a) Basically, every human being dreads death.
>
> (b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.
>
> (c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers - are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.
>
> (d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it".

56. Prior to 1955, under the old Criminal Procedure Code 1898, Section 367 (5) of the Code stipulated that the Court had to give reasons, if the sentence of death was not imposed in a case of murder. In other words, imposition of death sentence for the offence of murder was the rule, and if the court desired to make a departure from the rule and impose the lesser punishment of imprisonment for life, it was required to give reasons for the same. In 1955, sub- Section 5 of Section 367 was deleted. The result of such deletion was that the discretion available to the Court in the matter of the sentence to be imposed in a case of murder was widened. Several High Courts also interpreted the consequence of the deletion to mean that the sentence of life imprisonment was the normal sentence for murder and the sentence of death could be imposed only if there were aggravating circumstances. The Code of the Criminal Procedure was further amended in 1973, making life imprisonment the normal rule. Section 354 (3) of the new Code provides:

"When the conviction is for an offence punishable with death or, in the alternative, imprisonment for life or imprisonment for a term of years, the judgment shall state reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence".

57. Thus in the new Code, the discretion of the judge to impose death sentence has been narrowed, for the court has now to provide special reasons for imposing a sentence of death. It has now made imprisonment for life the rule and death

sentence an exception, in the matter of awarding punishment for murder.

58. In *Bachan Singh vs State of Punjab,* AIR 1980 SC 898, a Constitution Bench (5 Judge Bench) of this Court, while upholding the constitutional validity of death sentence observed (vide para 207):

" For persons convicted of murder life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed".

59. After *Bachan Singh's* case (supra) this Court again considered the question as to when death sentence should be imposed in *Machhi Singh and others vs State of Punjab* AIR 1983 SC 957 (a 3 Judge Bench decision). In that case the accused had methodically in a pre planned manner murdered seventeen persons of a village including men, women and children. The accused were awarded death sentences but the Court held that in order to apply the guidelines of *Bachan Singh's* case (supra) inter-alia the following questions should be asked: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and called for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender. The Court held that if the answer to the above is in affirmative, then death sentence is warranted.

60. In *Macchi Singh's* case (supra) this Court further observed:

"The reasons why the community as a whole does not endorse the humanistic approach reflected in `death

sentence-in-no- case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of `reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law endorsed by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others it if suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by killing a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self- preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission, of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. **Manner of Commission of Murder**

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. **Motive for commission of murder**

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-'-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course of betrayal of the motherland.

III. **Anti Social or Socially abhorrent nature of the crime**

(a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of

extracting dowry once again or to marry another woman on account of infatuation.

IV. **Magnitude of Crime**

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. **Personality of victim of murder**

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-'- vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

61. In *Macchi Singh's* case (supra) this Court further observed that in determining the culpability of an accused and the final decision as to the nature of sentence, a balance sheet of the aggravating and mitigating circumstances vis-a-vis the accused had to be drawn up and in doing so the mitigating circumstances had to be given full weight so that all factors were considered before the option is exercised.

Some decisions where death penalty has been affirmed by this Court

62. We may now consider some decisions where death penalty has been given by the court holding the crimes to belong to the 'rarest of the rare cases'.

63. In *Sunder Singh vs. State of Uttaranchal,* **(**2010) 10 SCC 611 the accused had gone to the place of occurrence well prepared carrying jerry cans containing petrol, sword, pistol with two bullets, which showed his pre-meditation and cold blooded mind. In the incident five persons lost their lives while the sole surviving lady survived with 70% burn injuries. The murder was committed in a cruel, grotesque and diabolical manner, and closing of the door of the house was the most foul act by which the accused actually intended to burn all the persons inside the room and precisely that happened. There were no mitigating circumstances, and hence it was one of the rarest of rare cases. Consequently, the death sentence was justified.

64. In *C. Muniappan vs. State of T. N.,* (2010) 9 SCC 567 three members of an unlawful assembly engaged in road blocking (in a public demonstration against a court verdict), committed planned murder by burning a bus carrying helpless, innocent, unarmed, girl students in a totally unprovoked situation. Three girls died and 20 got burn injuries in the incident. This Court held that it was one of the rarest of rare cases, one where the accused would be a menace and threat to the harmonious and peaceful co-existence of the society. The accused deliberately indulged in a planned crime without any provocation and meticulously executed it, and hence the death sentence was the most appropriate punishment. There being aggravating circumstances and no mitigating circumstance death sentence imposed on the three members of the unlawful assembly was upheld.

65. In *M. A. Antony vs. State of Kerala,* (2009) 6 SCC 220 all six members of a family were murdered at their residence at night. The motive was money, and the absence of the accused from his own residence during the corresponding periods i.e on the night of the occurrence till next morning, and recovery of clothes under Section 27 of Evidence Act 1872, finger prints on the door steps of the house matching with those of accused, and recovery of scalp hair of accused from place

of occurrence were damning circumstantial evidence. Having regard to the chain of circumstances the death sentence was upheld.

66**.** In *Jagdish vs. State of M. P.,* (2009) 9 SCC 495 the assailant murdered his wife and five children (aged 1 to 16 years) in his own house. The murders wee particularly horrifying as the assailant was in a dominant position and a position of trust as the head of the family. The assailant betraying the trust and abusing his position assailant murdered his wife and minor children (youngest being the only son just 1 year old). This Court held that the balance sheet of aggravating and mitigating circumstances was heavily weighted against the assailant making it a rarest of rare case. Consequently the award of death sentence was just.

67. In *Prajeet Kumar Singh vs. State of Bihar,* (2008) 4 SCC 434 the accused was a paying guest for a continuous period of four years in lieu of a sum of Rs. 500/- for food and meals. He brutally executed three innocent defenseless children aged 8, 15 and 16, attempted to murder the father (informant) and mother who survived the attack with multiple injuries. There was no provocation or reason for committing this ghastly act at a time when the children were sleeping. There were several incised wounds (muscle deep or bone deep) caused to the deceased. Considering the brutality, diabolic, inhuman nature and enormity of the crime (multiple murders and attacks), this Court held that the mindset of the accused could not be said to be amenable to any reformation. Therefore it came under the rarest of rare category where not awarding a death sentence would have resulted in failure of justice.

68. In *Ram Singh vs. Sonia,* (2007) 3 SCC 1 the wife in collusion with her husband murdered not only her step brother and his whole family including three tiny tots of 45 days, 2 and ½ years 4 years, but also her own father, mother and sister so as to deprive her father from giving property to her step brother and his family. The murders were committed in a cruel, pre-

planned and diabolic manner while the victims were sleeping, without any provocation from the victim's side. It was held that the accused persons did not possess any basic humanity and completely lacked the psyche or mindset amenable to any reformation. It was a revolting and dastardly act, and hence the case fell within the category or rarest of rare cases and thus death sentence was justified.

69. In *State of U.P. vs. Satish* **(**2005) 3 SCC 114 the victim was a six year old girl who lost her life on account of the bestial acts of the respondent who raped and murdered her. The body was found in a sugarcane field and blood was oozing from her private parts and there were marks of pressing on her neck (suggesting death by strangulation). It was held that this diabolic, iniquitous, flagitious act reached the lowest level of humanity when the rape was followed by brutal murder. Hence death sentence was justified.

70. In *Holiram Bordoli vs. State of Assam* **(**2005) 3 SCC 793 the accused persons were armed with lathis, and various other weapons. They came to the house of the victim and started pelting stones on the bamboo wall of the said house. Thereafter, they closed the house from the outside and set the house on fire. When the son, daughter and the wife of the victim somehow managed to come out of the house, the accused persons caught hold of them and threw them into the fire again. Thereafter the elder brother who was staying in another house at some distance from the house of the victim was caught and dragged to the courtyard of the accused where the accused cut him into pieces. It was held that there was absence of any strong motive and the victims did not provoke or contribute to the incident. The accused was the leader of the gang, and the offence was committed in the most barbaric manner to deter others from challenging the supremacy of the accused in the village. Held, that no mitigating circumstances to refrain from imposing death penalty were found.

71. In *Saibanna vs. State of Karnatka* (2005) 4 SCC 165

the accused was out on parole in the case of murder of his first wife, in which he was already convicted and sentence to life imprisonment. He pre-planned the murder of his second wife and daughter (aged 1 to 1 ½ years) when the victims were sleeping by using a hunting knife (jambia) which is not ordinarily available in a house. There were no justified reasons for any extenuating circumstances in favour of the accused. Putting the case under the 'rarest of rare case' category death sentence was upheld.

72. In *Karan Singh vs. State of U.P.* (2005) 6 SCC 342 the two appellants chased the deceased persons and butchered them with axes and other weapons in a very dastardly manner. After killing three adults, the appellants entered their house and killed two children who in no way were involved with the alleged property dispute with the appellants. It was held that the sole intention here was to exterminate the entire family. Thus, it was a 'rarest of the rare' case.

73. In *Gurmeet Singh vs. State of U.P.* (2005) 12 SCC 107, appellant G, along with his friend L killed thirteen members of his family including small kids for a flimsy reason (objection of family of G to the visits and stay of L at their house) while they were asleep. Award of death sentence was held proper.

74. In *Sushil Murmu vs. State of Jharkhand* (2004) 2 SCC 338, the accused sacrificed a child of another person before Goddess Kali in a most brutal and diabolic manner for personal gain and to promote his fortunes by appeasing the deity with blood. It was held that superstition can not and does not provide justification for any killing, much less a planned and deliberate one.

75. In *State of Rajasthan vs. Kheraj Ram* (2003) 8 SCC 224, the accused deliberately planned and executed his two innocent children, wife and brother-in-law when they were sleeping at night. There was no remorse for such a gruesome act which was indicated by the calmness with which he was

smoking "chilam" after the commission of the act. As it was pre-planned and after the entire chain of events and circumstances were comprehended, the inevitable conclusion, was that the accused acted in a most cruel and inhuman manner and the murder was committed in an extremely brutal, grotesque, diabolical, revolting and dastardly manner.

76. In *Om Prakash vs. State of Uttaranchal* (2003) 1 SCC 648 the accused, a domestic servant killed three innocent members and attempted to kill the fourth member of the family of his employer in order to take revenge for the decision to dispense with his service and to commit robbery. The death sentence was upheld.

77. In *Gurdev Singh vs. State of Punjab,* AIR 2003 SC 4187, the appellants, having known that on the next day a marriage was to take place in the house of the complainant and there would be lots of relatives present in her house, came there on the evening when a feast was going on and started firing on the innocent persons. Thirteen persons were killed on the spot and eight others were seriously injured. The appellants thereafter went to another place and killed the father and brother of PW 15. Out of the thirteen persons, one of them was a seven-year old child, three others had ages ranging between 15 and 17 years. The death sentence was held justified.

78. In *Praveen Kumar vs. State of Karnataka* (2003) 12 SCC 199 the accused was accommodated by one of the victims (who was his aunt) despite her large family, and she gave him an opportunity to make an honest living as a tailor. The accused committed the pre-planned, cold-blooded murders of relatives and well wishers (including one young child) while they were sleeping. After the commission of the crime the accused absconded from judicial custody for nearly four years, which indicates the fact that the possibility of any remorse are rehabilitation is nil. Held the extreme penalty of death was justified.

79. In *Suresh vs. State of U. P.* AIR 2001 SC 1344 the brutal murder of one of the accused's brother and his family members including minor children at night when they were fast asleep with axe and chopper by cutting their skulls and necks for a piece of land was considered to be a grotesque & diabolical act, where any other punishment than the death penalty was unjustified.

80. In *Molai vs. State of M.P.* AIR 2000 SC 177, the Jail officer sent to his quarter a guard and a prisoner to work in the house. The 16 year old daughter of the said officer was at that time alone in the quarter and was preparing for her class 10th examination. Taking advantage of her loneliness, both the guard and the prisoner raped her, strangulated her and stabbed her. Thereafter with an intention to hide their crime they threw her dead body into a septic tank. This Court held that death was a fit punishment.

81. In *Ramdeo Chauhan vs. State of Assam* AIR 2000 SC 2679, the accused committed a pre-planned cold-blooded brutal murder of four inmates of a house including two helpless women and a child aged 2 ½ years during their sleep with a motive to commit theft. The accused also attacked with a spade another inmate of the house, an old woman, and a neighbour when they entered the house. The Court held that the young age (22 years) of the accused at the time of committing the crime was not a mitigating circumstance, and death penalty was a just and proper punishment.

82. In *Narayan Chetanram Chaudhary vs. State of Mahrashtra* AIR 2000 SC 3352 there was a pre-planned, calculated, cold-blooded murder of five women, including one pregnant woman and two children aged 1 ½ years and 2 ½ years, all inmates of a house, in order to wipe out all evidence of robbery and theft committed by two accused in the house at a time when male members of the house were out. It was held that the young age (20-22 years) of the accused persons cannot serve as a mitigating circumstance.

83. In *State of U.P. vs. Dharmendra Singh* AIR 1999 SC 3789, 5 persons were murdered, an old man of 75 years, a woman aged 32 years, two boys aged 12 years and a girl aged 15 years, at night when they were asleep by inflicting multiple injuries to wreak vengeance. This Court held that the ghastly and barbaric murder can be termed as rarest of the rare case and death penalty was just for such a diabolic act.

84. In *Ronny vs. State of Mahrashtra* AIR 1998 SC 1251, the accused was the nephew of the deceased, and because of the relationship he gained access inside the house for himself and his friends. The victims were unarmed and the crime was committed for gain i.e. to rob the valuables of the deceased family. The accused then killed all three members and then committed rape on the lady who was the wife of his maternal uncle and as old as his mother. Considering the facts of the case this Court held that it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance as everything was done in a preplanned way, and hence death penalty was upheld.

85. In *Surja Ram vs. State of Rajasthan* AIR 1997 SC 18, the appellant murdered his bother, his two minor sons and an aged aunt by cutting their neck with a kassi while they were all sleeping. He also attempted to murder his brother's wife and daughter but they survived with serious injuries. The dispute between them only related to putting a barbed fence on a portion of their residential complex. The death sentence was held to be justified.

86. In *Umashankar Panda vs. State of M.P* AIR 1996 SC 3011, the accused and his wife and five children took dinner together and went to bed in the same room. At midnight the accused started to attack his wife with a sword and on hearing the shouting the children woke up. On being questioned by the wife as to why he was trying kill her he did not give an answer but rather inflicted on her head, hand and foot more injuries.

When the eldest daughter intervened, he did not spare her either. The wife and two children died but three others escaped death. On being asked, the accused confessed to a witness that he had slaughtered all of them but he did not know how three others had escaped the death. This attitude of the accused clearly showed that he had purposely caused injuries to all his family members in order to liquidate them and was not happy that even the three children had escaped from death. There was no provocation or other circumstances to suggest that there was any quarrel between the accused and his wife or the children. The way in which the crime was executed showed that it was pre-meditated and not on account of sudden provocation.

87. In *Ravji vs. State of Rajasthan* AIR 1996 SC 787, the accused in a cool and calculated manner wanted to kill his wife and three minor children while they were asleep. When his mother intervened he injured her with an axe with an intention to kill her. He then silently went to the neighbour's house and attempted to kill his neighbour's wife who was also asleep. When his neighbour intervened he killed him too and fled from the place of occurrence and tried to hide himself. The accused had a solemn duty to protect his family members and maintain them but he betrayed the trust reposed in him in a very cruel and calculated manner without any provocation whatsoever. Hence the death penalty had to be upheld.

88. In *Suresh Chandra Bahri vs. State of Bihar* AIR 1994 SC 2420, the wife of accused wanted to sell her house and migrate to USA with her children against the wishes of her husband. Hence, the accused killed his wife after torturing her by truncating her body into two parts in a devilish style evincing total depravity only to gain control over the property. Further he killed his own two innocent children making them believe that they were being taken on a pleasure trip to the farm, killing them by inflicting severe injuries on their neck and other parts of the body and throwing them in the river.

89. In *Bheru Singh vs. State of Rajasthan* (1994) 2 SCC 467, the accused slaughtered his own wife and five children for no fault of theirs but only on mere suspicion that his wife was having an affair. This deserved a death sentence.

90. In *Sevaka Perumal vs. State of T. N.* AIR 1991 SC 1463, the accused indulged in illegal business of purchase and sale of "ganja". They conspired to entice innocent boys from affluent families, took them to far flung places where the dead body could not be identified. Letters were written to the parents purporting to be by the deceased to delude the parents that the missing boys would one day come home alive and that they should not give any report to the police so that the crime would go undetected. Four murders in a span of five years were committed for gain in cold-blooded, premeditated and planned way. This Court held that any other penalty except the death penalty would amount to a miscarriage of justice.

91. In *Sudam @ Rahul Kaniram Jadhav vs. State of Maharashtra* (Criminal Appeal Nos. 185-186 of 2011 decided on 4.7. 2011 this Court held that where an accused was found guilty of committing murder of four children and a woman with whom he was living with as husband and wife, the death penalty was justified. In that decision Hon'ble C. K. Prasad, J. observed:

> "Now we proceed to consider as to whether the case in hand falls in the category of rarest of the rarest cases. The appellant had chosen to kill the woman with whom he lived as husband and wife, a woman who was in deep love with him and willing to pay Rs. 15,000/- to PW. 6, Muktabai, to save the relationship. Appellant had not only killed the two children of the deceased who were born from the first husband but also killed his own two children. He projected himself to be single and changed his name to dupe a woman and in fact succeeded in marrying her. However, when the truth came to light, he killed five persons. The manner in which the crime has been committed clearly

shows it to be premeditated and well planned. It seems that all the four children and the woman were brought near the Pod in a planned manner, strangulated to death and dead bodies of the children thrown in the pond to conceal the crime. He not only killed Anita but crushed her head to avoid identification. Killing four children, tying the dead bodies in bundles of two each and throwing them in the pond would not have been possible, had the appellant not meticulously planned the murders. It shows that the crime has been committed in a beastly, extremely brutal, barbaric and grotesque manner. It has resulted in intense and extreme indignation of the community and shocked the collective conscience of the society. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment in our opinion is fraught with danger as it may expose the society to peril once again at the hands of the appellant. We are of the opinion that the case in hand falls in the category of the rarest of the rare cases and the trial court did not err in awarding the death sentence and the High Court confirming the same."

92. In *Ranjeet Singh vs. State of Rajasthan* (1988) 1 SCC 633, the entire family was murdered when they were fast asleep and this Court observed as under:

"With regard to the sentence of death, there cannot be two opinions. The manner in which the entire family was eliminated indicates that the offence was deliberate and diabolical. It was pre-determined and cold blooded. It was absolutely devilish and dastardly".

93. In *Atbir vs. Govt. of NCT Delhi* AIR 2010 SC 3477 this Court confirmed the death sentence given to the appellant who had committed multiple murders of members of his family, who are none other than step-mother, brother and sister in order to inherit the entire property of his father. The appellant, in consultation with his mother planned to eliminate the entire

family of his step-mother, and with this intention went to her house, closed the doors and mercilessly inflicted 37 knife injuries on the vital parts of the victims' bodies.

94. In *Surendra Koli vs. State of U.P.* AIR 2011 SC 970, the accused was a serial killer who used to lure small girls inside a house, strangulate them, have sex with their bodies, cut off their body parts, and eat them. This Court held that no mercy could be shown to his horrifying and barbaric deeds, and upheld the death sentence.

Present Case

95. Having considered the law on the point and several decisions of this Court where death sentence was affirmed, we may now consider whether this case deserves the death sentence. This Court held in *Bachan Singh vs. State of Punjab* (Supra) that death sentence should only be given in the rarest of rare cases. In our opinion this is one of such cases. Burning living persons to death is a horrible act which causes excruciating pain to the victim, and this could not have been unknown to the appellant.

96. In our opinion, a person like the appellant who instead of doing his duty of protecting his family kills them in such a cruel and barbaric manner cannot be reformed or rehabilitated. The balance sheet is heavily against him and accordingly we uphold the death sentence awarded to him.

97. In the present case the accused did not act on any spur of the moment provocation. It is no doubt that a quarrel occurred between him and his wife at midnight, but the fact that he had brought a large quantity of petrol into his residential apartment shows that he had pre-planned the diabolical and gruesome murder in a dastardly manner.

98. In our opinion a distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous. While life sentence should be given in the former,

the latter belongs to the category of rarest of rare cases, and hence death sentence should be given.

99. This distinction has been clarified by a recent judgment of my learned brother *Hon'ble C. K. Prasad, J. in Mohd. Mannan @ Abdul Mannan vs. State of Bihar* (2011) 5 SCC 317 (vide paras 23 and 24), wherein it has been observed:

> **"23.** It is trite that death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and-fast rule and parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as the rarest of rare cases and although certain comprehensive guidelines have been laid to adjudge this issue but no hard-and-fast formula of universal application has been laid down in this regard. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue. Nevertheless it is widely accepted that in deciding this question the number of persons killed is not decisive.
>
> **24.** Further, the crime being brutal and heinous itself does not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of

> aggravating and mitigating circumstances and a just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty. These are the broad guidelines which this Court had laid down for imposition of the death penalty".

We fully agree with the above view as it has clarified the meaning of the expression 'rarest of the rare cases'. To take a hypothetical case, supposing 'A' murders 'B' over a land dispute, this may be a case of ordinary murder deserving life sentence. However, if in addition to murdering 'B', 'A' goes to the house of 'B' and wipes out his entire family, then this will come in the category of rarest of the rare cases' deserving death sentence. The expression 'rarest of the rare cases' cannot, of course, be defined with complete exactitude. However, the broad guidelines in this connection have been explained by various decisions of this Court. As explained therein, the accused deserves death penalty where the murder was grotesque, diabolical, revolting or of a dastardly manner so as to arouse intense and extreme indignation of the community, and when the collective conscience of the community is petrified, or outraged. It has also to be seen whether the accused is a menace to society and continues to do so, threatening its peaceful and harmonious coexistence. The Court has to further enquire and believe that the accused cannot be reformed or rehabilitated and shall continue with his criminal acts. Thus a balance sheet is to be prepared in considering the imposition of death penalty of the aggravating and mitigating circumstances, and a just balance is to be struck.

100. We fully agree with the above view and we are of the opinion that all the requisites for death penalty as noted above are satisfied in the present case for the reasons given above.

Abolition of Death Sentence

101. It is only the legislature which can abolish the death penalty and not the courts. As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary. It is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature vide *Common Cause vs. Union of India* 2008(5) SCC 511 (vide paragraphs 25 to 27). The very fact that it has been held that death penalty should be given only in the rarest of the rare cases means that in some cases it should be given and not that it should never be given. As to when it has to be given, the broad guidelines in this connection have been laid down in *Macchi Singh's* case (supra) which has been followed in several decisions referred to above. This Court has also held that honour killing vide *Bhagwan Dass vs. State (NCT) of Delhi* AIR 2011 SC 1863, fake encounter by the police vide *Prakash Kadam vs. R.V. Gupta* AIR 2011 SC 1945 and dowry death vide *Satya Narayan Tiwari vs. State of U.P.* (2010) 13 SCC 689 comes within the category of 'rarest of rare cases'. Hired killing would also ordinarily come within this category.

102. In view of the foregoing, there is no merit in this appeal which is accordingly dismissed.

103.Before parting with this case, we would like to mention that we are not dealing with mercy petitions under Article 72 and 161 of the Constitution, but are confining ourselves to the question of imposing death penalty on the judicial side.

N.J. Appeal dismissed.

SANTOSH KUMARI

v.

STATE OF J & K & OTHERS

(Criminal Appeal Nos. 1660-1662 of 2011)

SEPTEMBER 13, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

CODE OF CRIMINAL PROCEDURE, 1989 (1933 A.D.) (as applicable in the State of Jammu and Kashmir):

ss.267 to 269 – Framing of charge – Held: Every charge framed under the Code should state the offence with which the accused is charged and if the law which creates the offence gives it any specific name, the offence should also be described in the charge by that name only – Code of Criminal Procedure, 1973.

Bail – Interim bail – Accused charged for committing offence u/ss.302, 109, 147, 148, 149 of the Ranbir Penal code – Trial court framed the charge which contained particulars as to the time, place, date of the offence of rioting and the place where the deceased succumbed to his injuries – High Court set aside the order of the trial court framing the charges against the accused observing that mere mention of the sections of the law in the charge was likely to prejudice the accused in his trial and that he would be disabled to know the exact charge he had to face and remanded the case to the trial court to consider it in terms of ss.267 to 269 and also directed release of all the accused except accused 'S' – On appeal, held: The order of the High Court was erroneous – The nature of charge was clearly understood by each accused – The cross-examination of eye witnesses on behalf of the accused indicated that none of the accused was in fact misled by so-called error pointed out by High Court – The remand of case to trial court for fresh consideration on the

point of charge was not warranted at all, as there was nothing to suggest even remotely that the accused had or would have been misled by any error or omission in the charge – The order admitting the accused except accused 'S' to interim bail of Rs.25,000/- each to the satisfaction of the trial court pending consideration of the prosecution case afresh on question of charge, was not warranted nor justified at all – The fact that accused were involved in commission of murder which entails death or life imprisonment should have been taken into consideration before releasing them on interim bail – Trial court after having considered the gravity of the offence and the apprehension on the part of the prosecution that the accused would tamper with the evidence in the event of their release on bail had rightly refused to enlarge the accused on bail – High Court while granting the relief of bail to the accused completely ignored and overlooked the relevant factors which weighed heavily against the accused – Moreover, the fact that complainant and one of the witnesses were physically assaulted and threatened in the Court premises has to be given its due weight – The FIR was pending necessary investigation wherein the statement of the son of the appellant was recorded u/s.164 – The contents of the FIR would indicate that the accused either themselves or through their relatives would try to tamper the evidence which is going to be led by the prosecution in the case – Under the circumstances, release of the accused on interim bail is set aside – Ranbir Penal code – ss.302, 109, 147, 148, 149.

Code of Criminal Procedure, 1973:

Object of – Held: Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities – It regards some of its provisions as vital but others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby.

Framing of charge – Object of – Held: The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction – If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated – The object of the statement of particulars to be mentioned in the charge is to enable the accused person to know the substantive charge, he will have to meet and to be ready for it before the evidence is given – The extent of the particulars necessary to be given in the charge depends upon the facts and the circumstances of each case – In drawing up a charge, all verbiage should be avoided – However, a charge should be precise in its scope and particular in its details – The charge has to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged – Code of Criminal Procedure, 1989 (1933 A.D.) (as applicable in the State of Jammu and Kashmir).

The prosecution case was that the husband of the appellant-complainant was assaulted by respondent nos.3 to 8. The victim was rushed to hospital where he died after 2-3 days. On March 24, 2008, the trial court framed charges against each accused for offences punishable under Sections 302, 109, 147, 148, 149 of the Ranbir Penal Code. Respondent nos.3 to 7 filed revision petition before the High Court. The High Court called for the records of the case. Respondent no.8 filed a petition under Section 561-A, Cr.P.C. for quashing the order passed by the trial court framing charges. During pendency of the petitions, the High Court sent back the records of the case and granted liberty to respondent nos. 3 to 8 to seek bail from the trial court. Meanwhile, the prosecution had examined three witnesses to the occurrence.

Pursuant to the liberty granted by the High Court, respondent nos. 3 to 8 applied for bail before the trial court. The trial court rejected the bail applications. Respondent nos.3 to 7 moved bail applications before the High Court. On 10.8.2010, the High Court directed production of evidence of witnesses. On 13.8.2010, the brother of respondent no.3 physically assaulted and threatened the son of the appellant as well as other witnesses to refrain them from deposing against the accused.

Respondent Nos. 3 to 8 argued before the High Court that the charge was invalid because there was no mention in the order of the trial court indicating the specific offence found to have been prima facie committed by one or the other accused individually or jointly nor there was any indication regarding the specific names of the offences sufficient for description in the order of framing charge, but only sections of the law against which the offences were found to have been committed were mentioned. On 20.10.2010, the High Court set aside the order of the trial court framing the charges against respondent nos.3 to 8 and remanded the case to the trial court to consider it in terms of Sections 267 to 269, Cr.P.C. By the said order, the High Court directed release of all the accused persons except respondent no.3. The instant appeals were filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1. The provisions relating to framing of charge against the accused before the trial commences, are contained in the Code of Criminal Procedure 1989 (1933 A.D.) which is applicable to the State of Jammu and Kashmir. The statute requires that every charge framed under the said code should state the offence with which

the accused is charged and if the law which creates the offence gives it any specific name, the offence should also be described in the charge by that name only. The statute further requires that the law and section of the law against which the offence is said to have been committed has to be mentioned in the charge. It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him. The object of the statement of particulars to be mentioned in the charge is to enable the accused person to know the substantive charge, he will have to meet and to be ready for it before the evidence is given. The extent of the particulars necessary to be given in the charge depends upon the facts and the circumstances of each case. It is well settled law that in drawing up a charge, all verbiage should be avoided. However, a charge should be precise in its scope and particular in its details. The charge has to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. One of the requirements of law is that when the nature of the case is such that the particulars mentioned in the charge do not give the accused sufficient notice of the matter with which he is charged, the charge should contain such particulars of the manner in which alleged offence was committed as would be sufficient for that purpose. If 'A' is accused of the murder of 'B' at a given time and place, the charge need not state the manner in which 'A' murdered 'B'. [Para 6] [1067-G-H; 1068-A-E]

2. Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities. It regards some of its provisions as vital but others not, and a

breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge, or even a total absence of a charge in the curable class. The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. Sections 34, 114 and 149 of the IPC provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention. [Para 7] [1068-F-H; 1069-A-C]

Willie Slavey v. The State of M.P. **1955 (2) SCR 140 – followed.**

3. A fair and reasonable reading of the order dated March 24, 2008 made it abundantly clear that accused 'RS' on June 28, 2007 at Sanoora about 9.30 pm with criminal intention along with other accused, having common object armed with lathies (sticks) committed rioting. Thus, the charge contained particulars as to the time, place and date of the offence of rioting. The law which creates the offence gives it specific name, i.e., "rioting" and, therefore, the offence is described in the charge by that name, namely, "rioting". The charge further proceeded to state that while committing rioting accused 'RS' and other assaulted deceased 'SS' with an intention to murder him and injured him seriously. Thus the name of person with reference to whom common criminal object was formed by the members of the unlawful assembly was stated. It was also stated in the Charge that during the treatment injured 'SS' had

succumbed to his injuries on July 2, 2007 at Medical College, Jammu. Thus, the date on which the deceased succumbed to this injuries and the place where the deceased succumbed to his injuries were mentioned with precision. Finally in the Charge, it was mentioned that accused 'RS' had committed offences punishable under Sections 302, 109, 147, 148, 149 of the Ranbir Penal code. After framing Charge immediately the plea of accused 'RS' was recorded. The first question asked to him was whether he had understood the contents of the Charge which was read and explained to him. In answer to the said question accused 'RS' had answered in affirmative. The record showed that thereafter two questions were put to accused 'RS' in answer to which he had claimed that he was innocent and had wished to be tried. This is not a case of mere mention of the sections of the law in the charge or the order of framing charge. Therefore, the High Court was not justified in observing that mere mention of the sections of the law in the charge was likely to prejudice the accused in his trial and that he would be disabled to know the exact charge he had to face, nor the High court was justified in observing that the trial court was not alive to the provisions of Chapter XIX of the Code of Criminal Procedure. It is necessary to reproduce part of the order passed by the trial court which is relied upon by the High Court for the purpose of coming to the conclusion that mere mention of the sections of the law in the charge or the order framing charge, would not serve the purpose of the law. A glance at the order of the trial court would reveal that at the stage of framing charge the counsel for the accused had pleaded for discharge of the accused under the relevant provisions of the Code of Criminal Procedure 1989. Not only the counsel for the accused had advanced oral arguments, but he had also submitted written arguments and cited judgments as well as statements of the witnesses recorded by the police and relied upon other connected documents on the file

to emphasize that the accused should be discharged. The order of the trial court which was quoted by the High Court in the impugned judgment was not the order framing charge at all. It was a short order indicating that no case was made out by the counsel for the accused for discharging the accused at the stage of framing charge and that the accused should be tried for the offences which were mentioned in the order of framing charge separately against each accused. [Paras 9, 10, 11] [1071-E-H; 1072-A-E; 1073-C-F]

4. The facts and in the circumstances of the case showed that a patent error of law apparent on the fact of the record was committed by the High Court in coming to the conclusion that in the order of framing charge there was mere mention of the sections of the law which was likely to prejudice the accused in his trial, as the accused would be disabled to know the exact charge he had to face. The High Court erred in law in holding that it was obligatory for the trial court to have indicated in its order and the charge sheet the description of the offences for which one or the other accused had to be tried because all necessary particulars which should be stated as required by law were already stated by the trial court while framing charge. Further the fact that trial against the accused has/had made considerable progress in as much as material evidence of the eye witnesses to the occurrences was recorded by the trial court could not have been ignored while deciding the question whether proper charge against each accused was framed or not. The nature of charge to be faced was clearly understood by each accused which is evident from the plea recorded by the trial court after framing necessary charge that the nature of charge was very well understood by each accused. The fact was also evident from the averments made in the Revision Petition which was filed by the accused challenging order framing charge. The fact that

charge was clearly understood by each accused was also evident from the nature of cross-examination of the eye witnesses made on their behalf by their counsel. In view of the fact that all the eye witnesses were examined and cross-examined on behalf of the accused, the High Court should have resorted to the provisions of Section 225 of the Code of Criminal Procedure, 1989 as applicable to the State of Jammu and Kashmir. The cross-examination of the eye witnesses on behalf of the accused would indicate that none of the accused was in fact misled by so-called error pointed out by the High Court nor it could be successfully pointed out by any of them that so-called error has occasioned failure of justice to him. The remand of the case to trial court for considering the case afresh on the point of charge was not warranted at all, as there is nothing to suggest or indicate even remotely that the accused had or would have been misled by any error or omission in the Charge. Therefore, the impugned orders of the High Court are set aside. [Para 12] [1073-G-H; 1074-A-F; 1075-A-C]

5. The order admitting the accused except accused 'S' to interim bail of Rs.25,000/- each to the satisfaction of the trial court pending consideration of the prosecution case afresh on question of charge, was not warranted nor justified at all. Before granting interim bail to the accused the High Court could not have afforded to ignore the testimony of eye witnesses including that of the appellant who is wife of the deceased, merely because deceased had received only one injury nor the accused could have been accorded the benefit of temporary bail on the spacious plea that they were facing trial over a period of three years. The record of the case nowhere showed that the prosecution was responsible in any manner at all for so called delay in holding trial against the accused. The fact that accused were involved in commission of a heinous crime like murder which

entails death or life imprisonment as punishment should have been taken into consideration before releasing the accused on interim bail. The trial court after having considered the gravity of the offence and the apprehension on the part of the prosecution that the accused would tamper with the evidence in the event of their release on bail had rightly refused to enlarge the accused on bail. The High Court while granting the relief of bail to the accused has completely ignored and over looked the aforementioned relevant factors which weigh heavily against the accused. Moreover, the complaint that complainant and one of the witnesses were physically assaulted and threatened in the Court premises will have to be given its due weight. The FIR was pending necessary investigation wherein the statement of the son of the appellant was recorded on August 20, 2010 under Section 164 Criminal Procedure Code. The contents of the FIR would indicate that the accused either themselves or through their relatives would try to tamper the evidence which is going to be led by the prosecution in the case. Under the Circumstances, release of the accused except accused 'S' on interim bail deserves to be set aside. [Paras 13 and 14] [1075-D-H; 1076-A-D]

Case Law Reference:

1955 (2) SCR 140 Followed Para 7

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1660-1662 of 2011.

From the Judgment & Order dated 20.10.2010 of the High Court of Jammu & Kashmir at Jammu in Criminal Revision No. 29 of 2008, 561-A Cr.P.C. No. 54 of 2009 and Bail Application No. 26 of 2010.

Nitin Sangra, Hemantika Wahi for the Appellant.

R.P. Bhatt, Bimal Roy Jad, Vikram Rathore, Sunil Fernandes, Suhaas Joshi, Astha Sharma, Yawar Masoodi for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. The appellant is the widow of late Mr. Surinder Singh, who was murdered at about 9:00PM on June 28, 2007. Criminal Appeal No. 1660/2011 is directed against judgment dated October 20, 2010 rendered by the learned Single Judge of High Court of Jammu and Kashmir at Jammu in Criminal Revision No.29 of 2008 by which the order dated March 24, 2008 passed by the learned Additional Sessions Judge, Kathua framing charges under Sections 302, 109, 147, 148 read with Section 149 of Ranbir Penal Code against respondent Nos. 3 to 7 is set aside and the matter is remanded to the learned Judge, Samba to consider the case in terms of Sections 267, 268 and 269 of the Code of Criminal Procedure, 1989 (1933 A.D.) (as applicable in the State of Jammu and Kashmir). Criminal Appeal No. 1661 of 2011 is directed against order dated October 20, 2010 passed by the learned Single Judge of High Court of Jammu and Kashmir at Jammu in 561-A Cr.P.C. No.54 of 2009 by which prayer made by the respondent of the present appeal to quash order dated March 24, 2008 passed by the learned Additional Sessions Judge, Kathua in a Criminal Challan being File No. 33 of 2007 titled as State Vs. Subhash Singh and Others framing charge against him for commission of offences under Sections 302, 109, 147, 148 read with 149 of Ranbir Penal Code, is allowed. Criminal Appeal No. 1662 of 2011 is directed against judgment dated October 20, 2010 passed by the learned Single Judge of High Court of Jammu and Kashmir at Jammu in Bail Application No.26 of 2010 by which the respondent Nos. 3 to 7 have been released on interim bail pending trial against the respondents for above mentioned offences. As the three appeals arise out of common judgment and order dated October 20, 2010 rendered by the learned Single Judge of High Court of Jammu and Kashmir in Criminal Revision No.29

of 2008, petition filed under Section 561-A Cr.P.C. No.54 of 2009 and Bail Application No.26 of 2010, this Court proposes to dispose of them by this common judgment.

2. The case of the prosecution is that respondent Nos. 3 to 8 in criminal appeal No. 1660 of 2011 formed an lawful assembly on 29-06-2007, common object of which was to murder Surinder Singh and in prosecution of the common object of the said assembly, respondents Nos. 3 to 8 mounted a murderous assault on Surinder Singh, husband of the appellant, at village Sanoora, District Samba (J & K). The injured was immediately shifted to hospital for treatment. On the basis of the information given by the appellant, FIR No.113/2007 under Section 307 read with 109 of Ranbir Penal Code was registered at police station Hiranagar, in connection with the aforesaid incident on June 29, 2007. On July 2, 2007 injured Surinder Singh succumbed to his injuries in Military Hospital, Satwari, Jammu and, therefore, offence punishable under Section 302 of Ranbir Penal Code was added. On the basis of FIR lodged by the appellant, investigation was undertaken. During the course of investigation statement of the appellant and other witnesses were recorded under Section 164 of the Code of Criminal Procedure 1989. The dead body of the deceased was sent for postmortem examination. After completion of the investigation, the investigating agency had filed charge sheet in the Court of learned Magistrate for offences punishable under Sections 302, 109, 147, 148, 149 of the Ranbir Penal Code. As the offence punishable under Section 302 is triable exclusively by a Court of Sessions, the case was committed to Sessions Court for trial. The learned Additional Sessions Judge, after hearing the prosecution and the accused on the question of framing charge, framed necessary charge on March 24, 2008 against each accused for the offences punishable under Sections 302, 109, 147, 148, 149 of Ranbir Penal Code.

3. Feeling aggrieved by the framing of above mentioned

charges by the trial court on March 24, 2008, the respondent Nos. 3 to 7 in Criminal Appeal No.1660 of 2011 preferred Criminal Revision No. 29 of 2008 before the High Court. The High Court by order dated June 6, 2008 issued notice and summoned the record of the case from the trial court. On March 20, 2009, the respondent No. 8, who is original accused No.6, preferred a petition No. 54 of 2009 under Section 561-A of the Code of Criminal Procedure to quash order dated March 24, 2008 passed by the trial court framing charges against him for commission of offences punishable under Sections 302, 109, 147, 148 read with 149 of the Ranbir Penal Code. During the pendency of above numbered petitions, the High Court by order dated August 13, 2009 sent back the record to the trial court and granted liberty to the respondent Nos. 3 to 8 to seek bail from the trial court. When the above numbered Revision and the petition filed under Section 561-A were pending disposal before the High Court, the prosecution examined three eye witnesses to the occurrence viz. (1) Santosh Kumari, i.e., the appellant herein, (2) Surishta Devi and (3) Shakti Devi. It may be stated that the appellant and the Shakti Devi have fully supported the case of the prosecution.

Pursuant to the liberty granted by the High Court vide order dated August 13, 2009, the respondent Nos. 3 to 8 applied for bail before the trial court. The trial court rejected Bail Application filed by the accused vide order dated February 19, 2010. The record of the case indicates that except accused Iqram, who is respondent No.8 in Criminal Appeal No. 1660 of 2011, all the other accused filed Bail Application No. 26 of 2010 before the High Court claiming bail. The High Court by order dated August 10, 2010 directed the learned counsel for the accused to place on record the deposition of the witnesses recorded by the trial court. On August 13, 2010, Raman Singh, brother of accused Subash Singh, who is respondent no.3 in the main appeal, physically assaulted and threatened the son of the appellant as well as one Kuljit Singh who is one of the witnesses in the case, allegedly in the court premises itself, to

refrain them from deposing against the accused in the case. They were also warned that if they gave depositions against the accused they would be killed. Because of the assault mounted by brother of the accused, son of the appellant has lodged FIR No.183/2010 under Sections 341, 195-A, 504, 506 of Ranbir Penal Code at Police Station Samba. With reference to above mentioned FIR statement of the son of the appellant was recorded under Section 164 Cr.P.C. on August 20, 2010.

On September 8, 2010 and October 7, 2010 the prosecution examined two more eye witnesses, i.e., (1) Raksha Devi and (2) Kamlesh Devi who had supported the prosecution case.

4. The High Court by order dated October 20, 2010 has set aside the order dated March 24, 2008 passed by the trial court framing charge against the respondent Nos. 3 to 8 and has remanded the case to the trial court to consider it in terms of Sections 267, 268 and 269 of the Code of Criminal Procedure 1989. By the said order the High Court has directed release of all the accused persons except accused Subhash, who is respondent No.3 in the main appeal, pending consideration of the prosecution case for framing charge by the trial court. The above mentioned order dated October 20, 2010 of the High Court has given rise to the three instant appeals.

5. This Court has heard the learned counsel for the parties and have considered the documents forming part of the appeals.

6. The provisions relating to framing of charge against the accused before the trial commences, are contained in the Code of Criminal Procedure 1989 (1933 A.D.) which is applicable to the State of Jammu and Kashmir. The statute requires that every charge framed under the said code should state the offence with which the accused is charged and if the law which creates the offence gives it any specific name, the offence should also be described in the charge by that name only. The statute further requires that the law and section of the

law against which the offence is said to have been committed has to be mentioned in the charge. It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him. The object of the statement of particulars to be mentioned in the charge is to enable the accused person to know the substantive charge, he will have to meet and to be ready for it before the evidence is given. The extent of the particulars necessary to be given in the charge depends upon the facts and the circumstances of each case. It is well settled law that in drawing up a charge, all verbiage should be avoided. However, a charge should be precise in its scope and particular in its details. The charge has to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. One of the requirements of law is that when the nature of the case is such that the particulars mentioned in the charge do not give the accused sufficient notice of the matter with which he is charged, the charge should contain such particulars of the manner in which alleged offence was committed as would be sufficient for that purpose. If 'A' is accused of the murder of 'B' at a given time and place, the charge need not state the manner in which 'A' murdered 'B'.

7. Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities. It regards some of its provisions as vital but others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge, or even a total absence of a charge in the curable class. That is why we have provisions like Sections 215 and 464 in the Code of Criminal Procedure, 1973.

The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction.

If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. Sections 34, 114 and 149 of the IPC provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and as explained by five Judge Constitution Bench of this Court in *Willie Slavey Vs. The State of M.P.* 1955 (2) SCR 1140 at p. 1189, the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

In the light of above principles, the question whether proper charge was framed against the respondent Nos. 3 to 8, will have to be viewed.

8. In the present case, what was argued on behalf of the respondent Nos. 3 to 8 before the High Court was that the charge was invalid because there was no mention in the order of the trial court indicating the specific offence found to have been prima facie committed by one or the other accused individually or jointly nor there was any indication regarding the specific names of the offences sufficient for description in the order of framing charge, but only sections of the law against which the offences were found to have been committed were mentioned.

The High Court has held that mere mention of the sections of the law in the order framing the charge would not, serve the purpose of law, as it was likely to prejudice the accused in his trial, and that, the accused would be disabled to know the exact Charge he had to face. In view of the above mentioned conclusion, the High Court has set aside the order dated March 24, 2008 framing charge against the accused and has remanded the matter to the trial court to consider the case in

terms of Sections 267, 268 and 269 of the Code of Criminal Procedure 1989 which are pari materia to Sections 226, 227 and 228 of the Code of Criminal Procedure 1973.

9. In order to ascertain whether the Charge framed against respondent was proper or not, this Court proposes to reproduce order dated March 24, 2008 framing charge against Rajesh Singh son of Jagdish Singh, resident of Sanoora, tehsil Hiranagar, which reads as under :-

"IN THE COURT OF ADDL. SESSIONS JUDGE
KATHUA

I, Vinod Chatterji Koul hereby charge you, Rajesh Singh S/o Jagdish Singh R/o Sanoora, tehsil Hiranagar as under :

1. That on 28.6.07 at Sanoora at about 9.30 pm with criminal intention along with other accused persons, having common criminal object armed with lathies (sticks) committed rioting and in that attacked deceased Surinder Singh with an intention to murder him attacked and injured him seriously, who thereafter on 2nd July 2007 during treatment succumbed to his injuries at Medical College Jammu, and you thereby committed offence punishable u/s 302/109/147/148/149 of the Ranbir Penal Code and within the cognizance of this Court.

2. And I hereby direct you be tried by this Court on the said charge.

Dated 24.3.08Sd."

"Statement of accused dated 24th March 2008

Rajesh Singh S/o Jagdish Singh R/o Sanoora, tehsil Hiranagar Caste rajput, employee by profession aged...

Question: Whether you have understood the contents of the charge which has been read over and explained to you?

Answer: Yes

Question: Whether you have committed the offence?

Answer: No.

Question: Whether you want to say anything more?

Answer: I am innocent and want trial of the case.

Sd."

It may be mentioned that similar charge has been framed against each accused by order dated March 24, 2008.

A fair and reasonable reading of the above quoted order dated March 24, 2008 makes it abundantly clear that accused Rajesh Singh on June 28, 2007 at Sanoora about about 9.30 pm with criminal intention along with other accused, having common object armed with lathies (sticks) committed rioting. Thus, the charge contains particulars as to the time, place and date of the offence of rioting. The law which creates the offence gives it specific name, i.e., "rioting" and, therefore, the offence is described in the charge by that name, namely, "rioting". The charge further proceeds to state that while committing rioting accused Rajesh Singh and other assaulted deceased Surinder Singh with an intention to murder him and injured him seriously. Thus the name of person with reference to whom common criminal object was formed by the members of the unlawful assembly was stated. It was also stated in the Charge that during the treatment injured Surinder Singh had succumbed to his injuries on July 2, 2007 at Medical College, Jammu. Thus the date on which the deceased succumbed to this injuries and the place where the deceased succumbed to his injuries were

mentioned with precision. Finally in the Charge, it was mentioned that accused Rajesh Singh had committed offences punishable under Sections 302, 109, 147, 148, 149 of the Ranbir Penal code. After framing Charge immediately the plea of accused Rajesh was recorded. The first question which asked to him was whether he had understood the contents of the Charge which was read and explained to him. In answer to the said question accused Rajesh Singh had answered in affirmative. The record shows that thereafter two questions were put to accused Rajesh Singh in answer to which he had claimed that he was innocent and had wished to be tried.

10. This is not a case of mere mention of the sections of the law in the charge or the order of framing charge. Therefore, the High Court was not justified in observing that mere mention of the sections of the law in the charge was likely to prejudice the accused in his trial and that he would be disabled to know the exact charge he had to face, nor the High court was justified in observing that the trial court was not alive to the provisions of Chapter XIX of the Code of Criminal Procedure. It is necessary to reproduce part of the order passed by the trial court which is relied upon by the High Court for the purpose of coming to the conclusion that mere mention of the sections of the law in the charge or the order framing charge, would not serve the purpose of the law. The said order reads as under :-

"Upon consideration of the arguments of the learned Public Prosecutor, the learned counsel for the accused and the written arguments besides the judgments cited and also the statements of the witnesses recorded by the police and other connected documents on the file, I am of the considered opinion that there are reasonable grounds to presume that accused Subash Singh S/o Krishen Singh, Rajesh Singh S/o Jagdish Singh, Vijay Singh S/o Krishen Singh, Ranjit Singh S/o Baldev Singh, Rakesh Singh S/o Jagdish Singh and Ikram Singh S/o Neter Singh caste Rajput residents of Sonoora Tehsil Hiranagar have prima facie committed offences punishable under Sections 302/

109/147/148 and 149 RPC. Offence punishable under Section 302 RPC is exclusively triable by the court of sessions.

Charges under Sections 302/109/147/148 and 149 RPC is framed against accused Subash Singh, Rajesh Singh, Vijay Singh, Ranjit Singh, Rakesh Singh and Ikram Singh. The contents of the charges framed have been read over and explained to the accused persons who have pleaded not guilty to the said chages and have claimed to be tried….."

11. A glance at the order quoted above would reveal that at the stage of framing charge the learned counsel for the accused had pleaded for discharge of the accused under the relevant provisions of the Code of Criminal Procedure 1989. Not only the learned counsel for the accused had advanced oral arguments, but he had also submitted written arguments and cited judgments as well as statements of the witnesses recorded by the police and relied upon other connected documents on the file to emphasize that the accused should be discharged. The order of the trial court which is quoted by the High Court in the impugned judgment is not the order framing charge at all. It is a short order indicating that no case was made out by the learned counsel for the accused for discharging the accused at the stage of framing charge and that the accused should be tried for the offences which were mentioned in the order of framing charge separately against each accused.

12. On the facts and in the circumstances of the case, this Court is of the opinion that a patent error of law apparent on the fact of the record was committed by the High Court in coming to the conclusion that in the order of framing charge there was mere mention of the sections of the law which was likely to prejudice the accused in his trial, as the accused would be disabled to know the exact charge he had to face. Having noticed the charge which was separately framed against each accused, the inevitable conclusion to be reached by this Court

is that the High Court erred in law in holding that it was obligatory for the trial court to have indicated in its order and the charge sheet the description of the offences for which one or the other accused had to be tried because all necessary particulars which should be stated as required by law were already stated by the learned Judge of trial court while framing charge.

Further the fact that trial against the accused has / had made considerable progress in as much as material evidence of the eye witnesses to the occurrences was recorded by the trial court could not have been ignored while deciding the question whether proper charge against each accused was framed or not. The nature of charge to be faced was clearly understood by each accused which is evident from the plea recorded by the trial court after framing necessary charge that the nature of charge was very well understood by each accused. The fact is also evident from the averments made in the Revision Petition which was filed by the accused challenging order framing charge. The fact that charge was clearly understood by each accused is also evident from the nature of cross-examination of the eye witnesses made on their behalf by their learned counsel. In view of the fact that all the eye witnesses have been examined and cross-examined on behalf of the accused, the High Court should have resorted to the provisions of Section 225 of the Code of Criminal Procedure, 1989 as applicable to the State of Jammu and Kashmir which reads as under :-

"**225**. Effect of errors :- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned failure of justice."

The cross-examination of the eye witnesses on behalf of the accused would indicate that none of the accused was in fact misled by so-called error pointed out by the High Court nor

it could be successfully pointed out by any of them that so-called error has occasioned failure of justice to him. The remand of the case to trial court for considering the case afresh on the point of charge was not warranted at all, as there is nothing to suggest or indicate even remotely that the accused had or would have been misled by any error or omission in the Charge. Therefore, the order dated October 20, 2010 rendered in Criminal Revision No.29 of 2008 deserves to be set aside. For the similar reasons the order dated October 20, 2010 passed by the High Court in petition filed under Section 561-A Cr.P.C. No.54 of 2009 allowing the prayer made by the respondent No. 8 to quash the order dated March 24, 2008 will have to be set aside.

13. It may be mentioned that the order admitting the accused except accused Subhash Singh to interim bail of Rs.25,000/- each to the satisfaction of the trial court pending consideration of the prosecution case afresh on question of charge, was not warranted nor justified at all. Before granting interim bail to the accused the High Court could not have afforded to ignore the testimony of eye witnesses including that of the appellant who is wife of the deceased, merely because deceased had received only one injury nor the accused could have been accorded the benefit of temporary bail on the spacious plea that they were facing trial over a period of three years. The record of the case nowhere shows that the prosecution was responsible in any manner at all for so called delay in holding trial against the accused. The fact that accused are involved in commission of a heinous crime like murder which entails death or life imprisonment as punishment should have been taken into consideration before releasing the accused on interim bail. The trial court after having considered the gravity of the offence and the apprehension on the part of the prosecution that the accused would tamper with the evidence in the event of their release on bail had rightly refused to enlarge the accused on bail. The High Court while granting the relief of bail to the accused has completely ignored and over

looked the aforementioned relevant factors which weigh heavily against the accused. Moreover, the complaint filed by Vijinder Singh that he and Kuljit singh, who is one of the witnesses in the present case, were physically assaulted and threatened in the Court premises will have to be given its due weight. The FIR registered on August 13, 2010 is pending necessary investigation wherein the statement of Vijinder Singh who is son of the appellant was recorded on August 20, 2010 under Section 164 Criminal Procedure Code. The contents of the FIR would indicate that the accused either themselves or through their relatives would try to tamper the evidence which is going to be led by the prosecution in the case.

14. Under the Circumstances, this Court is of the opinion that release of the accused except accused Subhash Singh on interim bail deserves to be set aside. The net result of the above discussion is that all the three appeals will have to be allowed.

For the foregoing reasons the three appeals succeed. Order dated October 20, 2010 rendered by the High Court of Jammu and Kashmir at Jammu in Criminal Revision No.29 of 2008 is hereby set aside. Similarly the order dated October 20, 2010 passed by the High Court in petition filed under Section 561-A Cr.P.C. No.54 of 2009 is also set aside. The order dated October 20, 2010 passed in Bail Application No.26 of 2010 by which the accused except accused Subhash Singh are enlarged on interim bail is also set aside. Accused Subhash Singh is already in custody. Therefore, it is directed that the other accused shall be taken in custody immediately.

Having regard to the facts of the case and more particularly the fact that the trial has already commenced, the trial court is directed to complete the trial as early as possible and preferably within 9 months from the date of receipt of writ from this Court. Subject to above mentioned directions, all the three appeals stand disposed of.

D.G. Appeals disposed of.

STATE OF WEST BENGAL AND ORS.
v.
DEBASISH MUKHERJEE AND ORS.
(Civil Appeal No. 3480 of 2005)

SEPTEMBER 14, 2011

[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]

West Bengal Service Rules (Part I):

r.55(4) – Applicability of – Appointment of an employee 'D' as a Section Writer/Typist in the Original Side of the Calcutta High Court on 19.3.1964 – Promoted as Typist, Grade I with effect from 2.4.1981 – On 9.9.1985, he was selected to the post of Lower Division Assistant (LDA) – On 1.4.1989, he was awarded the second higher scale under the 20 years Career Advancement Benefit Scheme – Claim by employees in the cadre of LDA and senior to 'D' for re-fixation of pay at par with the pay of 'D' u/ r.55(4) or under any other service law principle – Entitlement – Held: 'D' was given a higher pay for wholly erroneous reasons – He was promoted to the post of Typist, Grade I although he was not confirmed in the lower post at that time – 'D' was appointed as LDA as a direct recruit on 9.9.1985 and, therefore, he was not entitled to the benefit of second higher scale with effect from 1.4.1989, as that benefit was available only at the end of 20 years service under the career advancement scheme – If these two benefits erroneously given were deleted, there would be no ground for the seniors to claim any benefit on the basis of parity of pay – Moreover, the post of LDA was neither a higher nor a promotional post, therefore, r.55(4) was inapplicable – The fact that a mistake was committed in the case of 'D' by extending the benefit under Career Advancement Scheme cannot be a ground to direct perpetuation of mistake by directing similar benefit to other senior employees – Moreover, the fact that a single employee ('D') was wrongly

given some benefit was certainly not an exceptional circumstance so as to invoke applicability of r.49 – Therefore, neither under r.55(4) nor under the general principles of service jurisprudence, the seniors were entitled to claim benefit of re-fixation of their pay at par with the pay of their junior 'D' – Service Law – Pay fixation – Claim for re-fixation of pay – Tenability.

Constitution of India, 1950: Article 14 – Held: Guarantee of equality before law is a positive concept and cannot be enforced in a negative manner – If an illegality or an irregularity has been committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of Courts and Tribunals to require the State to commit the same irregularity or illegality in their favour on the reasoning that they have been denied the benefits which have been illegally or arbitrarily extended to others – Service Law.

One 'D' was appointed as a Section Writer/Typist in the Original Side of the Calcutta High Court on 19.3.1964. He was brought under the regular establishment on 1.9.1979 and was allowed the pay-scale of Rs.230-425 under the West Bengal Services Revision of Pay and Allowances Rules, 1970 (WB (ROPA) Rules, 1970). The said pay-scale was subsequently revised as Rs.300-685/- with effect from 1.4.1981 under the WB (ROPA) Rules, 1981. He was promoted as Typist, Grade I in the scale of Rs.380-910/- with effect from 2.4.1981. He appeared in the selection examination for the post of Lower Division Assistant and was selected and appointed on 9.9.1985. On such appointment his pay was fixed as Rs.550 in the scale of Rs.300-685/-, taking into account his last pay drawn in the former Grade-I Post. On exercising option under the W.B. ROPA Rules, 1990, his pay scale was revised and re-fixed with effect from 1.8.1986. On 1.4.1989, he was awarded the second higher scale under the 20 years Career Advancement Benefit Scheme.

The State Government held that the Career Advancement benefits granted to 18 employees including that of 'D' were in order. Immediately thereafter, fifty employees (senior to 'D') including respondents 1 to 5, made representation to the Chief Justice, stating that since the State Government had found the pay fixation of 'D' to be in order and therefore, their pay may also be re-fixed to be at par with the pay of their junior - 'D' by relaxing Rule 55(4) of WBSR. Meanwhile 'D' retired from service. The office of the Accountant General returned the pension file of 'D' to the High Court twice to review the pay fixation of 'D' on the ground that awarding of second higher grade directly on 1.4.1989 was not in order and that career advancement benefit could be awarded to him only by reckoning the service from 9.9.1985.

The representation by respondents 1 to 5 and 45 other senior employees, was referred to a Three-Judge Special Committee and the said Committee submitted a report recommending that the said senior employees may be given the pay protection by stepping up their pay, so that their pay is not less than that of 'D'. However, when the memos from Accountant General's Office (stating that the grant of career advancement benefit to 'D' was not in order) was brought to their notice, the Special Committee gave modified report whereby it recommended that the memorialists be given the same benefit as was accorded to 'D', in keeping with the principle of pay protection so that their pay is equivalent to that of 'D' in relation to his appointment as Lower Division Assistant on 9.9.1985. On 13.2.2003, the Chief Justice of the High Court extended the benefit of pay protection to the 50 senior employees (including respondents 1 to 5).

The State Government by its letter addressed to the High Court, traced the career and emoluments of 'D' from 1964 and pointed out that 'D' was not entitled to Grade I

promotion of Section Writer (Typist) in the scale of Rs.380-910 under the ROPA Rules, 1981 with effect from 2.4.1981 as he had not been confirmed in that post at that time. The State Government further pointed out as 'D' was appointed as Lower Division Assistant as a direct recruit in the scale of Rs.300-685/-, with effect from 9.9.1985, he was not entitled to the second higher scale under the career advancement scheme with effect from 1.4.1989. In view of it, the High Court corrected the service book of 'D' by giving him the benefit of Grade I promotion of Section Writer (Typist) with effect from 1.8.1982 instead of 2.4.1981. The High Court also sent a letter to the office of the Accountant General admitting the said mistake and confirming the correction in regard to grant of Grade I promotion to 'D'. The Calcutta Pay & Accounts Office requested the High Court to resubmit the bills which provided for a higher pay to the 50 employees after obtaining the clarification of the state government, regarding applicability of Rule 55(4) and the consent of the Governor. On 7.5.2003, the Government requested the High Court to review the entire matter in view of the fact that fixation of pay of 'D' at various stages was erroneous and required rectification.

Respondents 1 to 5 approached the High Court and sought a declaration that they were entitled to pay protection as per orders of Chief Justice in the post of Lower Division Assistant, on and from 9.9.1985 in order to bring their pay at par with that of 'D', who was their junior. Similar writ petitions were filed by other employees senior to 'D' and by the State Government. The Single Judge inter alia held Rule 55(4) was inapplicable as the two conditions for applicability of the said Rule were admittedly absent. As it was also admitted that 'D' was wrongly given the benefits and 'D' did not challenge the correction of his pay and direction for recovery of the amount paid in excess, it followed that 'D' was not

entitled to the benefits wrongly given and consequently, respondents 1 to 5 and other senior employees were not entitled to stepping up of their pay with reference to the pay of 'D'. The Division Bench of the High Court allowed the appeal.

In the instant appeal, the questions which arose for consideration were: (i) Whether the respondents (employees senior to 'D') were entitled to re-fixation of their pay at par with the pay of their junior namely 'D', under Rule 55(4) of the WBSR (Part I) or under any other service law principle; (ii) If the relief granted to the respondents (employees senior to 'D') could not be supported with reference to Rule 55(4), whether it could be inferred that the order of the Chief Justice permitting the pay of the said senior employees to be brought at par with the pay of 'D', was passed in exceptional circumstances under Rule 49 of WBSR (Part I); and iii) Whether the order of Chief Justice dated 13.2.2003 is not justifiable ?

Disposing of the appeals, the Court

HELD:

Re : Question (i) :

1.1. A careful reading of Rule 55(4) of the West Bengal Service Rules – Part I showed that two conditions have to be fulfilled for attracting the benefit under the said rule. The first is that the junior employee as also the senior employees must be promotees. Secondly, they must come from the same cadre having the same scale of pay in their feeder post. Neither of the said conditions was fulfilled in the instant case. In fact, this finding was rendered by the Single Judge and was affirmed by the Division Bench. There is no reason to interfere with the said concurrent finding that Rule 55(4) is inapplicable. [Para 16] [110-G-H; 1101-A-D]

State of Andhra Pradesh vs. G. Sreenivasa Rao **(1989) 2 SCC 290:1989 (1) SCR 1000;** *Chandigarh Administration vs. Naurang Singh***(1997) 4 SCC 177: 1997 (2) SCR 965;** *Union of India vs. R. Swaminathan* **(1997) 7 SCC 690: 1997 (4) Suppl. SCR 94 – relied on.**

1.2. 'D' was given a higher pay for wholly erroneous reasons. Firstly he was given Grade I promotion of Section Writer (Typist) in the scale of Rs.380-910 under the ROPA Rules, 1981 with effect from 2.4.1981 even though he was not confirmed in the lower post at that time. Secondly, even though 'D' was appointed as Lower Division Assistant as a direct recruit in the scale of Rs.300-685 with effect from 9.9.1985, he was given the benefit of second higher scale under the Career Advancement Scheme, with effect from 1.4.1989, by taking note of his previous service. 'D' voluntarily chose to appear for selection as a Lower Division Assistant which carried a lesser pay scale when compared to the pay scale to which he was entitled as a Grade-I Typist, obviously because of better future prospects available to Lower Division Assistants. Having been appointed as a Lower Division Assistant on 9.9.1985, he was not entitled to the benefit of second higher scale with effect from 1.4.1989, as that benefit was available only at the end of 20 years service under the career advancement scheme. If these two benefits erroneously given were deleted, there would be no ground for the seniors to claim any benefit on the basis of parity of pay. Even otherwise, as 'D' was getting a higher pay in view of the earlier promotion as Section Writer/Typist, when he was selected and appointed as Lower Division Assistant, he was given pay protection and thus became entitled to a higher pay than what he would have normally received. His case was completely different from the case of his seniors and his seniors could not therefore claim parity in pay and stepping up of pay to match the pay of 'D'. Therefore, the Single Judge

and the Division Bench rightly held even that Rule 55(4) was inapplicable. The fact that a mistake was committed in the case of 'D' by extending the benefit of second higher scale under Career Advancement Scheme cannot be a ground for the Chief Justice to direct perpetuation of the mistake by directing similar benefit to other senior employees. Further, in view of his previous service between 1964 and 1985 and in view of the fact he was getting a higher pay (in a higher pay scale) when he was appointed thereby entitling him to benefit of pay protection, his seniors who were not in a comparable position were not entitled to seek higher pay with reference to the pay of 'D'. [Para 20] [1105-C-H; 1106-A-D]

1.3. It is now well settled that guarantee of equality before law is a positive concept and cannot be enforced in a negative manner. If an illegality or an irregularity has been committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of Courts and Tribunals to require the state to commit the same irregularity or illegality in their favour on the reasoning that they have been denied the benefits which have been illegally or arbitrarily extended to others. Neither under Rule 55(4) of WBSR nor under the general principles of service jurisprudence, the seniors were entitled to claim benefit of re-fixation of their pay at par with the pay of their junior 'D'. [para 21] [1106-E-F; 1107-F]

Gursharan Singh vs. New Delhi Municipal Administration **1996 (2)SCC 459: 1996 (1) SCR 1154;** *Union of India vs. Kirloskar Pneumatics Ltd.* **1996 (4) SCC 433: 1996 (2) Suppl. SCR 204;** *Union of India vs. International Trading Co.* **2003 (5) SCC 437: 2003 (1) Suppl. SCR 55;** *State of Bihar vs. Kameshwar Prasad Singh* **2000 (9) SCC 94: 2000 (3) SCR 764;** *Chandigarh Administration vs. Jagjit Singh* **1995 (1) SCC 745: 1995 (1) SCR 126 – relied on.**

Re : Question (ii) :

2.1. The representation given by the senior employees was for re-fixing their pay at par with the pay of 'D' by relaxing Rule 55(4) of WBSR. The basis of their claim was Rule 55(4) and they sought relief by relaxing the said rule. The first report of the Special Committee dated 2.12.1998 considered the claim of senior employees under Rule 55(4) and categorically held that the said rule was inapplicable to their claim. The subsequent reports of the Committee dated 27.11.2002 and 20.1.2003 held that the employees who were senior to 'D', could not get a lesser pay than 'D', in keeping with the principle of Rule 55(4) and recommended grant of relief accordingly. The Registrar (Original Side), High Court put up a note placing the report of the Special Committee dated 20.1.2003 and sought approval of the said recommendation of the Special Committee for the senior employees being granted relief by way of pay protection by stepping up their pay at par with that of 'D'. The Chief Justice concurred with the said proposal, without noting any other reason and thus, the Chief Justice merely accepted the reasons assigned by the Special Committee in their recommendation dated 20.1.2003. Even in their writ petitions, the senior employees made the claim only based on Rule 55(4). Neither the claim of the senior employees, nor the report of the Special Committee nor the order of the Chief Justice at any point of time, in any document, refer to any exceptional circumstances warranting the grant of increments prematurely to the employees senior to 'D' by stepping up their pay at par with the pay of 'D'. Rule 49 of WBSR was neither relied upon nor referred to by the senior employees in their representation, or by the Special Committee in their recommendations or by the Chief Justice in his order. Nor did the senior employees who were the writ petitioners, rely upon or refer to Rule

49 in the writ petition, as the source of power for the order dated 13.2.2003. In these circumstances, it is not understandable how the Division Bench of the High Court, having held in the impugned order that Rule 55(4) was inapplicable, could justify the order of the Chief Justice with reference to Rule 49. [Para 22] [1107-G-H; 1108-A-F]

2.2. Rule 49 of WBSR (Part I) relates to premature increments and reads thus : "*Save in exceptional circumstances and under specific orders of government, no government employee on a time scale of pay may be granted a premature increment in that time scale*". The proviso to Rule 23 of the Calcutta High Court Service Rules, 1960, no doubt, provides that "the power exercisable under the West Bengal Service Rules by the Governor of the State shall be exercised by the Chief Justice" in regard to the members of High Court service. If Rule 49 had to be invoked, exceptional circumstances should have existed and should have been referred to in the recommendation by the Special Committee or in the order of the Chief Justice. The assumption made by the Division Bench that when an order of the Chief Justice granting relief cannot be justified with reference to any Rule or legal principle, it should be inferred that the order was made in exceptional circumstances, is erroneous and cannot be accepted. A provision for granting higher pay by way of premature increment in exceptional circumstances, cannot be used to give relief to a large number of employees, without the existence of any exceptional circumstances. The fact that a single employee ('D') was wrongly given some benefit is certainly not an exceptional circumstance to perpetuate the mistake in the case of all his seniors. [Para 23] [1108-G-H; 1109-A-D]

Re : Question (iii)

3.1. In a democracy, governed by rule of law, where arbitrariness in any form is eschewed, no government or authority has the right to do whatever it pleases. Where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. Even prerogative power is subject to judicial review, but to a limited extent. The extent, depth and intensity of judicial review may depend upon the subject matter of judicial review. An order of the Chief Justice granting certain relief to High Court employees whose service conditions are governed by Rules is justiciable. [Para 25] [1109-H; 1110-A-C]

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

3.2. In exercise of the powers conferred by Article 229 of the Constitution of India, the Chief Justice of the High Court of Calcutta, with the approval of the Governor of the State of West Bengal, so far as the rules relate to salaries, allowances, leave and pensions, made the Calcutta High Court Service Rules, 1960, with respect to the appointment of persons to, and the conditions of service of persons serving on, the staff attached to the High Court. While the Chief Justice has the power to amend the Rules, he does not have the power to ignore the Rules. Reading together the two provisos to Rule 40(2) of the Allahabad High court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, this Court held that it was apparent that the rules and orders referred to therein were the rules and orders of a general nature and not orders made in individual cases; that insofar as officers and servants of the High Court were concerned, it was enough that the Chief Justice exercised the powers conferred upon the Governor under such rules and orders of the government and no further approval by the Governor was required. Even in Rule 41,

the reference was to the making of general orders and not the orders in individual cases. The order of the Chief Justice granting premature increments did not therefore require the approval of the Governor. As the Chief Justice had the power to create posts in the High Court, it was the Chief Justice who could grant premature increments under Rule 27 of the Financial Handbook, to the officers and servants of the High Court, and even if it was to be assumed that advance increments under Rule 27 could be granted by the Governor, the Chief Justice would exercise Governor's power by virtue of second proviso to Rule 40(2) of the 1976 Rules. It is, therefore, clear that the Chief Justice has the power and authority to grant premature increments in exceptional circumstances. But the Chief Justice cannot grant such relief in an irrational or arbitrary manner. If the Rules provide that premature increments could be granted in exceptional circumstances, there should be a reference to the existence of exceptional circumstances and application of mind to those exceptional circumstances. When neither the recommendation considered by the Chief Justice nor the order of the Chief Justice referred to any exceptional circumstances and did not even refer to the Rule relating to grant of relief in exceptional circumstances, the question of assuming exceptional circumstances does not arise. The order dated 13.2.2003 is justiciable. In view of that, none of the seniors was entitled to any relief with reference to the pay of their junior 'D'. [Para 26, 28, 30] [1110-D, G-H; 1111-G; 1112-F-H; 1113-A-B; 1114-D-F]

M. Gurumoorthy vs. Accountant-General, Assam and Nagaland **1971(2) SCC 137: 1971 (0) Suppl. SCR 420;** *State of UP vs. C. L. Agrawal* **(1997) 5 SCC 1: 1997 (1) Suppl. SCR 1;** *High Court of Judicature for Rajasthan vs. Ramesh Chand Paliwal* **(1998) 3 SCC 72: 1998 (1) SCR 961 – relied on.**

Case Law Reference:

1989 (1) SCR 1000	**relied on**	**Para 16**
1997 (2) SCR 965	**relied on**	**Para 18**
1997 (4) Suppl. SCR 94	**relied on**	**Para 19**
1996 (1) SCR 1154	**relied on**	**Para 21**
1996 (2) Suppl. SCR 204	**relied on**	**Para 21**
2003 (1) Suppl. SCR 55	**relied on**	**Para 21**
2000 (3) SCR 764	**relied on**	**Para 21**
1995 (1) SCR 126	**relied on**	**Para 21**
2010 (6) SCC 331	**relied on**	**Para 25**
1971 (0) Suppl. SCR 420	**relied on**	**Para 27**
1997 (1) Suppl. SCR 1	**relied on**	**Para 28**
1998 (1) SCR 961	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3480 of 2005.

From the Judgment & Order dated 20.1.2005 of the High Court at Calcutta in A.P.O. No. 689 of 2003.

WITH

C.A. No. 3481, 3482, 3483, 3484, 3485, 3486, 3650 & 3609 of 2005.

K.K. Venugopal, Tarun Kr. Ray, Tara Chandra Sharma, Neelam Sharma, Shyam Mohan Sharma for the Appellants.

Jaideep Gupta, Bhaskar P. Gupta, Soumya Chekraborty, Kunal Chatterjee, Rajdeep Chowdhury, Indra Sewhney, Shruti Chaudhary, Jayasree Singh, Swati Sinha (for Fox Mandal & Co.) Sarla Chandra for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. All these appeals question the common order dated 20.1.2005 of the Calcutta High Court allowing a batch of appeals by the employees of the High Court. The facts are similar and for convenience, we will refer to the facts from C.A. No.3480/2005.

2. One Gopniath Dey (for short 'Dey') was appointed as a Section Writer/Typist in the Original Side of the Calcutta High Court on 19.3.1964. He was brought under the regular establishment on 1.9.1979 and was allowed the pay-scale of Rs. 230-425 under the West Bengal Services Revision of Pay and Allowances Rules, 1970 (for short 'WB (ROPA) Rules, 1970). The said pay-scale was subsequently revised as Rs. 300-685/- with effect from 1.4.1981 and under the WB (ROPA) Rules, 1981. He was granted a promotion as Typist, Grade I in the scale of Rs. 380-910/- with effect from 2.4.1981. He appeared in the selection examination for the post of Lower Division Assistant and was selected and appointed on 9.9.1985. On such appointment his pay was fixed as Rs. 550 in the scale of Rs. 300-685/-, taking into account his last pay drawn in the former Grade-I Post. On exercising option under the W.B. ROPA Rules, 1990, his pay scale was revised and re-fixed with effect from 1.8.1986. On 1.4.1989, he was awarded the second higher scale under the 20 years Career Advancement Benefit Scheme.

3. Sixty three employees who were senior to Gopinath Dey in the cadre of Lower Division Assistants, working in the Original Side of the High Court, submitted a representation to the Chief Justice on 27.6.1997 requesting that by relaxing Rule 55(4) of West Bengal Service Rules – Part I (for short 'WBSR') their pay be stepped up and re-fixed on par with the pay of their junior Gopinath Dey. The Chief Justice referred the representation to a Special Committee of three Judges and the said Committee submitted a report dated 2.12.1998

recommending rejection of the representation with the following observations :

> "In our opinion Gopinath Dey has been given certain benefits to which he was not entitled to in law. We are of the view, the Rule 55(4) of WBSR Part-I cannot be said to have any application whatsoever in this case.
>
> It appears to us that Sri Gopinath Dey was granted undue benefits. The whole fact was not placed before us as to how he could be granted such benefits to which he was not entitled. If an illegality has been committed in the case of one employee, it is well settled in law, that on the basis of such illegality another person cannot claim the same benefit. Illegality is incurable as has been held in AIR 1974 SC 2177 and AIR 1995 SC 705.
>
> Furthermore, Article 14 of the Constitution of India contains a positive concept. Reference may be made in this connection the decision reported in 1996 (2) SCC 459. See also 1998 Lab & I.C 180 and 1998 Lab & I.C 1976. In view of the decisions, illegality cannot be directed to be perpetuated. *This illegal benefits granted to Sri Gopinath Dey, if any, cannot be extended to memorialists*."
>
> (Emphasis supplied)

4. Some time thereafter, the Dy. Secretary, Government of West Bengal, Judicial Department, by memo dated 5.12.2000 returned the Service Books of 18 employees (including that of Gopinath Dey) stating that the Career Advancement benefits granted to all of them were in order. Taking a cue therefrom, immediately thereafter, fifty employees (senior to Dey) including respondents 1 to 5, made another representation dated 10.1.2001 to the Chief Justice, stating that though seniors to Gopinath Dey, they were getting a lesser pay than Gopinath Dey, that by memo dated 5.12.2000, the state government had found the pay fixation of Gopinath Dey to be

in order and therefore, their pay may be re-fixed to be at par with the pay of their junior - Gopinath Dey, by relaxing Rule 55(4) of WBSR.

5. In the meanwhile, Gopinath Dey retired from service in the year 2001. When his service book was forwarded to the Accountant General, West Bengal, for processing his pensionary claim, the office of the Accountant General returned the pension file to the High Court twice under cover of memo dated 21.12.2001 and again on 9.5.2002 to review the pay fixation of Gopinath Dey on the ground that awarding of second higher grade directly on 1.4.1989 was not in order and that career advancement benefit could be awarded to him only by reckoning the service from 9.9.1985.

6. The representation dated 10.1.2001 given by respondents 1 to 5 and 45 other senior employees, was also referred to a Three-Judge Special Committee and the said Committee submitted a report dated 27.11.2002 recommending that the said senior employees may be given the pay protection by stepping up their pay, so that their pay is not less than that of Gopinath Dey. The Special Committee held that the report dated 2.12.1998 of the earlier Special Committee was no longer effective, on the following reasoning :

> "We find that the Special Committee of the three Judges in their report dated 2.12.1998 proceeded on the opinion that Sri Gopinath Dey was given the benefit to which he was not entitled in law and Rule 55(4) of the WBSR Part-I cannot be said to have any application whatsoever in this case.
>
> But now it has been held that allowing the Career Advancement Benefit to Sri Gopinath Dey is in order and this has neither challenged in any proceeding nor set aside by any appropriate forum. In such circumstances, we are of the opinion that observations of the earlier Special Committee of three Judges has lost its force as it preceded on an opinion about the irregularity in granting such benefit to Sri Gopinath Dey but presently, the same having been found to be in order, we fell that the present fifty memorialists are also entitled to pay protection so that they are not to get a pay lesser than Sri Gopinath Dey who is admittedly much junior to all the present memorialists."

7. The Special Committee was thus clearly of the view that if the fixation of pay of Gopinath Dey was erroneous or illegal, the memorialists would not be entitled to stepping up of pay to be on par with Gopinath Dey, but if the grant of Career Advancement benefit to Gopinath Dey was legal and valid, his seniors in the cadre would be entitled to stepping up of their pay so that their pay will not be less than that of Gopinath Dey. However, when the memos dated 21.12.2001 and 9.5.2002 from Accountant General's Office (stating that the grant of career advancement benefit to Dey was not in order) was brought to their notice, the Three-Judge Special Committee gave a further report dated 20.1.2003, modifying its earlier report dated 27.11.2002 by recommending that the memorialists be given the same benefit as was accorded to Dey, in keeping with the principle of pay protection so that their pay is equivalent to that of Dey in relation to his appointment as Lower Division Assistant on 9.9.1985. We extract below the reason assigned for such recommendation :

> "Admittedly, all the memorialists are senior to Dey but were receiving lesser pay that Dey and even if Dey's service as Lower Division Assistant from 9.9.1985, it is to be taken into consideration for the purpose of grant of benefit of Career Advancement Scheme the memorialists would also be entitled to the same benefit taking the date of consideration in their case also from 9.9.1985. Whatever be the method of calculation as far as the fixation of Dey's pay is concerned, the memorialist, who are all senior to him in the same cadre, cannot get a lesser

pay than Dey in keeping with the principle of Rule 55(4) of the West Bengal Service Rules-Part-I."

8. The Registrar (Original Side), High Court, placed the said report dated 20.1.2003 before the learned Chief Justice, with the following submission note : "I further submit before your Lordship for the reasons aforesaid, if your Lordship approved the recommendations of the Hon'ble Judges Committee for the said 50 memorialists be allowed and pay protection be given effect as per recommendations with intimation to the Government." On the said note, the Chief Justice made an order "Please do the needful" on 13.2.2003, thereby directing that the 50 memorialists be given pay protection as per the recommendation of the Special Committee in its report dated 20.1.2003.

9. The Registrar (Original Side) of the High Court issued the following note of acceptance dated 4.3.2003 extending the benefit of pay protection to the 50 senior employees (including respondents 1 to 5) :

"In approving the recommendation of the Hon'ble Judges' Committee on the memorial of fifty employees, the Hon'ble The Chief Justice in exercise of powers conferred under Clause 2 of Article 229 of the Constitution of India has been pleased to allow under order dated 13.2.2003 the following fifty employees who are seniors to Sri Gopi Nath Dey, the same benefit as given to Sri Gopi Nath Dey in keeping with the principle of pay protection under Rule 55(4) of the WBSR, Part-I so that their pay is equivalent to that of Sri Gopinath Dey in relation to his appointment as Lower Division Assistant on and from 9.9.1985."

The State Government by its letter dated 7.3.2003 addressed to the High Court, traced the career and emoluments of Gopinath Dey from 1964 and pointed out that Dey was not entitled to Grade I promotion of Section Writer (Typist) in the scale of ' 380-910 under the ROPA Rules, 1981 with effect from

2.4.1981 as he had not been confirmed in that post at that time. The state government further pointed out as Dey was appointed as Lower Division Assistant as a direct recruit in the scale of ' 300-685/-, with effect from 9.9.1985, he was not entitled to the second higher scale under the career advancement scheme with effect from 1.4.1989. In view of it, the High Court corrected the service book of Gopinath Dey by giving him the benefit of Grade I promotion of Section Writer (Typist) with effect from 1.8.1982 instead of 2.4.1981. The High Court also sent a letter dated 9.4.2003 to the office of the Accountant General admitting the said mistake and confirming the correction in regard to grant of Grade I promotion to Gopinath Dey. In the said letter, the Registrar (Original Side) High Court also admitted that extension of twenty years Career Advancement Scheme Benefit to Dey with effect from 1.4.1989 was a mistake and the order granting such benefit was cancelled and the service book of Dey had been correct.

10. When the pay bills of the 50 senior employees who were given the pay protection by increasing their pay at par with that of Gopinath Dey, were sent to the Calcutta Pay & Accounts Office-II, they were returned with a Return Memo dated 21.4.2003 stating that before allowing any benefit relating to salary, allowances, leave and pension to the employees of the High Court, the prior approval of the Governor of the State was required. The High Court immediately sent a reply dated 24.4.2003 stating that the Chief Justice is empowered to dispense with or relax the requirement of all or any of the rules to such extent and subject to such conditions as he may consider necessary, for dealing with the employees of the High Court in a just and equitable manner. The Calcutta Pay & Accounts Office-II again returned the pay bills with a Return Memo dated 29.4.2003 stating that it had no authority to pay the bill amounts without the directions from the State Government. By another Return Memo dated 6.5.2003, the Calcutta Pay & Accounts Office requested the High Court to resubmit the bills which provided for a higher pay to the 50

employees after obtaining the clarification of the state government, regarding applicability of Rule 55(4) and the consent of the Governor. On 7.5.2003, the Government requested the High Court to review the entire matter in view of the fact that fixation of pay of Gopinath Dey at various stages was erroneous and required rectification.

11. At this juncture, respondents 1 to 5 approached the High Court and sought a declaration that they were entitled to pay protection as per orders of Chief Justice dated 13.2.2003 in the post of Lower Division Assistant, on and from 9.9.1985 in order to bring their pay at par with that of Gopinath Dey, who was their junior. They also sought cancellation of the return memo dated 21.4.2003, 29.4.2003 and 6.5.2003 of the Calcutta Pay & Accounts Office. Similar writ petitions were filed by other employees senior to Gopinath Dey. The West Bengal Government also filed writ petitions challenging the report of the Judges Committee dated 20.1.2003, order of the Chief Justice dated 13.2.2003 and the consequential orders dated 4.3.2003 issued by the High Court, extending the stepping up benefit to the senior employees.

12. The six writ petitions filed by the employees and three petitions filed by the state government were heard and disposed of by a learned Single Judge by a common order dated 17.11.2003. The learned Single Judge inter alia held Rule 55(4) was inapplicable as the two conditions for applicability of the said Rule were admittedly absent. As it was also admitted that Dey was wrongly given the benefits and Dey has not challenged the correction of his pay and direction for recovery of the amount paid in excess, it followed that Dey was not entitled to the benefits wrongly given and consequently, respondents 1 to 5 and other senior employees were not entitled to stepping up of their pay with reference to the pay of Dey. He dismissed the writ petitions by the employees and allowed the writ petitions by the state government and directed that any excess amount paid to the senior employees by

stepping up their pay, should be recovered from them.

13. Feeling aggrieved, the employees filed appeals and those appeals were allowed by a Division Bench of the High Court by a common order dated 20.2.2005. The Division Bench held :

"(a) The Chief Justice had made the Calcutta High Court Rules, 1960 with the approval of the Governor of the State in so far as the rules relate to salaries, allowances, leave or pension. Once rules had been framed by the Chief Justice and were approved by the Governor in relation to financial matters, so long as there is no legislation by the State Legislature, action taken under the powers conferred by the rules cannot be questioned, when such powers exercised by the Chief Justice stood on equal footing to that of Governor.

(b) The state government could not raise any objection to the recommendation for fixation of salary, sanction of creation of posts or grant of increase in case of disparity in exceptional circumstances, particularly when it is aimed at the ameliorating the service conditions of the employees of the High Court. Such action of the Chief Justice, when exercised bona fide and when within the scope of the powers conferred on him, cannot be questioned by the executive or even by the court.

(c) The post of LDA is neither a higher nor a promotional post. Rule 55(4) would therefore not be applicable. Gopinath Dey was holding an ex cadre post which was not one of the sources of recruitment to the post of Lower Division Assistant. The post held by Gopinath Dey was not a feeder post for the post LDA. The post of LDA was not a promotional post. The post of LDA was the bottom post in the cadre in which the recruitment was made. Therefore, none of the factors, in which higher pay could be justified with reference to the pay of a junior, were satisfied.

(d) The moment Gopinath Dey entered the post of LDA through direct recruitment, he acquired the lien of that post. He could not hold the lien of another cadre when he came through direct recruitment to the cadre of LDA. On his substantive appointment to the permanent post of LDA, his lien in the substantive ex cadre post held permanently stood terminated. Thus Gopinath Dey could not claim any benefit on account of his length of service by reason of any lien. Unless lien was available to him, he could not claim fixation of pay at a higher stage than those of his seniors.

(e) Once the state government claim that the pay of Gopinath Dey was correctly fixed, it cannot contend that the senior employees cannot claim parity on the basis of a wrong fixation of pay of Gopinath. When the pay was wrongly fixed and Gopinath Dey was given a higher pay, the respondents being senior to him cannot be paid less and are entitled at least to the same pay Gopinath Dey was given.

(f) The Special Committee submitted its report recommending pay protection which itself is an indication of an exceptional circumstance when it was found that the Gopinath was not entitled to fixation of pay and the senior employees were not entitled to the benefit of Rule 55(4) of WBSR Part-I.

(g) Once in his wisdom the Chief Justice takes action to grant increase in the pay of senior employees to bring their pay at par with that of Gopinath Dey, such action cannot be questioned if the action of the Chief Justice is based on a source of power. Rule 49 is the source of power. The exercise of such power is immune from being questioned, as it is not justiciable.

(h) Once the Chief Justice takes an action pursuant to the rules which have been approved by the Governor, such action does not require any further approval. If no approval

of the Governor is necessary, the state government has no right to question the same, as that will run contrary to the autonomy of the Chief Justice as contemplated under Article 229(2) of the Constitution of India. The action of Chief Justice is non-justiciable. Under the usual circumstances, Gopinath Dey would not have been entitled to the increment, but the government had approved the same. Thus it had acquired a new dimension to justify the grant of higher pay to the respondents. The circumstances in which it was granted, were found to be exceptional due to which the Chief Justice has exercised his discretion. The wisdom of Chief Justice being non-justiciable, the state government cannot object to the same."

14. The said order is challenged in these appeals by special leave by the State of West Bengal on the following grounds :

(i) The senior employees through their repeated representations sought relief under rule 55(4) of the WBSR. The Special Committee consciously considered the merits of their claim with reference to the Rule 55(4) and made its recommendations expressly under the said Rule. The learned Chief Justice by his order dated 13.2.2003 merely accepted the said recommendation based on Rule 55(4). The learned Single Judge and the division bench found that Rule 55(4) was not attracted. Having reached such conclusion, the division bench could not justify the order dated 13.2.2003 of the Chief Justice by inferring that the Chief Justice must have granted relief in exercise of discretion under Rule 49 of WBSR.

(ii) Even assuming that Rule 49 of the WBSR could be regarded in itself as a source of power, in the absence of any consideration either by the Special Committee or by the Chief Justice, as to whether the fixation of pay in the post of LDA for Gopinath Dey at par with the last pay drawn by him in the old post of grade-I Typist/Section Writer could

not be regarded as an 'exceptional circumstance' for granting all Senior Lower Division Assistants pay protection. In the absence of exceptional circumstances, which is the condition precedent for the exercise of the power under Rule 49, the said rule cannot be invoked to justify the order of the Chief Justice.

(iii) In view of Rule 42 (1)(ii) of the WBSR, the fixation of pay of Gopinath Dey at higher initial start in the pay scale of LDA at par with the last pay drawn by him in the old post of Grade-I Typist/Section Writer was erroneous. Such wrong and illegal pay fixation will not entitle the other LDAs senior to him, to the same higher initial start, when all of them were being paid pay admittedly according to the pay scale for LDAs and at the stages to which they were otherwise entitled.

(iv) Having held that the fixation of pay at higher initial start for Gopinath Dey as a LDA was incorrect in terms of Rule 42(i)(ii) of the WBSR and Rule 55(4) of the WBSR was not applicable, the Division Bench could not justify the order of the Chief Justice extending pay protection to his seniors with reference to Rule 49 of WBSR. The Division Bench also fell into an error in holding that the order of the Chief Justice was non-justiciable in writ jurisdiction.

15. On the contentions urged, the following questions arise for our consideration :

(i) Whether the respondents (employees senior to Dey) were entitled to re-fixation of their pay at par with the pay of their junior namely Dey, under Rule 55(4) of the WBSR (Part I) or under any other service law principle?

(ii) If the relief granted to the respondents (employees senior to Dey) could not be supported with reference to Rule 55(4), whether it could be inferred that the order of the Chief Justice permitting the pay of the said senior

employees to be brought at par with the pay of Dey, was passed in exceptional circumstances under Rule 49 of WBSR (Part I)?

(iii) Whether the order of Chief Justice dated 13.2.2003 is not justiciable ?

Re : Question (i) :

16. Rule 55(4) of WBSR, on which the senior employees placed reliance, to claim parity with the pay of Gopinath Dey, reads thus :

"55(4). If a government employee while officiating in a higher post draws pay at a rate higher than his senior officer either due to fixation of his pay in the higher post under the normal rules, or due to revision of pay scales, the pay of the government employees senior to him shall be re-fixed at the same stage and from the same date his junior draws the higher rate of pay irrespective of whether the lien in the lower post held by the senior officer is terminated at the time of re-fixation of pay, subject to the conditions that both the senior and junior officers should belong to the same cadre and the pay scale of the posts in which they have been promoted are also identical.

The benefit of this rule shall not be admissible in case where a senior government employee exercises his option to retain un-revised scale of pay, or where the pay drawn by the senior officer in the lower post before promotion to the higher post was also less than that of his junior."

On a careful reading of Rule 55(4), it is evident that two conditions will have to be fulfilled for attracting the benefit under the said rule. The first is that the junior employee as also the senior employees must be promotees. Secondly, they must come from the same cadre having the same scale of pay in their feeder post. Neither of the said conditions is fulfilled in this

case. In fact, this finding was rendered by the learned Single Judge and was affirmed by the Division Bench. The Division Bench held :

> "Admittedly, Rule 55(4) is not applicable on two reasons. First, that Rule 55(4) was inserted in WBSR subsequent to its adoption by the High Court. Admittedly, the High court did not adopt the same. On account of thereof, benefit of Rule 55(4) would not applicable to the employees of the High Court. Second, Rule 55(4) applies in case of promotion or officiation in a higher port, as rightly contended by Mr. Ray. The post of LDA is neither a higher nor a promotional post. Rule 55(4) would, therefore, not be applicable in this case."

On a careful consideration, we find no reason to interfere with the said concurrent finding that Rule 55(4) is inapplicable.

17. We may now consider whether the private respondents are entitled to stepping up of their pay to bring it at par with that of Dey under the general principle of service jurisprudence. The principles relating to stepping up of pay of the seniors with reference to the higher pay of a junior are now well settled. We may refer to a few of the decisions of this Court in that behalf. In *State of Andhra Pradesh vs. G. Sreenivasa Rao* – (1989) 2 SCC 290, this Court observed :

> "Equal pay for equal work" does not mean that all the members of a cadre must receive the same pay-packet irrespective of their seniority, source of recruitment, educational qualifications and various other incidents of service. When a single running pay-scale is provided in a cadre the constitutional mandate of equal pay for equal work is satisfied. *Ordinarily grant of higher pay to a junior would ex-facie be arbitrary but if there are justifiable grounds in doing so the seniors cannot invoke the equality doctrine.* To illustrate, when pay-fixation is done under valid statutory Rules/executive instructions, *when*

> *persons recruited from different sources are given pay protection,* when promotee from lower cadre or a transferee from another cadre is given pay protection, when a senior is stopped at Efficiency Bar when advance increments are given for experience/passing a test/ acquiring higher qualifications or as incentive for efficiency; are some of the eventualities when a junior may be drawing higher pay than his seniors without violating the mandate of equal pay for equal work. The differentia on these grounds would be based on intelligible criteria which has rational nexus with the object sought to be achieved."
>
> (emphasis supplied)

This Court held that High Courts and Tribunals should not, in an omnibus manner come to the conclusion that whenever and for whatever reasons, a junior is given higher pay, the doctrine of 'equal pay for equal work' is violated and the seniors are entitled to the same pay, irrespective of the scope of the relevant Rules and the reasons which necessitated fixing of higher pay for juniors.

18. In *Chandigarh Administration vs. Naurang Singh* – (1997) 4 SCC 177, this Court held that principle of 'equal pay for equal work' and stepping up of pay would not apply where higher scale was granted to some persons by an evident mistake. This Court held :

> "We are, however, of the opinion that a mistake committed by the Administration cannot furnish a valid or legitimate ground for the Court or the Tribunal to direct the Administration to go on repeating that mistake. The proceedings placed before us clearly show that the pay revision of September 19, 1975 was an unscheduled one, effected merely on the basis of a letter written by the Principal of the College. The Administration no doubt could have rectified that mistake. That would have been the most

appropriate course *but their failure to do so cannot entitle the respondents to say that mistake should form a basis for giving the higher pay scale to them also.* The proceedings of the Administration dated 19.8.1982 clearly shows that the said higher pay scale was treated as personal to the then existing incumbents. As stated above that was really the pay scale admissible to the post of Assistants which was a promotion post to storekeepers. Both these posts cannot be given the same pay scale….An evident mistake cannot constitute a valid basis for compelling the administration to keep on repeating that mistake."

(emphasis supplied)

19. In *Union of India vs. R. Swaminathan* – (1997) 7 SCC 690, this Court considered the government order dated 4.2.1966 issued for removal of anomaly by stepping up of pay of a senior on promotion drawing less pay than his junior. This Court held :

"11. As the Order itself States, the stepping up is subject to three conditions: (1) Both the junior and the senior officers should belong to the same cadre and the posts in which they have promoted should be identical and in the same cadre; (2) the scales of pay of the lower and higher posts should be identical and: (3) anomaly should be directly as a result of the application of Fundamental Rule 22-C which is now Fundamental Rule 22(I)(a)(1). We are concerned with the last condition. The difference in the pay of a junior and a senior in the cases before us is not a result of the application of Fundamental Rule 22(I)(a)(1). The higher pay received by a junior is on account of his earlier officiation in the higher post because of local officiating promotions which he got in the past. Because of the proviso to Rule 22 he may have earned increments in the higher pay scale of the post to which he is promoted on account of his past service and also his previous pay

in the promotional post has been taken into account in fixing his pay on promotion. It is these two factors which have increased the pay of the juniors. This cannot be considered as an anomaly requiring the stepping of the pay of the seniors.

The Office Memorandum dated 4.11.1993. Government of India, Department of Personnel & Training, has set out the various instances where stepping of pay cannot be done. It gives, inter alia, the following instances which have come to the notice of the department with a request for stepping up of pay. These are:

(a) Where a senior proceeds on Extra Ordinary Leave which results in postponement of date of Next Increment in the lower post, consequently he starts drawing less pay than his junior in the lower grade itself. He, therefore, cannot claim pay parity on promotion even though he may be promoted earlier to the higher grade

(b) If a senior foregoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, junior draws higher pay than the senior. The senior may be on deputation while junior avails of the ad hoc promotion in the cadre. The increased pay drawn by a junior either due to ad hoc officiating/ regular service rendered in the higher posts for periods earlier than the senior, cannot, therefore, be an anomaly in strict sense of the term.

(c) If a senior joins the higher post later than the junior for whatsoever reasons, whereby he draws less pay than the junior, in such cases senior cannot claim stepping up of pay at par with the junior.

x x x x

> There are also other instances cited in the Memorandum. The Memorandum makes it clear that in such instances a junior drawing more pay than his senior will not constitute an anomaly and, therefore, stepping up of pay will not be admissible. The increased pay drawn by a junior because of ad hoc officiating or regular service rendered by him in the higher post for periods earlier than the senior is not an anomaly because pay does not depend on seniority alone nor is seniority alone a criterion for stepping up of pay."

20. The facts narrated above, without anything more, would clearly show that Dey was given a higher pay for wholly erroneous reasons. Firstly he was given Grade I promotion of Section Writer (Typist) in the scale of ' 380-910 under the ROPA Rules, 1981 with effect from 2.4.1981 even though he was not confirmed in the lower post at that time. Secondly, even though Dey was appointed as Lower Division Assistant as a direct recruit in the scale of ' 300-685 with effect from 9.9.1985, he was given the benefit of second higher scale under the Career Advancement Scheme, with effect from 1.4.1989, by taking note of his previous service. Dey voluntarily chose to appear for selection as a Lower Division Assistant which carried a lesser pay scale when compared to the pay scale to which he was entitled as a Grade-I Typist, obviously because of better future prospects available to Lower Division Assistants. Having been appointed as a Lower Division Assistant on 9.9.1985, he was not entitled to the benefit of second higher scale with effect from 1.4.1989, as that benefit was available only at the end of 20 years service under the career advancement scheme. If these two benefits erroneously given were deleted, there would be no ground for the seniors to claim any benefit on the basis of parity of pay. Even otherwise, as Dey was getting a higher pay in view of the earlier promotion as Section Writer/Typist, when he was selected and appointed as Lower Division Assistant, he was given pay protection and thus became entitled to a higher pay than what

he would have normally received. His case was completely different from the case of his seniors and his seniors could not therefore claim parity in pay and stepping up of pay to match the pay of Dey. Therefore, the learned Single Judge and the Division Bench rightly held even that Rule 55(4) was inapplicable. The fact that a mistake was committed in the case of Dey by extending the benefit of second higher scale under Career Advancement Scheme cannot be a ground for the Chief Justice to direct perpetuation of the mistake by directing similar benefit to other senior employees. Further, in view of his previous service between 1964 and 1985 and in view of the fact he was getting a higher pay (in a higher pay scale) when he was appointed thereby entitling him to benefit of pay protection, his seniors who were not in a comparable position were not entitled to seek higher pay with reference to the pay of Dey.

21. It is now well settled that guarantee of equality before law is a positive concept and cannot be enforced in a negative manner. If an illegality or an irregularity has been committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of Courts and Tribunals to require the state to commit the same irregularity or illegality in their favour on the reasoning that they have been denied the benefits which have been illegally or arbitrarily extended to others. [See : *Gursharan Singh vs. New Delhi Municipal Administration* - 1996 (2) SCC 459, *Union of India vs. Kirloskar Pneumatics Ltd*. - 1996 (4) SCC 433, *Union of India vs. International Trading Co*. - 2003 (5) SCC 437, and *State of Bihar vs. Kameshwar Prasad Singh* - 2000 (9) SCC 94. This question was exhaustively considered in *Chandigarh Administration vs. Jagjit Singh* - 1995 (1) SCC 745, wherein this Court explained the legal position thus :

> "8. The basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle.

> Generally speaking, the mere fact that the authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law."

We are therefore of the view that neither under Rule 55(4) of WBSR nor under the general principles of service jurisprudence, the seniors were are entitled to claim benefit of re-fixation of their pay at par with the pay of their junior Dey.

Re : Question (ii) :

22. The representation given by the senior employees was for re-fixing their pay at par with the pay of Dey by relaxing Rule 55(4) of WBSR. The basis of their claim was Rule 55(4) and they sought relief by relaxing the said rule. The first report of the Special Committee dated 2.12.1998 considered the claim of senior employees under Rule 55(4) and categorically held that the said rule was inapplicable to their claim. The subsequent reports of the Committee dated 27.11.2002 and

20.1.2003 held that the employees who were senior to Dey, could not get a lesser pay than Dey, in keeping with the principle of Rule 55(4) and recommended grant of relief accordingly. The Registrar (Original Side), High Court put up a note placing the report of the Special Committee dated 20.1.2003 and sought approval of the said recommendation of the Special Committee for the senior employees being granted relief by way of pay protection by stepping up their pay at par with that of Dey. The Chief Justice concurred with the said proposal, without noting any other reason and thus, the Chief Justice merely accepted the reasons assigned by the Special Committee in their recommendation dated 20.1.2003. Even in their writ petitions, the senior employees made the claim only based on Rule 55(4). Neither the claim of the senior employees, nor the report of the Special Committee nor the order of the Chief Justice at any point of time, in any document, refer to any exceptional circumstances warranting the grant of increments prematurely to the employees senior to Dey by stepping up their pay at par with the pay of Dey. Rule 49 of WBSR was neither relied upon nor referred to by the senior employees in their representation, or by the Special Committee in their recommendations or by the Chief Justice in his order. Nor did the senior employees who were the writ petitioners, rely upon or refer to Rule 49 in the writ petition, as the source of power for the order dated 13.2.2003. In these circumstances, it is ununderstandable how the division bench of the High Court, having held in the impugned order that Rule 55(4) was inapplicable, could justify the order of the Chief Justice with reference to Rule 49.

23. Rule 49 of WBSR (Part I) relates to premature increments and reads thus : "*Save in exceptional circumstances and under specific orders of government, no government employee on a time scale of pay may be granted a premature increment in that time scale*". The proviso to Rule 23 of the Calcutta High Court Service Rules, 1960, no doubt, provides that "the power exercisable under the West Bengal

Service Rules by the Governor of the State shall be exercised by the Chief Justice" in regard to the members of High Court service. If Rule 49 had to be invoked, exceptional circumstances should have existed and should have been referred to in the recommendation by the Special Committee or in the order of the Chief Justice. The assumption made by the division bench that when an order of the Chief Justice granting relief cannot be justified with reference to any Rule or legal principle, it should be inferred that the order was made in exceptional circumstances, is erroneous and cannot be accepted. A provision for granting higher pay by way of premature increment in exceptional circumstances, cannot be used to give relief to a large number of employees, without the existence of any exceptional circumstances. The fact that a single employee (Dey) was wrongly given some benefit is certainly not an exceptional circumstance to perpetuate the mistake in the case of all his seniors.

24. The division bench does not refer to any other exceptional circumstances. The logic of the division bench that the very fact that the Special Committee has made a recommendation and the very fact that the Chief Justice had accepted the recommendation and made an order granting relief, are indications of exceptional circumstances, is preposterous, irrational and arbitrary. The finding of the division bench that exceptional circumstances existed for stepping up the pay of large number of employees and therefore, the source of power for the order dated 13.2.2003 of the Chief Justice, is Rule 49 of WBSR is erroneous and improper and cannot be sustained.

Re : Question (iii)

25. We may next consider the correctness of the finding of the division bench that the order dated 13.2.2003 of the Chief Justice is not justiciable and the state government cannot challenge it in a court of law. At the outset, we may note that in a democracy, governed by rule of law, where arbitrariness in

any form is eschewed, no government or authority has the right to do whatever it pleases. Where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. Even prerogative power is subject to judicial review, but to a very limited extent. The extent, depth and intensity of judicial review may depend upon the subject matter of judicial review (vide observation of Constitution Bench in *B.P. Singhal vs. Union of India* – 2010 (6) SCC 331). The fact that in regard to certain types of action or orders of Chief Justice, the scope of judicial review may be very narrow and limited is different from saying that an order of the Chief Justice granting certain relief to High Court employees whose service conditions are governed by Rules, is not justiciable. Such orders are justiciable.

26. We may refer to the principles relating to the power and discretion of a Chief Justice of a High Court under Article 229(2) which reads thus :

> "229(2). Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the court authorized by the Chief Justice to make rules for the purpose :
>
> Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the state…"

In exercise of the powers conferred by Article 229 of the Constitution of India, the Chief Justice of the High Court of Calcutta, with the approval of the Governor of the State of West Bengal, so far as the rules relate to salaries, allowances, leave and pensions, made the Calcutta High Court Service Rules, 1960, with respect to the appointment of persons to, and the conditions of service of persons serving on, the staff attached to the High Court. While the Chief Justice has the power to amend the Rules, he does not have the power to ignore the

Rules. Rule 23 of the Calcutta High Court Service Rules, 1960 provided thus :

> "Subject to the following exceptions, the provisions of the West Bengal Service Rules in so far as they relate to salaries, leave and allowances, shall apply to the members of the High Court Service, Class – I, II, III and IV, as they apply to government servants of the corresponding classes in the service of the Government of West Bengal.
>
> Provided that the powers exercisable under the West Bengal Service Rules by the Governor of the State shall be exercised by the Chief Justice and the power exercisable by any authority sub-ordinate to the Governor shall be exercised by the Chief Justice or by such person or persons as he may, by general or special order, direct."

27. In *M. Gurumoorthy vs. Accountant-General, Assam and Nagaland* – 1971 (2) SCC 137, this Court held that Article 229 contemplates full freedom to the Chief Justice of the High Court in the matter of appointment of officers and servants of the High Court and their conditions of service. The unequivocal and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of such appointments, it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the article. Even the Legislature cannot abridge or modify the powers conferred on the Chief Justice.

28. In *State of UP vs. C. L. Agrawal* - (1997) 5 SCC 1, a Constitution Bench of this Court considered a dispute relating to the competence of the Chief Justice of the High Court to grant advance/premature increments to an employee working in the High Court :

> "The state government was of the view that the Chief Justice could not grant advance/premature increments without prior approval of the Governor. Instead of directly

challenging the Chief Justice's competence, the State Government refused to take into account premature increments sanctioned to the respondent by the Chief Justice of the Allahabad High Court, while determining respondent's pensionary benefits. The matter was examined with reference to, (i) Article 229(2) and proviso thereunder, which lay down that the conditions of service of officers and servants of a High court shall be regulated by the rules made by the Chief Justice, etc. and the rules, if they relate to salaries, allowances, etc., shall require Governor's approval; (ii) Rule 3, two provisos to Rule 40(2) and proviso to Rule 41 of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, which provide for creation of temporary posts with the approval of the Governor; applicability of state government rules to the High Court staff with such modifications, etc., as the Chief Justice may specify; obtaining of the Governor's approval where such modification, etc., relates allowances, leave or pensions; exercise of Governor's power by the Chief Justice in relation to High Court staff; (iii) Rule 27 of the Financial Handbook, Vol.II, Parts II to IV, which says that 'an authority may grant a premature increment to a government servant on a time scale of pay if it has power to create a post in the same cadre on the same scale of pay."

Reading together the two provisos to Rule 40(2) of the Allahabad High court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, this Court held that it was apparent that the rules and orders referred to therein were the rules and orders of a general nature and not orders made in individual cases; that insofar as officers and servants of the High Court were concerned, it was enough that the Chief Justice exercised the powers conferred upon the Governor under such rules and orders of the government and no further approval by the Governor is required. This Court also held that even in Rule 41, the reference was to the making of general orders and not the

orders in individual cases. The order of the Chief Justice granting premature increments did not therefore require the approval of the Governor. It was held that as the Chief Justice had the power to create posts in the High Court, it was the Chief Justice who could grant premature increments under Rule 27 of the Financial Handbook, to the officers and servants of the High Court, and even if it was to be assumed that advance increments under Rule 27 could be granted by the Governor, the Chief Justice would exercise Governor's power by virtue of second proviso to Rule 40(2) of the 1976 Rules.

29. In *High Court of Judicature for Rajasthan vs. Ramesh Chand Paliwal* – (1998) 3 SCC 72, this Court was considering the correctness of a direction given under Article 226, by a division bench of the High Court to the Registrar to prepare a report regarding the practicability of certain posts being manned by the officers from the establishment of the High Court instead of by Higher Judicial Officers and place it before the Full Court through the Chief Justice for taking a decision whether Judicial Officers could be relieved of such administrative posts in the High Court. This Court found that Rules 2, 2-A of, and Schedule I to the Rajasthan High Court (Conditions of Service of Staff) Rules, 1953, made by the Chief Justice in exercise of power conferred by Article 229, specified the posts on which officers of the Rajasthan Higher Judicial Service or Rajasthan Judicial Service were to be appointed. The method of recruitment had also been indicated. All appointments on these posts were to be made by the Chief Justice. The rules could be altered, amended or rescinded only by the Chief Justice who alone has the rule making power. This Court held that the real purport of the directions issued by the division bench on the judicial side was to override not only the constitutional provisions contained in Article 229 but also the rules made in exercise of powers available to the Chief Justice under that article. Even if the Registrar, in compliance of the impugned directions, is to report that the posts on which officers of the Rajasthan Higher Judicial Service or Rajasthan Judicial

Service are appointed on deputation, could well be manned by the High Court staff itself and even if such report is placed before the Full Court, the Full Court cannot give a direction to the Chief Justice not to fill up those posts by bringing officers on deputation but to fill up those posts by promotion from amongst the High Court staff. A Judge of the High Court individually or all the Judges sitting collectively, as in the Full Court, cannot either alter the constitutional provisions or the rules made by the Chief Justice. The Chief Justice has been vested with wide powers to run the High Court administration independently so as not to brook any interference from any quarter, not even from his brother Judges *who, however, can scrutinize his administrative action or order, on the judicial side, like the action of any other authority*.

30. It is therefore clear that the Chief Justice has the power and authority to grant premature increments in exceptional circumstances. But the Chief Justice cannot grant such relief in an irrational or arbitrary manner. If the Rules provide that premature increments could be granted in exceptional circumstances, there should be a reference to the existence of exceptional circumstances and application of mind to those exceptional circumstances. When neither the recommendation considered by the Chief Justice nor the order of the Chief Justice referred to any exceptional circumstances and did not even refer to the Rule relating to grant of relief in exceptional circumstances, the question of assuming exceptional circumstances does not arise. The order dated 13.2.2003 is justiciable.

Conclusion

30. In view of the above, none of the seniors was entitled to any relief with reference to the pay of their junior Gopinath Dey. We therefore, allow these appeals, set aside the order of the division bench and restore the order of the learned Single Judge dismissing the writ petitions.

D.G. Appeals disposed of.

M/S. DELHI INTERNATIONAL AIRPORT PVT. LTD.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 7872 of 2011 etc.)

SEPTEMBER 15, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Contract Labour (Regulation and Abolition) Act, 1970 – ss. 10(1) and 12A – Issuance of Notification by the Central Government u/s. 10 (1) prohibiting employment of contract labour of trolley retrievals in the establishment of the Airport Authority of India (AAI) at the Indira Gandhi International Airport and Domestic Airport at Delhi – Delhi International Airport Private Limited (DIAL), private undertaking coming into existence after the issuance of the said Notification, taking over the Airports (Domestic and International) – Applicability of the said Notification to DIAL – Appropriate government for DIAL under the CLRAA and ID Act – Held: Central Government is the appropriate government for DIAL and AAI under the CLRAA and ID Act – Entire functioning of DIAL is fully dependent on the grant of permission by the Central Government – Thus, DIAL operates and functions under the authority of the Central Government – Central Government's notification was issued before Operation, Management, Development and Agreement (OMDA) was signed, by virtue of which DIAL stepped into the shoes of AAI – DIAL expressly assumed the 'rights and obligations associated with the operation and management of the airport' through OMDA – DIAL was transferred all of AAI's responsibilities at the airports except certain reserved functions which means that DIAL only had incomplete control, thus, DIAL was nothing more than a contractor for AAI establishment and was not a principal employer of an independent establishment – Thus, the said Notification, directed at AAI establishment, was equally

binding on DIAL under the CLRAA – DIAL to abolish all contract labour as per the terms of the notification – In the interest of justice, DIAL directed to pay Rupees five lacs to each of the erstwhile workers of DIAL who were working for them as trolley retrievers till 2003 – Industrial Disputes Act, 1947.

136 workers were employed by the contractor TDI Company to do the work of trolley retrieving at the Domestic and at the International Airport at Delhi in the year 1992. The workmen approached the Contract Labour Court seeking abolition of contract labour system and their absorption as regular employees. On 26th July 2004, the Central Government issued a Notification abolishing the contract labour system. Airports Authority of India (AAI) which had come into force challenged the notification. The High Court held that the present proceedings could not be proceeded with till the matter was resolved by the High Powered Committee (HPC) and as such the matter went to the HPC and the Notification was not given effect to. Meanwhile, the said 136 workers were removed from service in the year 2003 as the contract of TDI Company came to an end and a new contractor 'SH' came in its place. Thereafter, from 4th April 2006, a new private entity, Delhi International Airport Private Limited (DIAL) took over the Airports (Domestic and International). 136 workers filed a writ petition praying for their absorption in service as regular employees and for implementation of the Notification dated 26th July, 2004. The Single Judge of the High Court dismissed the writ petition holding that the establishment of AAI is no longer in existence and has changed and as such, the Notification dated 26th July, 2004 cannot be applied to the new entity DIAL and the appropriate government shall have to issue a fresh Notification. Indira Gandhi International Airport TDI Karamchari Union and Union of

India filed separate LPA's. During pendency of the LPA's the Chief Labour Commissioner, Government of India passed an order holding that the appropriate government for DIAL is the Central Government and the documents and file relating to DIAL were sent to the Central Government. DIAL filed a writ petition. AAI filed another writ petition challenging the said notification. The Division Bench of the High Court held that in relation to airport, it is the Central Government which is the appropriate government for the purpose of CLRAA; and that DIAL is equally bound by the Notification dated 26th July, 2004 issued by the Central Government. The review petition filed by the Union of India was also disposed of. Aggrieved, DIAL, AAI and the Indira Gandhi International Airport TDI Karamchari Union filed the instant appeals.

The question which arose for consideration in these appeals are as to who is the appropriate government for DIAL under the CLRAA and ID Act; that whether the Notification dated 26th July, 2004 issued by the Central Government under Section 10 (1) of the CLRAA prohibiting employment of contract labour of trolley retrievals in the establishment of the Airport Authority of India at the Indira Gandhi International Airport and Domestic Airport at Delhi would be applicable to DAIL which only came into existence on 4th April, 2006.

Disposing of the appeals, the Court

HELD: 1.1. Section 2(a) of the Contract Labour (Regulation and Abolition) Act, 1970 makes it clear that the Central Government would be the "appropriate government" under CLRAA for any establishment for whom the Central Government is the "appropriate government" under the Industrial Disputes Act. Section 2(a) of the ID Act indicates that the Central Government is the "appropriate authority" in three relevant situations

wherein both Airport Authority of India (AAI) and the air transport service have been specifically incorporated itself. Thus, if Delhi International Airport Private Limited (DIAL) industry is carried on under the authority of the Central Government, the dispute in question can be said to concern AAI or if the dispute in question can be said to concern air transport service, then the Central Government is the appropriate authority both for ID Act and CLRAA. It may be pertinent to properly comprehend the relevant statute. [Paras 33 and 34] [1145-F-H; 1146-A-D-E]

1.2. The AAI Act was constituted for the better administration and cohesive management of airports and civil enclaves whereas air transport services are operated or are intended to be operated and of all aeronautical communication stations for the purpose of establishing or assisting in the establishment of airports and for matters connected therewith or incidental thereto. [Para 35] [1146-F-G]

1.3. It is clear from Section 12A that AAI may in public interest or in the interest of a better management of the airport, make a lease of the premises of the airport to carry out some of its functions under Section 12 as the Authority may deem fit. Detailed functions of the Authority have been enumerated in Section 12. Out of those functions under Section 12A, some functions can be delegated on lease in the public interest or in the interest of better control and management of the airports. Consequently, in pursuance of the agreement with DIAL, some functions of AAI were leased out to DIAL. DIAL derives its authority from AAI and AAI derives its authority from the powers given by the Central Government. In the impugned judgment, the Division Bench clearly held that AAI works "under the authority" of the Central Government. [Paras 38, 39 and 40] [1147-H; 1148-A-B-E]

1.4. A close reading of the objects and reasons indicates that the Central Government under Section 12A of the AAI Act has retained the power to give directions in the public interest or in the interest of better management to lease the premises of the airport to carry out some of its functions under Section 12A, as the authority may deem fit. Some of its (AAI's) functions have been leased out to DIAL. This has been done under Section 12A(2) with the previous approval of the Central Government. On proper scrutiny of the provisions of the AAI Act, it is abundantly clear that the Central Government has control over AAI and AAI has control over DIAL. [Para 42] [1150-E-F]

1.5. The AAI Act was passed by the Central Government "to provide for the constitution of the Airports Authority of India' which was in turn charged with the "better administration and cohesive management of airports." Preamble to Section 12A of the AAI Act allows AAI to contract with third parties to perform some of AAI's functions (in the public interest or in the interest of better management of airports). It was this proviso which allowed AAI to assign some of its functions to DIAL through Operation, Management, Development and Agreement (OMDA), responsibility for trolley collection services at the Indira Gandhi International Airport and the domestic airport. [Para 45] [1151-E-F]

1.6. In the impugned judgment, the Division Bench correctly held that "the provisions of the AAI Act show that there is extensive control of the Central Government over the functioning of AAI." Section 12A reveals control of the Central Government on AAI. AAI has to obtain approval from the Central Government before delegating any of its functions to third parties, such as DIAL. This clearly indicates that the Central Government has complete control over AAI. Sections 2, 6 and 10 of the AAI

are examples of governmental reservations of authority. The Central Government retains its statutory control over AAI. In the impugned judgment, the High Court correctly came to the conclusion that "the authority of the Central Government is conferred by the statute itself". [Para 50] [1153-A-C]

1.7. In case the Central Government had never granted permission, pursuant to Section 12A of the AAI Act, DIAL would not be able to carry out functions at the Delhi airports. The entire functioning of DIAL is fully dependent on the grant of permission by the Central Government. The undertakings need not be government undertakings to have had authority conferred upon them. But the word "government" clearly modifies "company." However, it cannot modify "undertaking," for the phrase "government/any undertaking". Thus, it would seem that any "undertaking"- even private undertakings, like DIAL - may function "under the authority" of the Central Government. Whether or not they do it, "a question of fact which has to be ascertained on the facts and in the circumstances of each case." In the facts and circumstances of these cases, it is abundantly clear that DIAL operates under the authority of the Central Government. [Paras 52, 53 and 54] [1153-G-H; 1154-D-E]

1.8. The functions and powers of DIAL in relation to the Delhi airports are traceable to Section 12A of the AAI Act. Without Central Government's permission, AAI could not have delegated any power to DIAL. In other words, the functioning of DIAL at the Delhi airports itself was fully dependent on the approval of the Central Government. DIAL could not have received its contract with AAI without the Central Government's approval. That being the case, by a plain reading of the phrase it seems that "DIAL functions under the authority of the Central Government". [Para 55] [1154-F-H]

1.9. DIAL does not explain how having the State Government as the appropriate government - the only alternative under CLRAA and ID Act - would be any more conducive to privatization. The Central Government does not impede privatization any more than the State Government; after all, it was the Central Government that sought to encourage privatization through the AAI Act by incorporating Section 12A in the Act. [Para 56] [1155-B-C]

1.10. In case AAI and DIAL act under the authority of different governments it would bring about absurd results: AAI could simply circumvent potential Central Government orders by delegating various functions to third parties, such as DIAL. AAI would need to obtain Central Government approval prior to making such a delegation under Section 12A of the AAI Act, but it nevertheless seems unlikely that the Central Government would intend to maintain authority over AAI's actions, while allowing actions performed by other entities on behalf of AAI, such as DIAL, to be carried out under the authority of the State Government. DIAL made no suggestions as to why the Central Government might have intended such a result while drafting the AAI Act and CLRAA, and there is, therefore, little justification for coming to such a conclusion. [Para 57] [1155-D-E]

1.11. DIAL expressly assumed the "rights and obligations associated with the operation and management of the airport" through OMDA. While Section 12A of the AAI Act only notes that the "powers and functions" of AAI will be transferred to its lessors, it is "inconceivable that by virtue of Section 12A the powers and functions of AAI will stand transferred and not the corresponding obligations." If it was the "obligation" of AAI to follow valid directions of the Central Government by virtue of its status as an enumerated

industry, and if DIAL has admittedly assumed those same obligations through OMDA, then DIAL is presumably also obligated to follow such directions. Again, a contrary interpretation would allow AAI to circumvent the Central Government's exercise of authority over its work merely by contracting it out to third parties. It is abundantly clear that the Central Government is the appropriate government *qua* DIAL and consequently the said Notification of 26th July, 2004 is equally applicable to DIAL. Under the ID Act (and therefore, CLRAA), the third situation in which the Central Government is the "appropriate Government" is "in relation to industrial disputes concerning air transport services." [Paras 58 and 59] [1155-G-H; 1156-A-C]

1.12. Trolley retrievers themselves are not physically transporting anything by air. However, it is entirely possible that the drafters of the AAI Act did not intend to restrict the coverage of this provision merely to pilots, stewardesses, and others engaged in the actual, physical transport of people and objects, as DIAL would have liked the Court to believe. Trolleys at airports relate to air transportation- just as they relate to "a single flight or a series of flights." [Para 60] [1156-E]

1.13. At the time of amendment when private airline operators had started functioning and as "air transport service" they included all airline operators, private or public and the said industry was included as an enumerated industry. Thus, the "air transport service" concerns airline operators only. DIAL is not engaged in the business of operating an airline for carrying passengers and goods by air through flights. In fact, AAI is also not involved in this activity and Section 12 of the AAI Act which lists out the functions of AAI does not include the function of carrying people and goods through air by flights operated by it. As such, when AAI

does not perform such function then there is no question of transfer of such functions to DIAL. [Paras 62 and 64] [1156-H; 1157-C]

1.14. It is the duty of the authority to provide all air transport services at the airport, and if it is not the duty of the authority to carry passengers and goods by air through flights, then by the appellants own logic, air transport service must mean more than the mere carriage of passengers and goods by air through flights. If it did not, then there would be no reason that "air transport service" would be listed as a "duty of the Authority" under Section 12(2). This Section clearly indicates that it is the duty of the Authority to provide "air transport service", such duty does not mean that the Authority provides such services itself. AAI is responsible under the AAI Act for providing air transport service would not necessarily mean that DIAL also does so. [Paras 65 and 66] [1157-E-F]

1.15. In the instant case, under Section 12A of the AAI Act all functions were given to DIAL except watch and ward function, air traffic service and civil enclaves. From the provisions of OMDA, it was clear that all functions of AAI barring reserved activities and all land except certain carved out assets were given to DIAL. DIAL admitted that AAI transferred to it all functions except those related to watch and ward, air traffic service and civil enclaves, none of which could be considered as "air transport service". That being the case, AAI must have transferred its duty to provide "air transport service" to DIAL and the Central Government must, therefore, be the appropriate government for DIAL under the CLRAA and ID Act. [Para 67, 68] [1157-G-H; 1158-A-B]

1.16. Section 10(1) of the CLRAA permits the "appropriate government" to "prohibit employment of contract labour in any process, operation or other work

in any establishment. The Central Government's 26th July, 2004 notification clearly forbade the "AAI establishment" from employing trolley retrievers as contract labour. [Para 69] [1158-D]

1.17. The provision s. 291)(e) makes it clear, the definition of "establishment" focuses either on (1) Place; or (2) Offices or departments of the Government or a local authority. The 26th July, 2004 notification must, therefore, have been directed at one of these types of establishments. [Para 72] [1159-C]

1.18. On the one hand, AAI clearly cannot be considered a local authority as it is charged with managing airports throughout India. On the other hand, AAI also cannot be considered an "office or department of the Government". The AAI Act makes clear that AAI must, in certain circumstances, obtain approval from the Central Government, thereby implying that AAI is not itself the Central Government. Therefore, "establishment" in this case cannot refer to "any office or department of the Government or a local authority", it must refer to a "place where any industry, trade, business, manufacture or occupation is carried on". The Division Bench in the impugned judgment held that the establishment for the purposes of the CLRAA is a place where the industrial, trade or business activity is carried on then it necessarily follows in the context of the instant case that it is the Delhi Airports which constitute the establishment of AAI and in turn the establishment of DIAL. There could be multiple establishments at the airport. That being the case, the Division Bench's assertion that the establishment of AAI is in turn the establishment of DIAL must be justified. [Paras 73, 75] [1159-D-G; 1160-B]

1.19. DIAL while performing work on behalf of AAI, it is not performing work on behalf of AAI establishment. Instead, it is merely working on behalf of its own

establishment. Further, all the independence DIAL does have, the AAI Act and OMDA make it clear that AAI maintains ultimate responsibility for the airport. [Paras78 and 79] [1160-G]

1.20. Noticing that air traffic services and security are the heart of the airport and also noticing the clauses of OMDA providing for overall supervision of DIAL by AAI, checking of accounts, step in rights of AAI and so on, it must be concluded that AAI has overall control of the airport site. [Para 80] [1161-A]

1.21. DIAL has been leased out the portion of AAI's work, which DIAL only has incomplete control over as well as the fact that DIAL meets the definition of a contractor under the CLRAA, further suggests that DIAL is nothing more than a contractor for AAI establishment. DIAL is not, in other words, a principal employer of an independent establishment. That being the case, the 26th July, 2004 notification, declared at AAI establishment, must also apply to DIAL. [Para 81] [1161-C]

1.22. DIAL falls under AAI establishment. Clause 5.1 of OMDA, which notes that the "rights and obligations associated with the operation and management of the Airport would stand transferred to" DIAL, would seem to suggest that orders given to AAI establishment would also apply to DIAL establishment, even if the two were, as DIAL claims, separate establishments. If AAI establishment is obligated to abolish contract labour and DIAL establishment (even if it is somehow separate) has assumed AAI establishment's obligations through the OMDA, then DIAL is presumably required to fulfil those obligations. Critical to this inference is the fact that the Central Government's 26th July, 2004 notification was issued before OMDA was signed. [Para 83] [1161-E-G]

1.23. In the impugned judgment, the Division Bench

correctly observed that "every time a fresh agreement is entered into, the entire process of getting a notification issued by the appropriate Government in relation to the same work of trolley retrieval and with the same establishment *vis-a-vis* such private player" must be repeated. This interpretation would defeat the rights of the workers, which are meant to be protected by CLRAA. The Division Bench correctly observed that the obligation flowing from the notification under Section 10(1) CLRAA should continue to bind every private player that steps into the shoes of AAI. [Para 84] [1162-A-C]

2. The Central Government is the appropriate government for DIAL for the following reasons –

(i) DIAL could not have entered into a contract with AAI without approval of the Central Government according to the mandate of Section 12A of the AAI Act. It is abundantly clear that DIAL functions "under the authority" of the Central Government;

(ii) AAI clearly acts under the authority of the Central Government and DIAL acts under the authority of AAI because of its contract with DIAL. DIAL works under the authority of the Central Government;

(iii) The Central Government has given AAI responsibility for overseeing the airports. To fulfil its obligations, AAI contracted with DIAL. However, it is clear that DIAL's work "concerns" AAI, if DIAL does not perform its work properly or adequately, then AAI would be breaching its statutory obligation and would be responsible for the consequences.

(iv) AAI is under an obligation to follow the

directions of the Central Government and if DIAL has admittedly assumed those obligations through the OMDA, then DIAL is presumably also obligated to follow such directions. A contrary interpretation would allow AAI to circumvent the Central Government's exercise of authority over its work merely by contracting it out to third party (DIAL).

(v) Clause 5.1 of the OMDA specifically notes that the "rights and obligations associated with the operation and management of the Airport would stand transferred" to DIAL. If AAI was admittedly obligated to follow the 26th July, 2004 notification and DIAL has assumed all of AAI's obligations, then DIAL must also be obligated to follow the notification. In other words, the notification issued by the Central Government is equally binding on DIAL.

(vi) Holding the 26th July, 2004 notification inapplicable to DIAL would mean that the Government would have to issue separate notification every time AAI contracts with a third party. This would clearly violate the basic objects and reasons of CLRAA.

(vii) The security of contract labour working for AAI envisaged, a law cannot be made to depend on the private sector. If the legislature had found it fit to specifically include AAI as an enumerated industry under the ID Act, it is extremely unlikely that it would have intended for AAI to be able to circumvent the Central Government orders by contracting with private parties.

(viii) The privatization of the airports does not mean that the "appropriate government" cannot be the Central Government. The definition of 'establishment' in the CLRAA takes in its fold purely private undertakings. Concerns about privatization are, therefore, unfounded.

(ix) Under Section 12(2) of the AAI Act, AAI is obliged to provide air traffic service and air transport service at the airport. DIAL admits that AAI transferred all of its responsibilities at the airports with the exception of certain reserved functions. Since industries concerning air transport service function under the authority of the Central Government, and since AAI transferred its "air transport service" responsibilities to DIAL, the Central Government must be held to be the appropriate Government for DIAL.

(x) The OMDA makes it clear that AAI maintains ultimate responsibility for the airports. The fact that DIAL was transferred only a portion of AAI's work which DIAL only has incomplete control over as well as the fact that DIAL meets the definition of a contractor under the CLRA Act further suggests that DIAL is nothing more than a contractor for AAI establishment. That being the case, notification dated 26th July, 2004 directed at AAI establishment must also apply to DIAL.

(xi) The contention of DIAL that it would not be bound by the obligation of AAI establishment would lead to absurd consequences. The Division Bench in the impugned judgment has rightly pointed out that every time a fresh agreement is entered into, the entire process

of getting a notification issued by the appropriate government in relation to the same work of trolley retrieval and with the same establishment *via-a-vis* such private player must be repeated. But this interpretation would defeat the rights of the workmen which are meant to be protected by the CLRAA.

(xii) In the impugned judgment, the Division Bench of the High Court correctly held that the obligation flowing from the said notification under Section 10(1) CLRAA should continue to bind every private player that steps into the shoes of AAI. [Para 85] [1162-D-H; 1163-A-H; 1164-A-H; 1165-A-B]

Steel Authority of India Limited & Others etc. etc. v. National Union Water Front Workers and Others etc. etc. **(2001) 7 SCC 1 – relied on.**

3.1. It is clear that the notification dated 26th July, 2004 was equally binding on DIAL under the CLRAA and, therefore, DIAL must abolish all contract labour as per the terms of the notification. [Para 86] [1165-C]

3.2. The Central Government notification dated 26th July, 2004 is clearly binding and applicable to DIAL. DIAL's obligation with regard to the contract labour in general is clear from the said notification. They are liable to be regularized as regular employees of DIAL. DIAL replaced many of the workers with other trolley retrievers and it would be unrealistic to expect DIAL to regularize the employment of their current trolley retrievers and member of the workers' union alike and inequitable to leave the current workers jobless so as to make room for erstwhile workers of DIAL. [Para 87] [1165-D-E]

3.3. In view of the peculiar facts and circumstances

of these cases directing DIAL to regularize services of trolley retrievers who worked with DIAL till 2003 would be harsh, unrealistic and not a pragmatic approach, therefore, in the interest of justice, DIAL is directed to pay Rupees five lacs to each of the erstwhile 136 workers of DIAL who were working for them as trolley retrievers till 2003 and in case any worker has expired, then his or her legal heirs would be entitled to the said amount. This compensation is paid to the workers in lieu of their permanent absorption/reinstatement with DIAL and their claim of back wages. This is in full and final settlement of entire claims of erstwhile 136 workers of DIAL. [Para 88] [1165-G-H; 1166-A]

Oil and Natural Gas Commission and Anr. vs. Collector of Central Excise **1992 Suppl. (2) SCC 432;** *Gammon India Ltd. and Ors. v. Union of India (UOI) and Ors.* **(1974) 1 SCC 596: 1974 (3) SCR 665 – referred to.**

Case Law Reference:

1992 Suppl. (2) SCC 432	**Referred to.**	**Para 7**
1974 (3) SCR 665	**Referred to.**	**Para 14**
(2001) 7 SCC 1	**Relied on.**	**Para 85**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7872 of 2011.

From the Judgment & Order dated 18.12.2009 of the High Court of Delhi at New Delhi in W.P. (C) No. 139 of 2008.

WITH

C.A. Nos. 7873, 7874, 7875, 7876, 7878-79 of 2011.

P.P. Malhotra, ASG, R.F. Nariman, Dr. A.M. Singhvi, Sudhir Chandra, Chander Udai Singh, Colin Gonsalves, Atul Sharma, Saket Singh, Milanka Chaudhary, Sarojanand Jha,

Sunil Fernandes, Atul Sharma, Abhishek Sharma, Lalit Bhasin, Nina, Gupta Ratna Dhingra, Mudit Sharma, Bina Gupta, Tariq Adeed, Alin Mahanta, Divya Jyoti (for Jyoti Mendiratta), Rachna Joshi Issar Chetan Chawla, Samridhi Sinha (for Shreekant N. Terdal) for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted in all the Special Leave Petitions.

2. These appeals emanate from the judgment of the High Court of Delhi delivered in LPA No.38 of 2007, LPA No.1065 of 2007, Writ Petition (C) No.139 of 2008 and Writ Petition (C) No.6763 of 2008 on December 18, 2009.

3. The short question which arises for consideration in these appeals is whether the Notification dated 26th July, 2004 issued by the Central Government under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970 (for short, 'CLRAA') prohibiting employment of contract labour of trolley retrievals in the establishment of the Airport Authority of India (for short, 'AAI') at the Indira Gandhi International Airport and Domestic Airport at Delhi would be applicable to the Delhi International Airport Private Limited (for short, 'DIAL') or not?

4. This judgment would decide these appeals preferred before this Court against the following Letters Patent Appeals and Writ Petitions decided by the High Court:

(a) *Indira Gandhi International Airport TDI Karamchari Union v. Union of India and others* - LPA No.38 of 2007

This Letters Patent Appeal was filed against the judgment of the learned Single Judge dated 28th November, 2006 in Writ Petition (C) No.15156 of 2006. The workers' Union had preferred the writ petition for seeking implementation of the Notification of prohibition dated 26th July, 2004 and for

absorption in service amongst other things. The learned Single Judge took notice of the fact that from 4th April, 2006 a new private entity, DIAL had taken over the Airports (Domestic and International). Hence at the airport, there was no longer any establishment of AAI existing but a new establishment of DIAL was operating due to which the notification dated 26th July, 2004, prohibiting the engagement of contract labour in trolley retrieval activity in the establishment of AAI at the Delhi Airports could not automatically apply to the new entity, DIAL and a new notification by the appropriate government would have to be issued.

(b) *Union of India v. Indira Gandhi International Airport TDI Karamchari Union* - LPA No.1065 of 2007

This Letters Patent Appeal was preferred by the Union of India against the learned Single Judge's judgment dated 28th November, 2006 passed in Writ Petition (C) No.15156 of 2008 on a very limited point of certain observation in the judgment.

(c) **Airports Authority of India v. Union of India Writ Petition (C) No.6763 of 2008**

AAI after getting permission of the High Powered Committee to go ahead with the litigation challenged the notification dated 26th July, 2004 by filing the said writ petition.

(d) **Delhi International Airports P.Ltd. v. Union of India Writ Petition (C) No.139 of 2008**

DIAL had preferred this writ petition challenging the order of the Chief Labour Commissioner, Government of India dated 24th September, 2007 by which the Central Government was held to be the 'appropriate government' for DIAL for the purposes of Industrial Disputes Act, 1947 (hereinafter referred to as "ID Act") and CLRAA. The order dated 22nd November, 2007 of Chief Secretary, Government of NCT of Delhi by which

all documents concerning DIAL were directed to be shifted to the Central Government machinery was also impugned.

5. Both the writ petitions of AAI and DIAL were heard and disposed of by the Division Bench of the High Court along with these LPAs by the impugned judgment.

BRIEF FACTS:

6. 136 workers were employed by the contractor M/s. TDI International Pvt. Ltd. to do the work of trolley retrieving at the Domestic and at the International Airport at Delhi in the year 1992. In view of the perennial nature of the work, the workmen approached the Contract Labour Court for abolition of contract labour system and for their absorption as regular employees. AAI came into force merging the International Airport Authority Act, 1971 and the National Airport Authority Act, 1985. On 26th July, 2004 the Central Government accepted the recommendations of the Contract Labour Court and issued notification dated 26th July, 2004 abolishing the contract labour system.

7. This notification was challenged by AAI before the High Court of Delhi. Taking note of the ONGC judgment reported in *Oil and Natural Gas Commission and Another Vs. Collector of Central Excise* 1992 Suppl. (2) SCC 432 the High Court vide judgment dated 3rd February, 2005 held that the present proceedings cannot be proceeded with till the matter is resolved by the High Powered Committee (HPC). Accordingly, the matter went to the HPC and the notification was not given effect to.

8. Meanwhile, 136 workers who were engaged as Trolley retrievers by the contractor M/s. TDI International Private Limited working at the airport since 1992 were removed from service on 5th December, 2003 as the contract of M/s. TDI International Private Limited had come to an end and a new contractor

Sindhu Holdings came in its place. These 136 members filed Writ Petition No.15156 of 2006 before the learned Single Judge of the High Court of Delhi praying for their absorption in service as regular employees and for implementation of the notification dated 26th July, 2004.

9. The learned Single Judge of the High Court after hearing the parties including DIAL vide judgment dated 28th November, 2006 held that the establishment of AAI is no longer in existence and has changed. As such, the notification dated 26th July, 2004 cannot be applied to the new entity DIAL. The appropriate government shall have to issue a fresh notification. Consequently, the Writ Petition filed by the said 136 workers stood dismissed by the learned Single Judge of the High Court.

10. Indira Gandhi International Airport TDI Karamchari Union preferred LPA No.38 of 2007 against the judgment of the learned Single Judge. The Union of India also preferred LPA No.1065 of 2007 against the judgment of the learned Single Judge.

11. During the pendency of these LPAs, an order dated 24th September, 2007 was passed by the Chief Labour Commissioner, Government of India holding that the appropriate government for DIAL is the Central Government. By order dated 22nd November, 2007 the documents and file relating to DIAL were sent to the Central Government. These orders were challenged by DIAL in Writ Petition (C) No.139 of 2008. After getting the permission, AAI filed another Writ Petition (C) No.6763 of 2008 challenging the said notification on merit. The Division Bench of the High Court heard all these matters together and passed the impugned order of 18th December, 2009.

12. The review petition was preferred by the Union of India which was decided on 12th March, 2010 by the High Court modifying para 61 of the impugned judgment. Against the

impugned judgment of the Division Bench of the High Court, two appeals were preferred by DIAL and three by AAI and one by the Indira Gandhi International Airport TDI Karamchari Union. In these appeals, two broad issues that arise are:

(a) Who is the appropriate government for DIAL under the CLRAA and ID Act? This is the subject matter of SLP (C) No.369 of 2010 filed by DIAL.

(b) Whether the notification dated 26th July, 2004 is applicable to DIAL as it is issued by the Central Government which is not the appropriate government for DIAL and secondly whether the notification that applies to the 'establishment of AAI' will be applicable to the 'establishment of DIAL' which only came into existence on 4th April, 2006? This is the subject matter of SLP (C) No.377 of 2010 filed by DIAL.

13. We deem it appropriate to deal with the basic objects and reasons of passing the CLRAA. This Act was enacted with a view to abolish the contract labour under certain circumstances and to provide for better conditions of service to the labour. The business of providing contract labour is regulated as the contractor is required to obtain a licence and the principal employer is not entitled to engage a contractor without obtaining registration. The rules also contain detailed provisions to carry out the purposes of the Act. It is significant to note that the 1970 Act does not create any machinery or forum for the adjudication of any dispute arising between the contract labour and the principal employer of the contractor.

14. The object of the Act was dealt with by this Court in the judgment of *Gammon India Ltd. and Others* v. *Union of India (UOI) and Others* (1974) 1 SCC 596 which reads as under:-

"The Act was passed to prevent the exploitation of contract labour and also to introduce better conditions of work. The

Act provides for regulation and abolition of contract labour. The underlying policy of the Act is to abolish contract labour, wherever possible and practicable, and where it cannot be abolished altogether, the policy of the Act is that the working conditions of the contract labour should be so regulated as to ensure payment of wages and provision of essential amenities. That is why the Act provides for regulated conditions of work and contemplates progressive abolition to be extent contemplated by Section 10 of the Act. Section 10 of the Act deals with abolition while the rest of the Act deals mainly with regulation. The dominant idea of the Section 10 of the Act is to find out whether contract labour is necessary for the industry, trade, business, manufacture or occupation which is carried on in the establishment."

15. The Central Government will be the appropriate government under CLRRA for any establishment for whom the Central Government is the appropriate government under the ID Act. The main question arises for adjudication is whether the Central Government is the appropriate government for DIAL under the ID Act? Section 2 (a) of the ID Act deals with the appropriate government which reads as under:-

"2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "appropriate government" means—

(i) in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government, or by a railway company [or concerning any such controlled industry as may be specified in this behalf by the Central Government] or in relation to an industrial dispute concerning [a Dock Labour Board established under section 5A of the Dock Workers (Regulation

of Employment) Act, 1948 (9 of 1948), or [the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956 (1 of 1956)] or the Employees' State Insurance Corporation established under section 3 of the Employees' State Insurance Act, 1948 (34 of 1948), or the Board of Trustees constituted under section 3A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948), or the Central Board of Trustees and the State Boards of Trustees constituted under section 5A and section 5B, respectively, of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952), or the Life Insurance Corporation of India established under section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956), or [the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956 (1 of 1956)], or the Deposit Insurance and Credit Guarantee Corporation established under section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (47 of 1961), or the Central Warehousing Corporation established under section 3 of the Warehousing Corporations Act, 1962 (58 of 1962), or the Unit Trust of India established under section 3 of the Unit Trust of India Act, 1963 (52 of 1963), or the Food Corporation of India established under section 3, or a Board of Management established for two or more contiguous States under section 16, of the Food Corporations Act, 1964 (37 of 1964), or [the Airports Authority of India constituted under section 3 of the Airports Authority of India Act, 1994 (55 of 1994)], or a Regional Rural Bank established under section 3 of the Regional Rural Banks Act, 1976 (21 of 1976), or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Bank of India Limited], [the National Housing Bank established under section 3 of the National Housing Bank Act, 1987 (53 of 1987)], or [an air transport service, or a banking or an insurance company,] a mine, an oil field,] [a Cantonment Board,] or a [major port, any company in which not less than fifty-one per cent. of the paid-up share capital is held by the Central Government, or any corporation, not being a corporation referred to in this clause, established by or under any law made by Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government, the Central Government, and]

(ii) in relation to any other industrial dispute, including the State public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the State Government, the State Government:

Provided that in case of a dispute between a contractor and the contract labour employed through the contractor in any industrial establishment where such dispute first arose, the appropriate government shall be the Central Government or the State Government, as the case may be, which has control over such industrial establishment.

(aa) "arbitrator" includes an umpire;

(aaa) "average pay" means the average of the wages payable to a workman—

(i) in the case of monthly paid workman, in the three complete calendar months,

(ii) in the case of weekly paid workman, in the four complete weeks,

(iii) in the case of daily paid workman, in the twelve full working days,

preceding the date on which the average pay becomes payable if the workman had worked for three complete calendar months or four complete weeks or twelve full working days, as the case may be, and where such calculation cannot be made, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked;."

16. Firstly, the Central Government is the "appropriate government" in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government. Secondly, the Central Government is the "appropriate government" in relation to industrial disputes concerning AAI. Thirdly, the Central Government is the "appropriate government" in relation to industrial disputes concerning an air traffic service. Thus, if DIAL's industry is carried on "under the authority" of the Central Government, if the dispute in question can be said to concern AAI, or the dispute in question can be said to concern an "air transport service", then the Central Government is the "appropriate government" both under ID Act and CLRAA.

17. In these appeals, the validity of the Notification dated 26th July, 2004 issued by the Central Government under Section 10(1) CLRAA was assailed by AAI and DIAL. It was also urged that the Notification dated 26th July, 2004 cannot bind DIAL.

18. It was further contended that DIAL is not an agent of AAI and DIAL cannot be considered as a 'delegate' of such an entity. It was also contended that an "establishment" in question is that of DIAL, wherever it conducts its business and

that in relation to DIAL there has to be a separate Section 10 (1) notification issued by the Government of the NCT Delhi prohibiting the employment of contract labour in trolley retrieval work in the establishment of DIAL. According to DIAL, NCT Delhi is an "appropriate government" to issue the notification. DIAL also disputed that it did not carry on the 'air transport service'. It was pointed out that DIAL is not required to and in fact does not have a licence issued to it under Rule 134 of the Aircraft Rules. It is submitted that DIAL is performing its functions independently in its own establishment which is not that of AAI's.

19. The workers' union submitted that the notification dated 26th July, 2004 clarified the position of DIAL. According to them, the definition of the term under CLRAA does not envisage multiple principal employers or establishments. It was submitted that the definition of an 'establishment' under CLRAA is materially different from the definition of that term under the ID Act which envisages separation of establishments. For the purposes of CLRAA, it was submitted that the prohibition on employment of the contract labour in a job is *qua* the establishment and operates irrespective of any change in the principal employer as long as the process, operation or other work continues in that establishment. Alternatively, it was submitted that even if DIAL is taken to be the principal employer which has stepped into the shoes of AAI by virtue of Operation, Management, Development and Agreement (for short "OMDA"), the notification under Section 10 (1) CLRAA would bind it and for DIAL too the appropriate government would be the Central Government.

20. It was also submitted that DIAL is providing an "air transport service", therefore, the appropriate government is the Central Government. The Central Government defended the notification of 26th July, 2004. It was submitted that adopting a contrary interpretation would defeat the objective and purpose of CLRAA. The Central Government submitted that DIAL is

operating under the authority of the Central Government. The industry that is carried on by DIAL by virtue of OMDA is relatable to the authority granted by Section 12A of the Airport Authority of India Act 1994 (55 of 1994) (for short, the 'AAI Act'). It was submitted that DIAL is rendering "air transport service" including emplaning and deplaning of passengers, handling of passengers' luggage, booking of cargo, and, therefore, the Central Government is the appropriate government.

21. The Division Bench held that the notification dated 26th July, 2004 issued by the Central Government under Section 10(1) CLRAA is valid and binding on it. The Division Bench in the impugned judgment held that the recourse to the ID Act for the purposes of understanding what is an "establishment" is misconceived since the definition of 'establishment' under CLRAA is unambiguous. It is futile to seek recourse to ID Act to understand what is an 'establishment' for the purposes of CLRAA. The Division Bench further held that the establishment is one and it cannot be divided into several small establishments where for one part the appropriate government would be the Central Government and for the other part it would the State Government. Such an interpretation would run counter to the scheme of CLRAA and would defeat its object and purpose.

22. The Division Bench also held that it is inconceivable by virtue of Section 12A of the AAI Act, that only the functions and powers of AAI stand transferred and not the corresponding obligations. In fact, in terms of Clause 5.1 of OMDA, the statutory obligations under CLRAA which are that of AAI and its contractors also get transferred to CLRAA. This transfers all powers and functions and correspondingly the obligations under CLRAA by virtue of Section 12A of the AAI Act.

23. The Division Bench held that:

"....In fact OMDA makes an express reference to the AAI

Act. Consequently, consistent with the observations of the Supreme Court in the SAIL case, the exercise by DIAL of the functions and powers of DIAL in relation to the Delhi airports is traceable to Section 12A of the AAI Act and therefore in relation to the Delhi airports the Central Government will continue to remain the appropriate government. Further, the provisions of the AAI Act show that there is extensive control of the Central Government over the functioning of AAI. The authority of the Central Government is conferred by the statute itself. Therefore, it is not correct to contend that consequent upon OMDA, the establishment of AAI i.e. the Delhi airports ceased to be under the control of the Central Government.

Therefore, the inescapable conclusion is that consistent with the observations in the SAIL case, the statute itself contemplates the Central Government to be the appropriate government notwithstanding that there has been a privatization of the management of the Delhi airports. By being brought within the ambit of Section 12 A of the AAI Act, even the private actor i.e. DIAL has been brought within the ambit of the control and authority of the Central Government. In fact, there is an express reference to the AAI Act in the body of the OMDA itself. If there was no provision like Section 12 A in the AAI Act, there could not have been an OMDA between AAI and DIAL."

24. After examining the settled legal principles, the Division Bench held that irrespective of whether the amendment to Section 2(a) I.D. Act was later, the appropriate government for the purposes of Section 10 CLRAA in the instant case continues to be the Central Government.

25. The definition of "air transport service" is certainly wider than "air traffic service". This has to be seen also in the context of Section 2(i) which defines "civil enclave" to mean as under :

2(i) "civil enclave" means the area, if any, allotted at an

airport belonging to any armed force of the Union, for use by persons availing of any air transport services from such airport or for the handling of baggage or cargo by such service, and includes land comprising of any building and structure on such area."

26. The Division Bench further observed that when the above definitions are read along with Section 1(3) of the AAI Act, it is plain that the AAI Act will apply to a civil enclave. It is clear that the handling of baggage or cargo by an air transport service would form part of the services provided in a civil enclave. The functions that have been excluded under Section 12A(1) of the AAI Act are "air traffic services or watch and ward at airport and civil enclaves". In other words, air traffic services and provision of watch and ward at the airport and civil enclaves remain with AAI, notwithstanding that it has entered into an agreement of OMDA with DIAL.

27. The Division Bench further observed that the Air Traffic Rules envisage that all the licences for air and air traffic service would be issued separately. That by itself may not be determinative of whether trolley retrieval forms part of the services to be provided by DIAL in terms of OMDA. Only 'air traffic services and provision of watch and ward' are, in terms of Section 12A of the AAI Act to be retained by AAI as part of its functions. The Division Bench viewed that the trolley retrieval along with toilets and handling of baggage or car within the area of a 'civil enclave' are recognized as essential services by virtue of Schedule 16 to the OMDA. This is what is relevant in determining whether trolley retrieval is also part of the services provided in the establishment. Therefore, notwithstanding whether DIAL is actually offering other kinds of air transport services, it is certainly meant to provide trolley retrieval services at the Delhi airports.

28. The Division Bench also came to the categorical finding that for the purpose of establishment of Delhi airport, it

is the Central Government that continues to be the "appropriate government". The Division Bench also came to the conclusion that in view of Section 12A of AAI Act, the obligation flowing from the said notification under Section 10(1) of CLRAA will continue to bind every private player that steps into the shoes of AAI even for some of its functions. Otherwise, every time a fresh agreement is entered into, the entire process of getting a notification issued by the appropriate government in relation to the same work of trolley retrieval and with the same establishment *vis-a-vis* such private player has to be re-stated. That was never the intention of the legislature in enacting CLRAA and in particular Section 10 CLRAA. Such interpretation would defeat the rights of the workmen which are meant to be protected by the CLRAA.

29. The Division Bench of the High Court came to the following conclusions:

(i) That in relation to airport, it is the Central Government which is the appropriate government for the purpose of CLRAA;

(ii) DIAL is equally bound by the Notification dated 26th July, 2004 issued by the Central Government;

30. The most useful starting point of analysis is Section 10 of CLRAA. Sub-Section (1) reads as follows:

"Notwithstanding anything contained in this Act, the appropriate government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the official gazette, employment of contract labour in any process, operation or other work in any establishment."

31. Two critical issues are raised by DIAL to suggest that the Central Government's 26th July, 2004 notification directed at "AAI establishment" under the authority of Section 10(1) of CLRAA is inapplicable to DIAL. First, DIAL claims that the

Central Government is not the appropriate government to issue such notices to it. Second, DIAL claims that even if the Central Government was the appropriate government, its 26th July, 2004 notification was directed at "AAI establishment" and AAI and DIAL are separate establishments. For the terms of the notice to be made applicable to DIAL establishment, a separate notification would have to be issued. These two issues will be addressed in its own turn.

32. WHETHER THE CENTRAL GOVERNMENT IS THE "APPROPRIATE GOVERNMENT"

CLRAA Section 2(1) reads as follows:

(1) In this Act, unless the context otherwise requires,-

(a) "appropriate government" means,—

(i) in relation to an establishment in respect of which the appropriate government under the Industrial Disputes Act, 1947 (14 of 1947), is the Central Government;

(ii) in relation to any other establishment, the Government of the State in which that other establishment is situated.

33. In the definition itself given in Section 2(a), specific reference has been made to the Airport Authority of India constituted under the AAI Act and the air transport service. This provision makes it clear that the Central Government will be the "appropriate government" under CLRAA for any establishment for whom the Central Government is the "appropriate government" under the ID Act. The question which now arises for adjudication is whether the Central Government is the "appropriate government" under the ID Act. According to DIAL, it is not an "appropriate government", therefore, it is imperative

to analyse this provision. Section 2(a) of the ID Act indicates that the Central Government is the "appropriate authority" in three relevant situations:

(i) The Central Government is the "appropriate authority" in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government.

(ii) The Central Government is the "appropriate government" in relation to the industrial disputes concerning AAI.

(iii) The Central Government is the "appropriate government" in relation to industrial dispute concerning air transport service.

34. Both AAI and the air transport service have been specifically incorporated in the Section itself. Thus, if DIAL industry is carried on under the authority of the Central Government, the dispute in question can be said to concern AAI or if the dispute in question can be said to concern air transport service, then the Central Government is the appropriate authority both for ID Act and CLRAA. It may be pertinent to properly comprehend the relevant statute.

35. The AAI Act was constituted for the better administration and cohesive management of airports and civil enclaves whereat air transport services are operated or are intended to be operated and of all aeronautical communication stations for the purpose of establishing or assisting in the establishment of airports and for matters connected therewith or incidental thereto.

36. In Section 2 of the AAI Act, air transport service has been defined in Section 2(e) of the Act which is set out as under:

"air transport service" means any service, or any kind of remuneration, whatsoever, for the transport by air of persons, mail or any other things, animate or inanimate, whether such service relates to a single flight or series of flights;

37. Section 12A of the AAI Act, which was inserted with effect from 1.7.2004, reads as under:

"12A. *Lease by the authority.*- (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management or airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit;

Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.

(3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.

(4) The lessees, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

38. It is clear from Section 12A that AAI may in public interest or in the interest of a better management of the airport, make a lease of the premises of the airport to carry out some

of its functions under Section 12 as the Authority may deem fit. Detailed functions of the Authority have been enumerated in Section 12. Out of those functions under Section 12A, some functions can be delegated on lease in the public interest or in the interest of better control and management of the airports. Consequently, in pursuance of the agreement with DIAL, some functions of AAI were leased out to DIAL. DIAL argued that not only its own industry is not carried on under the authority of the Central Government but further that not even AAI's authority is carried on under the authority of the Central Government.

39. It is relevant to mention that DIAL derives its authority from AAI and AAI derives its authority from the powers given by the Central Government. The question, of course, is whether DIAL works "under the authority" of the Central Government and therefore, whether the Central Government is the "appropriate authority" for DIAL?

40. In the impugned judgment, the Division Bench has clearly held that AAI works "under the authority" of the Central Government.

41. It would be relevant to recapitulate the Statement of Objects and Reasons for passing the AAI Act. The Statement of Objects and Reasons reads as under:

"STATEMENT OF OBJECTS AND REASONS

Until 1971, the Director General of Civil Aviation was entrusted with the responsibility not only of regulatory functions relating to civil aviation but also of construction and management of airports, air traffic control and air space management in the country.

2. Considering the need for heavy investments and operational flexibility required for construction and management of large airports, the International Airports Authority of India (IAAI) was constituted as an autonomous

body under the International Airports Authority Act, 1971. Four international airports, namely, Delhi, Bombay, Madras and Calcutta were transferred to IAAI with effect from 1.4.1972; later, Trivandrum airport was also transferred to IAAI. In 1985, it was felt that similar treatment was required for domestic airports and air traffic control and related services. Consequently, the National Airports Authority (NAA) was constituted under the National Airports Authority Act, 1985.

3. International airports are put to more intensive use and generate substantial revenues which accrue to the IAAI. Revenues of the NAA are much less buoyant because a number of its airports do not have any commercial air service whatsoever while many others have only infrequent operations. The NAA has, therefore, not been able to generate adequate resources to meet the requirements of development and modernization. To overcome this handicap and provide for closer integration in the management of airports and air traffic contract services in the country, it has been found necessary to merge the IAAI and the NAA, which the Bill seems to achieve.

4. The salient features of the Bill are:-

(a) Constitution of a single unified Airports Authority of India to control and manage both the national and international airports in the country and transfer and vesting of the undertakings of the International Airports Authority of India and National Airport Authority in the said Airports Authority of India.

(b) Repeal of the International Airports Authority of India Act, 1971 and the National Airports Authority Act, 1985.

(c) All licences, permits, quotas and exemptions granted to the International Airports Authority of India or the

National Airports Authority be deemed to have been granted to the Airports Authority of India.

(d) Guarantees given for or in favour of the International Airports Authority of India or the National Airports Authority to continue to be operative in relation to the Airports Authority of India.

(e) Every officer or other employee of the International Airports Authority of India and the National Airports Authority, serving in its employment immediately before the appointed day, to become an officer or other employee, as the case may be, of the Airports Authority of India, with option to resign.

(f) Power of the Central Government to give directions to the Airports Authority of India.

5. The Bill seeks to achieve the aforesaid objectives."

42. A close reading of the objects and reasons indicates that the Central Government under Section 12A of the AAI Act has retained the power to give directions in the public interest or in the interest of better management to lease the premises of the airport to carry out some of its functions under Section 12A, as the authority may deem fit. Some of its (AAI's) functions have been leased out to DIAL. This has been done under Section 12A(2) with the previous approval of the Central Government. On proper scrutiny of the provisions of the AAI Act, it is abundantly clear that the Central Government has control over AAI and AAI has control over DIAL.

43. DIAL claims that if AAI's industry was being carried out under the authority of the Central Government under Section 2 of the ID Act, there would have been no need for the legislature to separately include AAI as an "enumerated industry". Such reasoning would be seen on a plain reading of the phrase: "under the authority of the Central Government", as DIAL itself

has admitted that all these industries, on a cursory look, seem to be by or under the control of the Central Government. Further, this line of thinking would imply that none of the many industries enumerated in ID Act can be held to act "under the authority of the Central Government". While this is conceivably the case, it may be more likely that the authors of the ID Act, in listing the enumerated industries, simply wanted to ensure that those industries were covered by the Act, without meaning to affect the separate issue of whether those industries were also acting "under the authority of the Central Government." Further, while it is fair to assume that the legislature attempts to avoid tautology, such canons are not necessarily dispositive. It is well established canon of statutory construction that the legislature is known to avoid tautology and redundancy.

44. The crucial questions which need our adjudication are: whether DIAL works under the Central Government and whether the Central Government is the 'appropriate government' for DIAL?

45. The AAI Act was passed by the Central Government "to provide for the constitution of the Airports Authority of India' which was in turn charged with the "better administration and cohesive management of airports." Preamble to Section 12A of the AAI Act allows AAI to contract with third parties to perform some of AAI's functions (in the public interest or in the interest of better management of airports). It was this proviso which allowed AAI to assign some of its functions to DIAL through OMDA, responsibility for trolley collection services at the Indira Gandhi International Airport and the domestic airport.

46. DIAL claims that if AAI's industry was being carried out under the authority of the Central Government under Section 2 of the ID Act, then there would have been no need for the legislature to separately include AAI as an "enumerated industry". On the one hand, this argument of DIAL is correct. On the other hand, however, such reasoning would seem to

contradict a plain reading of the phrase "under the authority of the Central Government" as DIAL itself has admitted, "all these industries, on a cursory look seem to be by or under the control of the Central Government." Further, this line of thinking would imply that none of the many industries enumerated under Section 2 of the ID Act can be held to act "under the authority of the Central Government". While this is conceivably the case, it may be more likely that the framers of the ID Act, in listing the enumerated industries simply wanted to ensure that these industries were also acting "under the authority of the Central Government."

47. The Constitution Bench of this Court in *Steel Authority of India Limited & Others etc. etc. v. National Union Water Front Workers and Others etc. etc.*, (2001) 7 SCC 1, popularly known as *'SAIL'* case held:

> "Where the authority, to carry on any industry for or on behalf of the Central Government, is conferred on the government company/any undertaking by the statute under which it is created, no further question arises."

48. AAI, a government undertaking has been created by a statute, to carry out the air transport industry on behalf of the Central Government. In the words of the AAI Act itself, the Act was created :

> "….for the transfer and vesting of the undertakings of the International Airports Authority of India and the National Airports Authority to and in the Airports Authority of India so constituted for the better administration and cohesive management of airports and civil enclaves..." (Preamble)

49. If the passage from *SAIL's* case is to be taken at its face value, it would appear that AAI clearly functions "under the authority" of the Central Government, and that the Central Government is, therefore, the "appropriate government" under the terms of CLRAA and ID Act.

50. In the impugned judgment, the Division Bench correctly held that "the provisions of the AAI Act show that there is extensive control of the Central Government over the functioning of AAI." Section 12A reveals control of the Central Government on AAI. AAI has to obtain approval from the Central Government before delegating any of its functions to third parties, such as DIAL. This clearly indicates that the Central Government has complete control over AAI. Sections 2, 6 and 10 of the AAI are further examples of governmental reservations of authority. The Central Government retains its statutory control over AAI. In the impugned judgment, the High Court correctly came to the conclusion that "the authority of the Central Government is conferred by the statute itself."

51. In fact, in these cases, we are merely concerned with very limited controversy whether DIAL works under the authority of the Central Government or not? DIAL, of course, claims that it does not. In the *SAIL* judgment, the Constitution Bench held as under :

> "the phrase "any industry carried on under the authority of the Central Government" implies an industry which is carried on by virtue of, pursuant to, conferment of, grant of, or delegation of power or permission by the Central Government to a Central Government company or other government company/undertaking. To put it differently, if there is lack of conferment of power or permission by the Central Government to a government company or undertaking, it would disable such a company/undertaking to carry on the industry in question."

52. In case the Central Government had never granted permission, pursuant to Section 12A of the AAI Act, DIAL would not be able to carry out functions at the Delhi airports. The entire functioning of DIAL is fully dependent on the grant of permission by the Central Government. The Constitution Bench, in the *SAIL* judgment further observed as under :

> "may be conferred, either by a statute or by virtue of the relationship of principal and agent or delegation of power. Where the authority, to carry on any industry for or on behalf of the Central Government, is conferred on the government company/any undertaking by the statute under which it is created, no further question arises. But, if it is not so, the question that arises is whether there is any conferment of authority on the government/any undertaking by the Central Government to carry on the industry in question. This is a question of fact and has to be ascertained on the fact and in the circumstances of each case."

53. The undertakings need not be government undertakings to have had authority conferred upon them. But the word "government" clearly modifies "company." However, it cannot modify "undertaking," for the phrase "government/any undertaking". Thus, it would seem that any "undertaking"- even private undertakings, like DIAL – may function "under the authority" of the Central Government. Whether or not they do it, as the Constitution Bench noted, "a question of fact which has to be ascertained on the facts and in the circumstances of each case."

54. In the facts and circumstances of these cases, it is abundantly clear that DIAL operates under the authority of the Central Government.

55. In the impugned judgment, it was noted that "the functions and powers of DIAL in relation to the Delhi airports are traceable to Section 12A of the AAI Act." It is clear that without Central Government's permission, AAI could not have delegated any power to DIAL. In other words, the functioning of DIAL at the Delhi airports itself was fully dependent on the approval of the Central Government. In other words, DIAL could not have received its contract with AAI without the Central Government's approval. That being the case, by a plain reading of the phrase it seems that "DIAL functions under the authority of the Central Government".

56. It was argued on behalf of DIAL that "if the intent of the Parliament was to make DIAL come under the authority of the Central Government then it would have militated against the basic objective of achieving privatization." DIAL, however, does not explain how having the State Government as the appropriate government – the only alternative under CLRAA and ID Act – would be any more conducive to privatization. It is now clear that the Central Government does not impede privatization any more than the State Government; after all, it was the Central Government that sought to encourage privatization through the AAI Act by incorporating Section 12A in the Act.

57. In case AAI and DIAL act under the authority of different governments it would bring about absurd results : AAI could simply circumvent potential Central Government orders by delegating various functions to third parties, such as DIAL. Of course, AAI would need to obtain Central Government approval prior to making such a delegation under Section 12A of the AAI Act, but it nevertheless seems unlikely that the Central Government would intend to maintain authority over AAI's actions, while allowing actions performed by other entities on behalf of AAI, such as DIAL, to be carried out under the authority of the State Government. DIAL has made no suggestions as to why the Central Government might have intended such a result while drafting the AAI Act and CLRAA, and there is, therefore, little justification for coming to such a conclusion.

58. DIAL expressly assumed the "rights and obligations associated with the operation and management of the airport" through OMDA. While Section 12A of the AAI Act only notes that the "powers and functions" of AAI will be transferred to its lessors, it is "inconceivable that by virtue of Section 12A the powers and functions of AAI will stand transferred and not the corresponding obligations." If it was the "obligation" of AAI to follow valid directions of the Central Government by virtue of

its status as an enumerated industry, and if DIAL has admittedly assumed those same obligations through OMDA, then DIAL is presumably also obligated to follow such directions. Again, a contrary interpretation would allow AAI to circumvent the Central Government's exercise of authority over its work merely by contracting it out to third parties. It is abundantly clear that the Central Government is the appropriate government *qua* DIAL and consequently the said Notification of 26th July, 2004 is equally applicable to DIAL.

59. Under the ID Act (and therefore CLRAA), the third situation in which the Central Government is the "appropriate Government" is "in relation to industrial disputes concerning air transport services."

60. The question for the purposes of this case, then, is whether the trolley retrieval services performed by DIAL are done "for the transport by air of persons, mail, or any other thing." Clearly, trolley retrievers themselves are not physically transporting anything by air. However, it is entirely possible that the drafters of the AAI Act did not intend to restrict the coverage of this provision merely to pilots, stewardesses, and others engaged in the actual, physical transport of people and objects, as DIAL would have liked the Court to believe. Clearly, trolleys at airports relate to air transportation- just as they relate to "a single flight or a series of flights."

61. On behalf of DIAL, it was submitted that "air transport services" as enumerated industry under ID Act replaced an earlier listing of "Indian Airlines" and "Air India", two corporations clearly engaged in the actual, physical transportation of individuals by air.

62. At the time of amendment when private airline operators had started functioning and as "air transport service" they included all airline operators, private or public and the said industry was included as an enumerated industry. This makes

it abundantly clear that "air transport service" concerns airline operators only.

63. Section 12(2) of the AAI Act reads as under:

> "It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves."

64. It may be relevant to mention that DIAL is not engaged in the business of operating an airline for carrying passengers and goods by air through flights. In fact, AAI is also not involved in this activity and Section 12 of the AAI Act which lists out the functions of AAI does not include the function of carrying people and goods through air by flights operated by it. As such, when AAI does not perform such function then there is no question of transfer of such functions to DIAL.

65. It is the duty of the authority to provide all air transport services at the airport, and if it is not the duty of the authority to carry passengers and goods by air through flights, then by the appellants own logic, air transport service must mean more than the mere carriage of passengers and goods by air through flights. If it did not, then there would be no reason that "air transport service" would be listed as a "duty of the Authority" under Section 12(2). This Section clearly indicates that it is the duty of the Authority to provide "air transport service", such duty does not mean that the Authority provides such services itself.

66. AAI is responsible under the AAI Act for providing air transport service would not necessarily mean that DIAL also does so.

67. In the instant case under Section 12A of the AAI Act all functions have been given to DIAL except watch and ward function, air traffic service and civil enclaves. From the provisions of OMDA, it is clear that all functions of AAI barring reserved activities and all land except certain carved out assets has been given to DIAL.

68. DIAL has admitted that AAI has transferred to it all functions except those related to watch and ward, air traffic service and civil enclaves, none of which can be considered as "air transport service". That being the case, AAI must have transferred its duty to provide "air transport service" to DIAL and the Central Government must, therefore, be the appropriate government for DIAL under the CLRAA and ID Act.

AAI and DIAL are not separate establishments, but even if they were, the 26th July, 2004 notification applies to DIAL anyway

69. Section 10(1) of the CLRAA permits the "appropriate government" to "prohibit employment of contract labour in any process, operation or other work in any establishment. The Central Government's 26th July, 2004 notification clearly forbade the "AAI establishment" from employing trolley retrievers as contract labour. The question, then, is whether DIAL is part of "AAI establishment" for purposes of the CLRAA?

70. DIAL contends that the establishment of AAI at the Indira Gandhi International Airport and Domestic Airport underwent a change and a new private entity in the form of the appellant DIAL established its establishment, after being granted a lease under Section 12A of the AAI Act. In support of this claim, DIAL contends that it has complete overall control and supervision over the Airport to the exclusion of AAI, and is not an agent or delegate of AAI but is, rather, a separate and a new principal entity to whom the Central Government's 26th July, 2004 notification, even if otherwise valid, did not apply. The Single Bench apparently agreed, holding that

> "the notification itself has become irrelevant in view of the privatization of the airports and a new notification will have to be issued by the appropriate government.

71. To address these claims, it is important to analyse the definition of "establishment". Section 2(1)(e) of the CLRAA defines "establishment" as follows:

" 'establishment' means –

c) any office or department of the Government or a local authority, or

d) any place where any industry, trade, business, manufacture or occupation is carried on."

72. As this provision makes it clear, the definition of "establishment" focuses either on (1) Place; or (2) Offices or departments of the Government or a local authority. The 26th July, 2004 notification must, therefore, have been directed at one of these types of establishments.

73. On the one hand, AAI clearly cannot be considered a local authority as it is charged with managing airports throughout India. On the other hand, AAI also cannot be considered an "office or department of the Government". The AAI Act makes clear that AAI must, in certain circumstances, obtain approval from the Central Government, thereby implying that AAI is not itself the Central Government. Therefore, "establishment" in this case cannot refer to "any office or department of the Government or a local authority", it must refer to a "place where any industry, trade, business, manufacture or occupation is carried on". The Division Bench in the impugned judgment held that the establishment for the purposes of the CLRAA is a place where the industrial, trade or business activity is carried on then it necessarily follows in the context of the present case that it is the Delhi Airports which constitute the establishment of AAI and in turn the establishment of DIAL.

74. This Court in *SAIL's* case held as under:

"It is thus evident that there can be plurality of establishments in regard to the Government or local

authority and also in regard to any place where any industry, trade, business, manufacture or occupation is carried on."

75. Accordingly, there could be multiple establishments at the airport. That being the case, the Division Bench's assertion that the establishment of AAI is in turn the establishment of DIAL must be justified.

76. It would be pertinent to refer to the definition of "contractor" in Section 2(1)(c) of CLRAA, which reads as under:

"'contractor', in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor."

77. DIAL "undertakes to produce a given result" – trolley retrieval services, among other things – for AAI establishment through contract labour. To prove, otherwise, DIAL would need to be able to assert the following, adopted from the CLRAA definition of contractor excerpted above.

"DIAL does not undertake to produce any result for AAI establishment. Instead, DIAL undertakes to produce result for its own establishment"

78. DIAL while performing work on behalf of AAI, it is not performing work on behalf of AAI establishment. Instead, it is merely working on behalf of its own establishment.

79. Further, all the independence DIAL does have, the AAI Act and OMDA make it clear that AAI maintains ultimate responsibility for the airport.

80. The question that has to be answered is who has

control of the entire establishment? Noticing that air traffic services and security are the heart of the airport and also noticing the clauses of OMDA providing for overall supervision of DIAL by AAI, checking of accounts, step in rights of AAI and so on, it must be concluded that AAI has overall control of the airport site.

81. Admittedly, DIAL has been leased out the portion of AAI's work, which DIAL only has incomplete control over as well as the fact that DIAL meets the definition of a contractor under the CLRAA, further suggests that DIAL is nothing more than a contractor for AAI establishment. DIAL is not, in other words, a principal employer of an independent establishment. That being the case, the 26th July, 2004 notification, declared at AAI establishment, must also apply to DIAL.

82. The fact that DIAL is a private entity is of no assistance to it. In *SAIL's case*, the Constitution Bench explicitly held that the definition of "establishment" in the CLRAA takes in its fold purely private undertakings.

83. This issue is fully settled by the foregoing analysis. From the analysis, DIAL falls under AAI establishment. For example, Clause 5.1 of OMDA, which notes that the "rights and obligations associated with the operation and management of the Airport would stand transferred to" DIAL, would seem to suggest that orders given to AAI establishment would also apply to DIAL establishment, even if the two were, as DIAL claims, separate establishments. If AAI establishment is obligated to abolish contract labour and DIAL establishment (even if it is somehow separate) has assumed AAI establishment's obligations through the OMDA, then DIAL is presumably required to fulfil those obligations. Critical to this inference is the fact that the Central Government's 26th July, 2004 notification was issued before OMDA was signed.

84. The contention that DIAL would not also be bound by

the obligations of AAI establishment would once again lead to absurd consequences. In the impugned judgment, the Division Bench correctly observed that "every time a fresh agreement is entered into, the entire process of getting a notification issued by the appropriate Government in relation to the same work of trolley retrieval and with the same establishment *vis-a-vis* such private player" must be repeated. This interpretation would defeat the rights of the workers, which are meant to be protected by CLRAA. The Division Bench has correctly observed that the obligation flowing from the notification under Section 10(1) CLRAA shall continue to bind every private player that steps into the shoes of AAI.

85. We have carefully heard the learned counsel for the parties and perused the written submissions filed by them. In our considered view, the Central Government is the appropriate government for DIAL for the following reasons –

(i) DIAL could not have entered into a contract with AAI without approval of the Central Government according to the mandate of Section 12A of the AAI Act. In this view of the matter, it is abundantly clear that DIAL functions "under the authority" of the Central Government;

(ii) AAI clearly acts under the authority of the Central Government and DIAL acts under the authority of AAI because of its contract with DIAL. Then it can be logically stated that DIAL works under the authority of the Central Government;

(iii) The Central Government has given AAI responsibility for overseeing the airports. To fulfil its obligations, AAI contracted with DIAL. However, it is clear that DIAL's work "concerns" AAI, if DIAL does not perform its work properly or adequately, then AAI will be breaching its statutory obligation and would be responsible for the consequences.

(iv) AAI is under an obligation to follow the directions of the Central Government and if DIAL has admittedly assumed those obligations through the OMDA, then DIAL is presumably also obligated to follow such directions. Again, a contrary interpretation would allow AAI to circumvent the Central Government's exercise of authority over its work merely by contracting it out to third party (DIAL).

(v) Clause 5.1 of the OMDA specifically notes that the "rights and obligations associated with the operation and management of the Airport would stand transferred" to DIAL. If AAI was admittedly obligated to follow the 26th July, 2004 notification and DIAL has assumed all of AAI's obligations, then DIAL must also be obligated to follow the notification. In other words, the notification issued by the Central Government is equally binding on DIAL.

(vi) Holding the 26th July, 2004 notification inapplicable to DIAL would mean that the Government would have to issue separate notification every time AAI contracts with a third party. This would clearly violate the basic objects and reasons of CLRAA.

(vii) The security of contract labour working for AAI envisaged, a law cannot be made to depend on the private sector. If the legislature had found it fit to specifically include AAI as an enumerated industry under the ID Act, it is extremely unlikely that it would have intended for AAI to be able to circumvent the Central Government orders by contracting with private parties.

(viii) The privatization of the airports does not mean that the "appropriate government" cannot be the Central

Government. According to the Constitution Bench judgment of this Court in the case of SAIL, the definition of 'establishment' in the CLRAA takes in its fold purely private undertakings…".Concerns about privatization are, therefore, unfounded.

(ix) Under Section 12(2) of the AAI Act, AAI is obliged to provide air traffic service and air transport service at the airport. DIAL admits that AAI has transferred all of its responsibilities at the airports with the exception of certain reserved functions. Since industries concerning air transport service function under the authority of the Central Government, and since AAI has transferred its "air transport service" responsibilities to DIAL, the Central Government must be held to be the appropriate Government for DIAL.

(x) The OMDA makes it clear that AAI maintains ultimate responsibility for the airports. The fact that DIAL was transferred only a portion of AAI's work which DIAL only has incomplete control over as well as the fact that DIAL meets the definition of a contractor under the CLRA Act further suggests that DIAL is nothing more than a contractor for AAI establishment. That being the case, notification dated 26th July, 2004 directed at AAI establishment must also apply to DIAL.

(xi) The contention of DIAL that it would not be bound by the obligation of AAI establishment would lead to absurd consequences. The Division Bench in the impugned judgment has rightly pointed out that every time a fresh agreement is entered into, the entire process of getting a notification issued by the appropriate government in relation to the same work of trolley retrieval and with the same

establishment *via-a-vis* such private player must be repeated. But this interpretation would defeat the rights of the workmen which are meant to be protected by the CLRAA.

(xii) In the impugned judgment, the Division Bench of the High Court has correctly held that the obligation flowing from the said notification under Section 10(1) CLRAA should continue to bind every private player that steps into the shoes of AAI.

86. For the foregoing reasons, it is clear that the notification dated 26th July, 2004 was equally binding on DIAL under the CLRAA and, therefore, DIAL must abolish all contract labour as per the terms of the notification.

87. We have no hesitation in coming to the conclusion that the Central Government notification dated 26th July, 2004 is clearly binding and applicable to DIAL. DIAL's obligation with regard to the contract labour in general is clear from the said notification. They are liable to be regularized as regular employees of DIAL. DIAL has replaced many of the workers with other trolley retrievers and it would be unrealistic to expect DIAL to regularize the employment of their current trolley retrievers and member of the workers' union alike and inequitable to leave the current workers jobless so as to make room for erstwhile workers of DIAL.

88. In view of the peculiar facts and circumstances of these cases directing DIAL to regularize services of trolley retrievers who worked with DIAL till 2003 would be harsh, unrealistic and not a pragmatic approach, therefore, in the interest of justice, we deem it proper to direct DIAL to pay Rupees five lacs to each of the erstwhile 136 workers of DIAL who were working for them as trolley retrievers till 2003 and in case any worker has expired, then his or her legal heirs would be entitled to the said amount. This compensation is paid to the workers in lieu of their permanent absorption/reinstatement with DIAL and their

claim of back wages. This is in full and final settlement of entire claims of erstwhile 136 workers of DIAL.

89. We direct DIAL to pay the amount to these 136 erstwhile workers of DIAL within three months after proper verification. In case the amount, as directed, is not paid within the prescribed period, then it would carry interest at the rate of 12% per month from that point till the amount is paid.

90. These appeals are accordingly disposed of in the aforementioned terms. In the facts and circumstances of these cases, we direct the parties to bear their own costs.

N.J. Appeals disposed of.